Harmonic Convergence? Constitutional Criminal Procedure in an International Context

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Constitutional Criminal Procedure
in an International Context

DIANE MARIE AMANN*

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INTRODUCTION

In Cambodia, a defender challenges a government witness by means of cross-examination, a procedure new to that state's courts. Meanwhile, the proper scope of such confrontation spurs argument before a tribunal at The Hague. In Rwanda, an attorney stands beside a defendant who, not long before, would have had no hope of representation. A court in Strasbourg scrutinizes the United Kingdom's use of compelled statements against a defendant, as Justices in the United States decline to apply an international concept of degrading treatment. Chinese defendants, traditionally considered offenders from the time of arrest, now enjoy a presumption of innocence. These examples point to an important global trend: the emergence, in national, regional, and international courts, in common law, civil law, and mixed systems, of a shared, a constitutional, criminal procedure.

Traditionally, how a state chose to fight crime was an internal matter. States developed their own methods to investigate crimes, to capture and try suspects, and to punish criminals. That changed in the last half-century. Crime became global, spurring law enforcement officers in individual states to join together in an international attack on crime. At the same time, a certain model, by which an individual's fundamental rights may outweigh a state's assertion of might, began to predominate. International norms respecting the treatment of accused individuals emerged, and states eager to entrench membership in the world political and economic community began to adopt them. Thus has the administration of criminal justice started to converge. Some accounts suggest a harmonic convergence, an eventual combination of various strains into a unified body of law.

This Article explores whether such a convergence is possible. Part I posits, as a keynote around which harmony may develop, the model of constitutional criminal procedure built in the United States in the first part of the twentieth century. The model's core is the belief that the state must treat accused individuals equally, with due respect for their liberty; that is, to use the term preferred by the U.S. Supreme Court, with fundamental fairness. Part II traces global movements toward this kind of model. The process began at the time of the French Revolution and continued at the Nürnberg trials. It accelerated as the belief that an accused has certain rights won international acceptance, and as mounting crime prompted greater international law enforcement cooperation. Convergence has moved most rapidly in Europe as a part of that region's economic and political integration. International enforcement efforts


have grown, most recently in the 1998 Rome Statute of the proposed International Criminal Court. Part III sounds notes of discord. It demonstrates that in a number of countries—China, the Islamic states, France, and the United States—adherence to sovereignty and national tradition may prevent a full embrace of a global standard. Part IV examines implications of these global phenomena. Forces such as global crime and desires to participate in the world political and economic community will continue to motivate consensus. Still, some states will continue to resist out of perceived national interests. Because of these competing strains, the Article concludes, external pressures alone will not bring harmony. Rather, there must be acceptance of a shared norm, of a body of internationally recognized rights, as a fundamental component of civil society. Even if both are present, however, states will reject components of convergence that they believe threaten their security or position within the world community.

I. KEYNOTE: A MODEL OF CONSTITUTIONAL CRIMINAL PROCEDURE

The tenet that the individual enjoys natural or inalienable rights—rights that a state may not infringe—has a long history. It appeared in the writings of medieval natural law and Enlightenment philosophers throughout Europe. It fueled struggles against tyranny in England, on the European continent, and in the colonies. The concept of individual rights attained a new status at the founding of the United States of America. In 1789 the “People” of the new country adopted a written Constitution, which dispersed power among the legislative, the executive, and the judicial branches, each of which was to check the other. Power also was to be shared between the federal government and the governments of the constituent states.


7. See id. amend. X (stating that powers neither delegated to the federal government nor prohibited to the states reside with the states or the people).
This new Constitution contained some restraints on the prosecution and punishment of individuals. No conviction for treason, for example, was permitted unless there were two corroborating witnesses, and the writ of habeas corpus could not be suspended. But critics argued that the Constitution was incomplete because it failed to articulate the full scope of an individual’s rights. In response, the new United States soon adopted a Bill of Rights, ten short amendments that restricted governmental action against individuals. Reflecting the secular philosophy that had arisen in the last century, the Bill of Rights assured free exercise of religion and forbade establishment of a state church. To promote individual autonomy, it guaranteed rights to freedom of expression and against unreasonable searches and seizures. It assured criminal defendants the rights not to testify against themselves, to have assistance of counsel, and to be tried by an impartial jury. In contrast with the proclamation of individual rights in the 1776 Declaration of Independence, which generally is considered aspirational, the enumeration in the 1791 Bill of Rights was to be enforceable. Little enforcement occurred in the early history of the United States, however, largely because the U.S. Supreme Court held that the Bill of Rights constrained only the federal and not the state governments. The Court adhered to a doctrine of dual sovereignty, which accorded states maximal freedom to operate in areas not ceded in the Constitution itself. Among those areas was the administration of criminal justice.

The dual sovereignty doctrine eroded as a result of decisions interpreting the Fourteenth Amendment, which provides in part that “[n]o State shall... deprive any person of life, liberty, or property, without due process of law.” Litigation, sometimes supported by civil liberties and other organizations, drew national

8. See id. art. I, § 9; id. art. III, § 3.
9. See M. Cherif Bassiouni, Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 3, 33 (M. Cherif Bassiouni ed., 1982) (pointing to 1648 Treaty of Westphalia as source of Western secularism); Kent Benedict Gravelle, Islamic Law in Sudan: A Comparative Analysis, 5 ILSA J. INT’L & COMP. L. 1, 1 (1998) (“In a Western country such as the United States, government and law are separated from the Christian religion, although many of our most basic laws are drawn from the Bible.”).
10. See U.S. CONST. amend. I.
11. See id. amend. V, VI.
12. This doctrine was first enunciated in Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).
13. See Amann, supra note 4, at 1211-15 (discussing dual sovereignty doctrine).
14. See, e.g., Knapp v. Schweitzer, 357 U.S. 371, 375 (1958) (stating that the “bulk of authority to legislate on what may be compendiously described as criminal justice, which in other nations belongs to the central government, is under our system the responsibility of the individual States”).
15. U.S. CONST. amend. XIV, § 1. The Fifth Amendment to the Constitution contains a parallel requirement for the federal government. The Fifth Amendment’s Due Process Clause has been held to enjoin the federal government to guarantee equal protection of the laws, just as states must do pursuant to the Equal Protection Clause of the Fourteenth Amendment. See Bolling v. Sharpe, 347 U.S. 497 (1954). For a discussion of the process by which the dual sovereignty doctrine ended, see Duncan v. Louisiana, 391 U.S. 145, 147-58 (1968).
attention to states' abuses of defendants. Members of the U.S. Supreme Court further expressed concern that greater cooperation between federal and state officers, prompted by increasing cross-border crime, threatened the rights of the accused. In a series of decisions spanning the twentieth century, the Court held that the Due Process Clause required the states to obey provisions in the Bill of Rights that served "fundamental fairness," a concept variously amplified as entailing principles of liberty and justice that are "at the base of all our civil and political institutions"; "implicit in the concept of ordered liberty . . . enshrined in the history and the basic constitutional documents of English-speaking people"; "part of the Anglo-American legal heritage"; and "essential to a fair trial." The Court declared virtually all the rights contained in the Bill of Rights to be fundamental, and thus applicable throughout the United States. Defendants, whether in state or federal court, were entitled to appointment of counsel, to a privilege against self-incrimination, to be free from illegal searches, and to a public trial before a jury of their peers.


17. See, e.g., Knapp, 357 U.S. at 385 (Black, J., dissenting) (complaining that, as a result of cooperation between state and federal officers, individuals could be "whipsawed" into sacrificing rights in one or both jurisdictions); cf. Amann, supra note 4, at 1218-20 (explaining interrelation between growing law enforcement cooperation and individual rights).

18. See, e.g., Duncan, 391 U.S. at 148-50; id. at 172-73, 177-92 (Harlan, J., dissenting); Irvine v. California, 347 U.S. 128, 148 (1954) ("[W]hen a conviction is secured by methods which offend elementary standards of justice, the victim of such methods may invoke the protection of the Fourteenth Amendment because that Amendment guarantees him a trial fundamentally fair in the sense in which that idea is incorporated in due process.").


23. See id. at 335.


25. See Wolf, 338 U.S. 25 (establishing right), overruled on other grounds by Mapp v. Ohio, 367 U.S. 643 (1961) (holding that remedy for impermissible search or seizure is exclusion of evidence).

A government that denied those rights faced stiff sanctions, ranging from exclusion of evidence to reversal of conviction.

Out of this case law, decided by a Court that took seriously its constitutional role as a "'bulwark'" of liberty,\textsuperscript{27} a new model of criminal procedure emerged. It was derived not from any precise text, but from the Court's interpretation of the broad principles on which the United States was founded. Through this model the Court endeavored to serve both individual autonomy and public order, in a manner that is just and equal; that is, to use the Court's term, "fundamentally fair."\textsuperscript{28} The model has come to be called constitutional criminal procedure. It is "constitutional" not because its rules appear in a constitution, though they may.\textsuperscript{29} Rather, it is "constitutional" in that it assumes that certain rights are part of the constitutive nature of civil society.\textsuperscript{30} Constitutional criminal procedure does not simply involve choices among techniques for investigating and adjudicating crimes; it is a substantive law that constrains police, prosecutors, and judges.\textsuperscript{31}

\textsuperscript{27} Maeva Marcus, \textit{The Adoption of the Bill of Rights}, 1 WM. & MARY BILL RTS. J. 115, 119 (1992) (quoting 1789 speech of James Madison that declared that if a Bill of Rights is adopted, judges "will be an impenetrable bulwark against every assumption of power in the legislative or the executive"). This image was a favorite of two Framers of the Constitution, Alexander Hamilton and James Madison. \textit{See} \textit{THE FEDERALIST} No. 78, at 508 (Alexander Hamilton) (1st Modern Library ed. 1941); Marcus, \textit{supra}, at 119; \textit{see also} Amann, \textit{supra} note 4, at 1289-90, nn.557-58.

\textsuperscript{28} See RONALD J. ALLEN ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE at xxiv (3d ed. 1995) (describing "the study of constitutional criminal procedure... as an inquiry into this nation's ever-changing view of the demands of human autonomy as reflected by the formal relationship between government and citizen").

\textsuperscript{29} Indeed, in many countries, rules now considered part of constitutional criminal procedure may be found neither in constitutions nor judicial decisions, but in statutes. \textit{See}, e.g., Manfred Pieck, \textit{The Accused's Privilege Against Self-Incrimination in the Civil Law}, 11 AM. J. COMP. L. 585, 585-86 (1962) (noting that in France, Germany, and the Netherlands, the right of an accused to remain silent is guaranteed in criminal procedure statutes). In such countries, the process is referred to as the "constitutionalizing" of, rather than as "constitutional," criminal procedure. \textit{See} E-mail from Professor Doctor Albrecht Weber to Author (Aug. 16, 1999) (on file with author) (discussing German term \textit{Konstitutionalisierung}). Although that terminology is not unknown in the United States, see, for example, \textit{Mitchell v. United States}, 526 U.S. 314, 342-43 (1999) (Thomas, J., dissenting), this Article opts for the more common, less cumbersome, English language term.

\textsuperscript{30} See \textit{Wolf}, 338 U.S. at 27 ("Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society."); cf. Richard Bellamy, \textit{Introduction: Constitutionalism, Democracy and Sovereignty, in CONSTITUTIONALISM, DEMOCRACY AND SOVEREIGNTY: AMERICAN AND EUROPEAN PERSPECTIVES} 1 (Richard Bellamy ed., 1996) (stating that constitutionalism reflects a "desire to subject the exercise of state power to certain normative limits").

\textsuperscript{31} \textit{See}, e.g., Kahan & Meares, \textit{supra} note 16, at 1155 (among the effects of doctrines comprising "contemporary criminal procedure" is that "they constrain, both in substance and in form, the authority of the police to maintain order"); Carol S. Steiker, \textit{Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers}, 94 Mich. L. REV. 2466, 2470 (1996) ("If [A]'s any teacher of both substantive and procedural criminal law knows, constitutional criminal procedure is a species of substantive criminal law for cops."); cf.
At times this model of constitutional criminal procedure is treated as if it were unique to the United States.\textsuperscript{32} In fact, however, it is a keynote around which global movements toward harmony may play out.

II. Concordance: Movements Toward a Shared Constitutional Criminal Procedure

How might harmonic convergence be achieved? What might prod divergent systems to merge into a body of law based on a model of constitutional criminal procedure? There is no one answer to these questions, no straight path to harmony.\textsuperscript{33} In the United States, numerous factors contributed to the development of constitutional criminal procedure: a recognition that liberty, equality, and fairness were bedrock principles of civil society; a willingness on the part of the Supreme Court, sometimes urged by special interest groups, to interpret those principles to guarantee certain rights to accused individuals; and a concern that increased interaction between federal and state law enforcement officers threatened those rights.\textsuperscript{34} Similarly, in the international arena, the elements that may spur convergence are as varied and complex as global society itself.

Scholarship on international law and international relations offers ways to identify and explore the interplay of such elements. In a recent address, Professor Harold Hongju Koh listed a number of theories on why states come to obey international legal norms.\textsuperscript{35} "Realist" scholars, he explained, maintain that a state obeys simply because it is forced to do so by other states or by international bodies.\textsuperscript{36} "Rationalists" hold that a state chooses to obey based on a reasoned decision that obedience serves its self-interest.\textsuperscript{37} "Liberal Kantians" assume that states obey out of "a sense of moral obligation derived from considerations of fairness, democracy, and legitimacy that are embedded in their 'liberal,' domestic legal structures,"\textsuperscript{38} while "communitarian Grotians" focus on "the commonality of values within 'international society': a
community that constructs national interests and identities." Finally, "transnational legal process" theorists—among them Professor Koh—find incentives to obey in a state's myriad, repeated, global interactions. For Koh, these interactions include not only the state's "horizontal" relationships with other states through treaty-based regimes, but also its "vertical" relationships with domestic and foreign individuals, governmental officials, interest groups, courts, and other organizations. Obedience to international norms, he contends, results from "a complex combination" of all five theories. In short, Koh describes a dynamic that depends on the actions not only of states, but also of individuals and organizations.

This image of a dynamic global society well serves the instant inquiry. There is an ongoing movement toward convergence in criminal procedure, one with several sources. These include acknowledgment of certain fundamental principles of civil society, coercive and cooperative efforts among states, pressure from domestic and international human rights organizations, and establishment of international forums concerned with criminal justice matters. These elements often occur contemporaneously, sometimes pulling convergence in different directions. Indeed, as will be seen, some elements of harmony also sound notes of disharmony. First, however, an examination of the factors contributing to convergence is in order.

A. First Movements:
Post-Revolutionary Reforms

Two methods of criminal procedure long predominated in the West and, because of Western imperialism, in much of the world. One, the "inquisitorial" method, was part of the civil law system that prevailed in continental European states and their colonies. The second, the "accusatorial" method, was part of the common law system that held sway in England and in its present and former colonies, including the United States. In their purest form, the two methods differed considerably.

The accusatorial method, grounded in mistrust of the state, relied on an adversarial relationship between prosecution and defense lawyers as a prime means of arriving at justice. A judge presided, but as a referee rather than as an active
participant. The accusatorial method committed the verdict to lay jurors, yet constructed complex rules to prevent jurors from being misled by evidence that was probative but highly prejudicial. Defendants secured a privilege against giving self-incriminating testimony, in part on the theory that the state ought to secure conviction by its own labor, not by words from the defendant’s mouth. Indeed, jurors were to convict only if the state proved guilt beyond a reasonable doubt.

The inquisitorial method conferred immense power on the state. This method depended not on lay jurors but on a professional judge who performed investigations, levied accusations, and passed judgments. The judge directed a search for the truth with assistance from attorneys. Officials required defendants to testify, and often extracted confessions through torture. Evidence was freely admitted for consideration by the judge, who rendered a verdict based on conviction intime, or inner conviction.

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STUDY 41, 42-43, 48 (Phil Fennell et al eds., 1995); see also Mirjan Damaška, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 U. Pa. L. Rev. 506, 565 (1973) (noting that “traditional Lockean liberal values, with distrust of the state and freedom from its restraint, were found to be in the ideological matrix of the adversary model”).


50. See In re Winship, 397 U.S. 358, 361 (1970) (concluding that Due Process Clause allows conviction only if based on proof beyond a reasonable doubt, and observing that this standard is “virtually unanimous” in common law states).

51. This coincided with the French tradition that the law, as administered by the state, was the supreme guarantor against arbitrariness. See Delmas-Marty, supra note 33, at 9.


53. See Bradley, Convergence, supra note 1, at 471–72; Jörg et al., supra note 46, at 42-43; see also Damaška, supra note 46, at 565 (identifying “collectivistic values and benevolent paternalism . . . as preconceptions” of inquisitorial method).

54. See Richard Vogler, Criminal Procedure in France, in COMPARATIVE CRIMINAL PROCEDURE 14, 24, 31-32 (John Hatchard et al. eds., 1996); see also Madlener, supra note 52, at 238.

55. See Damaška, supra note 48, at 21. In modern France, the doctrine of conviction intime still frees judges from evidentiary rules of exclusion, but requires verdicts based on rational inferences drawn from the evidence. See id.
The systems began to converge as early as the eighteenth century. More precisely, continental European states, responding to French revolutionary ferment and to Enlightenment philosophers’ critiques, infused the inquisitorial method with accusatorial techniques. For a time lay juries won prominence. The trial became a public contest between prosecution and defense. The pretrial process, however, stayed largely secret and was governed by the juge d'instruction, or investigating judge, with police assistance. And though torture was prohibited, confessions remained a preferred form of evidence. Thus, even after post-revolutionary reforms, the methods still diverged.


Accommodation of these two criminal procedure methods became critical in the mid-twentieth century. As World War II came to a close, the Allied Powers met in London to conclude a charter detailing the “constitution, jurisdiction and functions of the International Military Tribunal,” which conducted the Nurnberg trials of accused Nazi war criminals. A joint tribunal required a single procedure; however,

56. See Triffterer, supra note 47, at 468 (stating that throughout Europe, reformers “were struggling to realize demands of revolutionary ideas in order to establish guarantees for human liberty against the uncontrolled arbitrariness of absolute monarchs and state power”); Vogler, supra note 54, at 17 (commenting that the trial stage was “borrowed from the English and American models enthusiastically championed by Robespierre and the revolutionaries of 1792”).

57. See Madlener, supra note 52, at 239. Although many European states later cut back on use of jurors, some states still employ mixed benches, in which lay persons deliberate with professional judges, in some types of cases. See id. See generally Rudolf B. Schlesinger, Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience, 26 BUFF. L. REV. 361, 363, 366 (1977) (discussing continental use of jurors).

58. See Madlener, supra note 52, at 239; Vogler, supra note 54, at 31.

59. See Madlener, supra note 52, at 238-39; Vogler, supra note 54, at 17. Although France and Spain, among others, still use the juge d'instruction, it has been abolished in Germany, Austria, and elsewhere in favor of an independent prosecutor charged with deciding whether to commence proceedings. See Madlener, supra note 52, at 240; Triffterer, supra note 47, at 469.

60. See Madlener, supra note 52, at 238; Triffterer, supra note 47, at 468 (noting that Austria abolished torture in 1776); Vogler, supra note 54, at 17 (stating that France abolished torture by 1786); Schlesinger, supra note 57, at 365, 377 (stating that modern European states condemn the use of physical force to extract confessions).

61. See Madlener, supra note 52, at 250 (stating that because inquisitorial procedure depended on accused’s confession, “[s]elf-incrimination was, so to speak, built into that procedure”). The notion that a witness needed such a privilege ran counter to the assumption that, unlike the partisan police officer of the common law system, the inquiring judge would gather evidence dispassionately. Furthermore, whereas the common law system requires a defendant to speak under oath, at the risk of prosecution for perjury, see Schlesinger, supra note 57, at 377-80, in the civil law system it is considered “unacceptable,” Madlener, supra note 52, at 251-52, to require a defendant to choose between self-incrimination and perjury.

62. See Agreement for the Prosecution and Punishment of the Major War Criminals of the
the United States and England used the accusatorial method, while France and the Soviet Union applied the inquisitorial method. Commentators had underscored the differences between the methods, and a Nuremberg prosecutor recalled that the need to mesh the two was a nearly "intractable" problem.

Article IV of the London Charter provided a bridge across this divide. In what amounted to an international code of criminal procedure, the charter included a number of accusatorial features, such as the rights to a detailed indictment, to conduct one's own defense or have assistance of counsel, and to present evidence and cross-examine prosecution witnesses. Indeed, its assignment of direct and cross-examination to the lawyers rather than to the court gave the trials a decidedly common law flavor.

Yet aspects of the inquisitorial method remained. The defendant retained a right to explain himself at a preliminary hearing, and the cases were tried to a panel of four judges rather than to a lay jury. Furthermore, the London Charter eschewed "technical rules of evidence" and allowed admission of all probative evidence, even if highly prejudicial. Uniting these disparate techniques was a common theme: the Allies titled Article IV "Fair Trial for Defendants," indicating that a concern for fairness to the accused should guide the proceedings.

Nonetheless, by today's standards, the protections in the London Charter were minimal. Defendants were afforded no right to remain silent and no post-conviction...
right to appeal. Even contemporaries complained that, contrary to the promise of Article IV, the defendants did not receive a fair trial. Although the coercive aspect of trials organized by the victors to punish the vanquished doubtless played a role, other factors also contributed to this situation. This was, after all, an early attempt to combine civil law, common law, and military law systems. Furthermore, the trials took place in the mid-1940s, before even the U.S. Supreme Court had declared many procedures to be fundamental components of constitutional criminal procedure.

C. After Nürnberg: Cross-Border Crime and the Rights of the Accused

As the post-World War II United States witnessed increased federal-state law enforcement cooperation and recognition of the rights of the accused grounded in fundamental fairness, the international community witnessed parallel developments. Thus, movements toward a global criminal procedure continued after the trials at Nürnberg ended.

1. Increased Global Crime and Law-Enforcement Cooperation

Global crime is on the rise. Genocide, war crimes, and torture are the unwelcome hallmarks of modern armed conflicts. At the same time, air travel and the Internet

71. See London Charter, supra note 62, arts. 16, 17(b), 59 Stat. at 1550, 82 U.N.T.S. at 294 (omitting right to silence from list of fair trial rights and giving the tribunal the power to interrogate defendants); id. art. 26, 59 Stat. at 1552, 82 U.N.T.S. at 300 (barring review of convictions).


73. See supra text accompanying notes 12-31.

74. See supra text accompanying notes 15-31.

foster transnational crimes such as smuggling and money laundering. Criminals who endeavor to exterminate their own nationals, no less than those who seek to profit from cross-border trafficking, compel the global community to increase its crime-fighting efforts. As shown by the efforts to bring to trial Yugoslav President Slobodan Milošević, former Chilean dictator Augusto Pinochet, and the Lockerbie bombing suspects, states now are willing to pursue, prosecute, and punish international criminals.

The law enforcement reach of the United States extends particularly far, including more than a hundred posts and more than 1500 employees worldwide. Joint investigations, as well as U.S. agents' training of and consultation with other states' officers, have resulted in a number of prosecutions and seizures of contraband.

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77. In a landmark opinion, the English House of Lords ruled 6-1 that Pinochet was not immune from extradition to Spain for crimes committed after 1988, when English law first proscribed extraterritorial torture. See Regina v. Bartle (H.L. 1999), reprinted in 38 I.L.M. 581 (1999). The British government recently released Pinochet on the ground that he was not well enough to stand trial in Spain; nonetheless, a Chilean judge continues his efforts to prosecute Pinochet in Chile. See Clifford Krauss, Pinochet, at Home in Chile: A Real Nowhere Man, N.Y. TIMES, Mar. 5, 2000, § 1, at 12.

78. After years of negotiations, Libya surrendered for trial two of its nationals, suspects in the 1988 bombing of an airliner over Scotland. See Marlise Simons, 2 Libyan Suspects Handed to Court in Pan Am Bombing, N.Y. TIMES, Apr. 6, 1999, at A1. Scottish judges will preside at the trial, to be held at a former military base in the Netherlands. See id.

79. At one time the "intrusive" nature of criminal prosecution had prompted U.S. law enforcement agencies to invoke it "sparingly . . . and only upon strong justification." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 reporter's note 8 (1987) [hereinafter RESTATEMENT]. That changed in the last two decades, however, as the international community increased its investigation and prosecution of global crime. See, e.g., Scott Sultzer, Money Laundering: The Scope of the Problem and Attempts To Combat It, 63 TENN. L. REV. 143, 212-14 (1995); Christopher S. Wren, Long Arm of U.S. Law Gets Longer, N.Y. TIMES, July 7, 1996, § 4, at 4; see also United States v. Yousef, 927 F. Supp. 673, 681-82 (S.D.N.Y. 1996) (accepting U.S. argument that universality, as well as territoriality, principle justified prosecution for conspiring to bomb U.S. airliners operating overseas).


81. See Freeh Statement, supra note 80, at 62-63; cf. Elizabeth Olson, Ex-Soviets Are Focus
Many states have concluded treaties promising mutual assistance in the investigation of crime and in the return of fugitives and prisoners.82 International agencies such as the Vienna-based U.N. Centre for International Crime Prevention83 and the Paris-based Financial Action Task Force84 coordinate global policy. The International Criminal Police Organization, or Interpol, circulates information and helps track international fugitives. A similar European police force now operates.85

These bilateral and multinational cooperative efforts foster greater understanding, acceptance, and adoption of certain ways of administering criminal justice. Treaties, for example, routinely specify procedures for protection of requested fugitives or persons otherwise subjected to international law enforcement activities.86 International bodies admonish member states to adhere to certain norms for treating

of Inquiry by the Swiss, N.Y. TIMES, Dec. 20, 1998, § 1, at 19 (describing Swiss efforts to work with Russian and Ukrainian authorities to combat organized crime).

82. See generally WHITE HOUSE, supra note 75, at 39-46, 78 (setting as goal for fighting global crime greater cooperation through means such as mutual legal assistance treaties and extradition); Amann, supra note 4, at 1263-67 (discussing how international treaties further law enforcement cooperation).


84. Seven major industrial states formed this task force in 1989 to study and issue recommendations on means to stop the flow of illegally laundered money. Twenty-six countries are members, including Hong Kong and Switzerland, considered money laundering centers. See Financial Action Task Force on Money Laundering, About FATF (visited Mar. 24, 2000) <http://www.oecd.fr/fatf/about.htm>.

85. See Amann, supra note 4, at 1267-68 (describing activities and criticism of Interpol); cf. Ronald K. Noble, A Neglected Anti-Terror Weapon, N.Y. TIMES, Sept. 9, 1998, at A25 (calling, in wake of terrorist bombings of U.S. embassies in Africa, for strengthening of Interpol to increase ability to combat international terrorism and other crimes).


87. See, e.g., Inter-American Convention on Serving Criminal Sentences Abroad, Jan. 10, 1995, art. IV(1), S. TREATY DOC. No. 104-35 (1996) (requiring members to inform sentenced nationals of another member state of treaty-based right to be transferred home for service of sentence); Council of Europe: Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, art. 18(4)(f), 30 I.L.M. 148, 156 (permitting a state to refuse another state's request for confiscation of property if confiscation order fails to give due regard to "minimum rights of defence"); U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, art. 6(6), 28 I.L.M. 493, 507 (allowing requested state to refuse to extradite if it believes compliance would discriminate against fugitive on basis of race, religion, nationality, or political opinions); Supplementary Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 25, 1985, arts. 3-4, U.S.–U.K., as amended, T.I.A.S. No. 12050 (entered into force Dec. 23, 1986) (setting forth grounds for denying extradition request, including insufficiency of evidence, failure to permit fugitive to present evidence in U.S. court, and discriminatory basis for request).
2. Protection of the Individual in International Law

Out of what Professor Mireille Delmas-Marty has called "the shock of World War II" arose a renewed belief that individuals enjoy certain fundamental rights which a state may not infringe.90 States demonstrated this commitment by explicit guarantees in new constitutions,91 and by judicial decisions making clear that the state must honor the individual's fundamental rights.92 Further recognition that international law protects not only the interests of nation-states, but also the rights of the individual,93


89. See M. Cherif Bassiouuni, Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions, 3 DUKE J. COMP. & INT'L L. 235, 240 (1993) (observing that rise in both international and transnational crime has "broken through national sovereignty barriers," resulting in increased application, in national courts, of international standards of criminal justice); cf Delmas-Marty, supra note 2, at 194 (describing human rights as "one of the by-products of modern criminal procedure").

90. Delmas-Marty, supra note 33, at 10 (discussing how Second World War experience transformed notions of state-individual relations in France and Germany).


92. See generally Margaret Raymond, Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure, 76 N.C. L. REV. 1193 (1998) (demonstrating how perceived need to hold U.S. system as antithetical to Nazi and Stalinist totalitarianism prompted Supreme Court opinions guaranteeing individual rights). See also Jean Gicquel, L'appliquabilité directe de la norme constitutionelle, in LIBERTÉS ET DROITS FONDAMENTAUX, supra note 33, at 237, 237-38 (stating that as a result of a 1971 decision of the French Conseil constitutionnel, the notion that the state is subject to law—a notion contrary to the original underpinnings of the inquisitorial method—"has become . . . a reality in France").

93. See Amann, supra note 4, at 1245-51 (describing global trend toward recognition of individual rights).
came in a progression of multilateral agreements. Common to each agreement was a stated commitment to fair and equal treatment of individuals and to protection of individual dignity. Thus the Charter of the United Nations underscored the importance of "fundamental," "equal" human rights and "the dignity and worth of the human person." Subsequent regional charters echoed this emphasis.

The Universal Declaration of Human Rights was the first instrument to couple this commitment with an enumeration of individual rights related to criminal justice. Included were: protection against arbitrary arrest, detention, or invasions of privacy; a presumption of innocence; and a promise of "full equality" at a fair, public trial, before a neutral arbiter, with "all the guarantees necessary" for the defense. Regional human rights conventions have catalogued such rights in greater detail.

94. U.N. CHARTER pmbl.
97. Id. arts. 9-12. Similarly, the Geneva Conventions on the laws of war, concluded a year later, contained "a mini-code on the requirements of a fair trial." Roger S. Clark, Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg, 57 NORDIC INT'L L. 49, 71 (1988).

With regard to criminal trials, all three conventions entitle the accused to a fair hearing. See African Human Rights Charter, supra, arts. 6, 7(1) (guaranteeing a right to be heard and forbidding deprivations of liberty without reason); American Human Rights Convention, supra, arts. 8(1), 8(5) (under heading "Right to a Fair Trial," requiring hearing "with due guarantees"); European Human Rights Convention, supra, art. 6(1). The accused further is entitled: to a presumption of innocence; to be heard without undue delay by a competent, neutral tribunal; and to a right to defense, including assistance of counsel. See African Human Rights Charter, supra, art. 7; American Human Rights Convention, supra, art. 8; European Human Rights Convention, supra, art. 6. The American and European Conventions also guarantee that the trial will be public, that the defendant will receive notice of charges, and that the defendant will be permitted to cross-examine adverse witnesses and compel the presence of favorable witnesses. See American Human Rights Convention, supra, art. 8; European Human Rights Convention, supra, art. 6. The American Convention further provides that no one may be compelled to give self-incriminating testimony, that coerced confessions shall be excluded from evidence, and that a convicted defendant has a right to appeal. See American Human Rights Convention, supra, arts. 8(2)(g)-(h), 8(3); accord African Human Rights Charter, supra, art. 7(1)(a) (ensuring right to appeal).
Joining these efforts was the International Covenant on Civil and Political Rights, often described as part of an International Bill of Rights. Like the regional instruments, the Covenant carefully detailed rights to personal liberty, dignity, and privacy. Its fair trial rights were most extensive, providing for, inter alia: an equal, fair, public, and speedy trial before a competent tribunal; a presumption of innocence; the rights to be informed of the charges, to have assistance of an interpreter, and to have adequate time and resources to prepare a defense; the assistance of counsel, including appointment of state-paid counsel if necessary; the rights to cross-examine adverse witnesses and to secure favorable witnesses; the right to silence; the right to an appeal; compensation for unjust convictions; and the right against double jeopardy. Ratified by nearly three-quarters of the members of the United Nations, the Covenant provides the basis for a set of shared expectations about how states ought to treat the accused. Thus it stands to become a central component of a new, global, constitutional criminal procedure.

D. European Integration at the Vanguard of Convergence

Although the International Covenant on Civil and Political Rights, with its list of the rights of the accused, has the potential to lead the development of a global body of constitutional criminal procedure, its promise remains largely unrealized. No permanent international criminal court yet exists that might apply the ICCPR’s provisions, and domestic laws in many states limit its applicability. For these


101. See ICCPR, supra note 99, arts. 9-10, 17.

102. See id. art. 14.

103. See M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE 1 (1980) (“As a consequence of these shared values and expectations, the world community has come to require of its participants a greater degree of conformity and compliance with certain minimum standards of behaviour for the attainment of its perceived goals of collective and personal security.”).


105. An optional protocol permits individuals to complain to the U.N. Human Rights
reasons, it is not the Covenant, but rather the ongoing formation of a European Union, that stands at the vanguard of convergence. As this Article will show, opinions of the European Court of Human Rights enunciating rights of the accused have led the way. Promising to have an effect in the future is the political and economic integration taking place within the European Union. Of particular interest is Corpus Juris, a project aimed at developing a single means to investigate, prosecute, and punish financial crimes against the Union.

1. European Court of Human Rights

Efforts to bring European states closer together began as part of the post-World War II rebuilding of the continent. In 1949, ten states formed the Council of Europe in the hope of strengthening political ties among governments. A year later came the Council's premier achievement, the European Convention for the Protection of Human Rights and Fundamental Freedoms. Like its forebear, the Universal Declaration, the European Human Rights Convention stressed the new importance in international law of the rights of the individual. Unlike the Universal Declaration, however, the Convention offered concrete protection of those rights, via a judiciary that would hear individual complaints and issue sanctions against offending states.

Committee that their rights under the ICCPR have been violated. See Optional Protocol to the International Covenant on Civil and Political Rights, art. 1, 999 U.N.T.S. 302 (1976) (entered into force Mar. 23, 1976). After review, the Committee "shall forward its views to the State Party concerned and to the individual." Id. art. 5. Ninety-five states are parties to this optional protocol; among those that have not joined are the United States and the United Kingdom. See U.N. Treaty Collection (last modified Oct. 28, 1999) <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part boo/iv boo/iv_5.html#s823aPatr>.

106. Other regional courts may one day play a role in developing an international body of constitutional criminal procedure. The Inter-American Court of Human Rights only recently began issuing opinions enforcing the American Human Rights Convention, supra note 98. See Thomas Buergenthal, The Normative and Institutional Evolution of International Human Rights, 19 HUM. RTS. Q. 703, 716 (1997). This charter is not ratified by the United States. See ENCYCLOPEDIA OF HUMAN RIGHTS 1679 (Edward Lawson ed., 2d ed. 1996). Meanwhile, the Organization of African Unity has opened for ratification a protocol to establish a court to enforce the African Human Rights Charter, supra note 98. See Hamid Boukrif, La Cour africaine des droits de l'homme et des peuples: Un Organe judiciaire au service des droits de l'homme et des peuples en Afrique, 10 AFR. J. INT'L & COMP. L. 60 (1998) (analyzing protocol). Also of significance are commissions and committees charged with monitoring human rights abuses, although further consideration of such vehicles is beyond the scope of this Article. See, e.g., Rod Morgan, Another Angle on European Harmonisation: The Case of the European Committee for the Prevention of Torture, in THE NEW EUROPEAN CRIMINOLOGY 156 (Vincenzo Ruggiero et al. eds., 1998).

107. The original members were Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom. See The 41 Member States of the Council of Europe (last modified June 25, 1999) <http://www.coe.fr/eng/std/states.htm>.

108. European Human Rights Convention, supra note 98.

Furthermore, given that both the common law and civil law systems were represented among its original members, the Convention marked an early step toward legal integration.\textsuperscript{110}

The European Convention’s fair trial provisions, contained largely in Article 6, are less extensive than those in the ICCPR. Nonetheless, vigorous litigation has produced a series of opinions interpreting the Convention to accord ample protection to criminal defendants. In 1989, the European Court of Human Rights held that the Netherlands had denied a defendant a fair and public hearing and unduly curtailed his right to examine witnesses, in violation of Article 6.\textsuperscript{111} In 1996, the court inferred a right to silence out of the Convention’s fair trial guarantees, and thus held that the United Kingdom had breached the same article by convicting a defendant based on statements compelled from him during investigation.\textsuperscript{112} In an oft-cited opinion, the court warned the United Kingdom not to extradite a defendant to the United States on the ground that, if convicted and condemned to a prolonged wait for execution, the defendant might suffer inhuman treatment in violation of Article 3.\textsuperscript{113}

Several aspects of the court’s rulings, beyond their precise holdings, deserve note. In order to interpret its own charter—the Convention that the court has described as “a constitutional instrument of European public order”\textsuperscript{114}—the court relied on diverse sources. These included its own decisions,\textsuperscript{115} opinions of other courts in Europe and


110. Cf. Jörg et al., \textit{supra} note 46, at 54-56 (describing Convention as force for convergence); Schlesinger, \textit{supra} note 57, at 363-64 (stating that by following Convention, continental states had adopted “general standards of procedural fairness quite comparable to due process notions” in the United States).


112. \textit{See} Saunders v. United Kingdom, 24 Eur. Ct. H.R. at 2044 (1996) (relying on European Human Rights Convention, \textit{supra} note 98, arts. 6(1)-(2) (rights to fair, public hearing and to presumption of innocence)); \textit{see also} Murray v. United Kingdom, 1 Eur. Ct. H.R. at 30, 57-58 (1996) (declaring the privilege not to give self-incriminating testimony and the right not to speak during an interrogation “generally recognised international standards of fair procedure,” yet concluding that, on the facts before it, a Northern Ireland court did not violate these standards when it drew adverse inferences from a defendant’s post-arrest silence).

113. \textit{See} Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 34-44 (1989) (interpreting Article 3 of the European Human Rights Convention, which states, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”); \textit{see also} \textit{infra} text accompanying note 128 (discussing subsequent reliance on \textit{Soering}).


beyond; international instruments; academic writings; and practices related to the accusatorial and the inquisitorial methods of criminal procedure. The court's deliberations have been aided by briefs not only from litigants, but also from human rights organizations. Moreover, in each case, the supranational Court of Human Rights imposed a sanction, for violation of a quasi-federal rule, upon a court that had followed its own state's law. Thus, through a process that bears resemblance to the development of a constitutional criminal procedure in the United States, the European court has established a rule of law that all forty-one states now subject to its jurisdiction must abide. Indeed, states not party to a case often enact laws


118. See, e.g., Loizidou, 310 Eur. Ct. H.R. (ser. A) at 22, para. 57 (citing scholarly works on state responsibility and on obligations to follow international law in occupied territories).

119. See, e.g., Murray, 1 Eur. Ct. H.R. at 62-63 (Pettiti, J., joined by Valticos, J., partly dissenting) (objecting to majority's approval of use of adverse inferences from silence on ground that it contradicts both common law and civil law traditions).


121. See, e.g., Murray, 1 Eur. Ct. H.R. at 56-57, para. 74-79 (ordering the United Kingdom to pay £15,000, minus legal-aid fees, to a defendant whom it had denied access to counsel during first 48 hours of police detention).

122. The European court's jurisprudence is like that of the U.S. Supreme Court not only in its methods, but also in its frequently expressed desire to effect fundamental fairness. See supra text accompanying notes 15-31; cf. Ryssdall, supra note 109, at 23 ("The theme that runs through the Convention and its case law is the need to strike a balance between the general interest of the community and the protection of the individual's fundamental rights."). One commentator, invoking the U.S. Supreme Court era in which many individual-rights cases were decided, has called the European Court of Human Rights "a Warren Court in the midst of Europe." Gordon Van Kessel, European Perspectives on the Accused as a Source of Testimonial Evidence, 100 W. VA. L. REV. 799, 802 (1998).

123. See Ryssdall, supra note 109, at 22 ("The Court's position as a quasi-constitutional court for the whole of Europe is now widely accepted."); see also Sibrand Karl Martens, Opinion: Incorporating the European Convention: The Role of the Judiciary, 1 EUR. HUM.
conforming to the court's interpretation of the Convention. Some states, like the Netherlands, enforce the Convention directly in their own courts. Even in England, long a laggard in the European integration process, a new statute increased the Convention's domestic applicability.

The Convention's principles matter outside Europe as well. Its terms inspired other regional human rights conventions. The seminal opinion of the European Court of Human Rights regarding inhuman treatment has spawned litigation and judgments

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RTS. L. REV. 5, 9-10 (1998) (predicting that court will move even more toward "the role of a constitutional court that lays down common standards" now that all members must submit to court's jurisdiction). Besides the founding states mentioned, see supra note 107, members are Albania, Andorra, Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, Germany, Georgia, Greece, Hungary, Iceland, Latvia, Liechtenstein, Lithuania, Macedonia, Malta, Moldova, Poland, Portugal, Romania, Russia, San Marino, Slovakia, Slovenia, Spain, Switzerland, Turkey, and Ukraine. See The 41 Member States of the Council of Europe, supra note 107.

124. See Ryssdall, supra note 109, at 20 n.4 (using as example Dutch legislation that shortened permissible delay between arrest and appearance before magistrate, in response to Brogan v. United Kingdom, 152 B. Eur. Ct. H. R. (ser. A) at 40 (1989), which found a violation of the Convention’s guarantee that detainee will be brought promptly before magistrate); Triffterer, supra note 47, at 478.


126. See Human Rights Act, 1998, ch. 42 (Eng.), reprinted in 38 I.L.M. 464 (1999). This act requires national courts to "take into account" the rights set out in the European Convention. Id. § 2. National legislation must be read as much as possible to be compatible with the Convention. See id. § 3. Although a law deemed incompatible may remain valid, such a declaration may trigger amendment of the law. See id. §§ 304, 10; see also Bert Swart & James Young, The European Convention on Human Rights and Criminal Justice in the Netherlands and the United Kingdom, in CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY, supra note 46, at 57, 62 (noting that although England joined the Convention at its outset, it accorded the Convention value only as a subsidiary source of law).

127. See Ryssdall, supra note 109, at 22 (describing European Convention as a model for the American Human Rights Convention, supra note 98, and for the African Human Rights Charter, supra note 98).
in the U.N. Human Rights Committee and in national courts in North America, Europe, and Africa. Some of its opinions now guide the ad hoc international criminal tribunals. Thus the Convention, as interpreted by the European Court, fosters agreement about the rights of the accused.

2. European Union

Also providing impetus for convergence is the ongoing process of European integration. It began not long after the conclusion of the European Human Rights Convention, when a number of European states established communities to coordinate economic activity. Today those communities comprise the European Union. Its charters, or constitutive treaties, established a quasi-federal entity, complete with executive, legislative, and judicial organs. The treaties included no


Bill of Rights; however, all branches have committed themselves to respect the fundamental rights embodied in the European Human Rights Convention. Through these developments, member states have shed absolute sovereignty in favor of what Professor Anne-Marie Slaughter has called “permeable sovereignty”—a “network” in which each government is “constrained by the activities of individuals and groups operating in transnational civil society.”

Because of its initial limitation to economic concerns, the Union’s organs seldom considered questions relating to human rights. That has changed, however, as the Union’s compass has expanded to include political, cultural, domestic, and foreign policy matters. In recent years, for example, the Union has required foreign aid recipients to conform to its own human rights standards. Moreover, as the Corpus Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140, and the Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167.

All 20 European Commissioners recently resigned after an experts’ report concluded that they had mismanaged the hundred billion dollar budget. See Roger Cohen, Mouse That Roared: European Parliament Stands up, N.Y. TIMES, Mar. 17, 1999, at A8. Some observers urged a shift in legislative power to the European Parliament and away from the Commission, which is an unelected body that also wields executive power. See id. In 1977, three European Community institutions affirmed “the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention,” and promised to “continue to respect these rights.” Joint Declaration by the European Parliament, the Council and the Commission, 1977 O.J. (C 103) 1. The Maastricht Treaty made this pledge mandatory, stating that the “Union shall respect fundamental rights, as guaranteed by the European Convention... and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” Treaty on European Union, art. F(2), 1992 O.J. (C 224) 1 (entered into force Nov. 1, 1993) [hereinafter TEU]; see also DINNAGE & MURPHY, supra note 125, at 97-98 (stating that Maastricht Treaty and opinions of the European Court of Justice had “remedied” initial absence of human rights guarantees).


See TEU, supra note 131, tits. V-VI (setting out policies relating to foreign and home affairs); European Treaty, supra note 130, pt. 3 (discussing Community policies in, for instance, agricultural, economic and monetary, social and educational, cultural, consumer-protection, and environmental sectors).

In early years the European Community had a civil law perspective. But the accession in the 1970s of common law states, the United Kingdom and Ireland, necessitated blending of the two juridical systems. The convergence began just after the French Revolution had proceeded, so that aspects of each method had continued to infiltrate the other. In common law systems, attorney-directed jury trials now occur less often, and the standing police forces once unique to the inquisitorial method are routine. A right to silence now constrains examinations of the accused in civil law systems, though pressures to plea-bargain increase the incidence of self-incrimination in common law systems. Meanwhile, common law characteristics like an investigating prosecutor and a defense right to present evidence have a place in civil law courts. Some commentators thus have gone so far as to
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dismiss debate about the two methods as passé.  Nevertheless, each method retains much of its original form, and aspects of each method continue to draw fire. Scholars still debate which method is more fair.

Notably, that debate rests on common ground: a commitment to fairness, one that may be traced to medieval and Enlightenment philosophers in England and on the continent. Both the common law and the civil law systems required the penal

Marty, supra note 2, at 192-93 (noting the increased abandonment of the juge d'instruction in civil law countries); Stephen P. Freccero, An Introduction to the New Italian Criminal Procedure, 21 AM. J. CRIM. L. 345 (1994) (noting Italy's adoption of adversarial aspects, including relegation of judge to role of monitoring opposing attorneys and a form of plea bargaining).

144. See Françoise Tulkens, Criminal Procedure: Main Comparable Features of the National Systems, in THE CRIMINAL PROCESS AND HUMAN RIGHTS, supra note 2, at 5, 8 (maintaining that aspects of each method now occur in the other to a degree that distinguishing the two "is almost a 'metaphysical question' which is now sterile and obsolete").

145. An oft-criticized facet of the accusatorial method is plea-bargaining, which places great pressure on defendants to waive fair trial rights in hope of a more lenient sentence. See supra note 142. Critics of the inquisitorial method focus attention on retention of the juge d'instruction, discussed supra text accompanying note 59. See, e.g., Madlener, supra note 52, at 240 (stating that in Spain the examining judge "has wide powers of investigation and once he has established proof of facts against the defendant it is well nigh impossible to destroy this proof at the trial"); Vogler, supra note 54, at 28, 71-72 (maintaining that the institution puts the defense at a disadvantage by repeatedly subjecting the defendant to questioning). But see id. at 31, 51 (acknowledging French view that such questioning benefits the defense by allowing an early establishment of innocence or explanation of conduct).

146. See, e.g., Bradley, Convergence, supra note 1, at 473 (stating that while the rights-based accusatorial method may seem "more fair," it affords the prosecution far more resources than the defense, in contrast with the neutral balance of the judge-directed inquisitorial method); Delmas-Marty, supra note 2, at 192-93 (criticizing accusatorial method for failing to provide equality of resources); Michael N. Schmitt & Steven A. Hatfield, Scientific Evidence in Courts-Martial: From the General Acceptance Standard to the Relevancy Approach, 130 MIL. L. REV. 135, 144 (1990) (arguing that civil law system offers fairer trial because judge, not prosecutor, controls inquiry free from evidentiary constraints).

A heated exchange occurred in the 1970s. Compare Abraham S. Goldstein & Martin Marcus, The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany, 87 YALE L.J. 240 (1977) (criticizing states using inquisitorial method; in particular, criticizing French system for lack of judicial oversight of police), with John H. Langbein & Lloyd L. Weinreb, Continental Criminal Procedure: "Myth" and Reality, 87 YALE L.J. 1549, 1554-60, 1569 (1978) (criticizing Goldstein & Marcus article as taking French and German practices out of context, asserting that dissatisfaction with the criminal justice system is greater in the United States than in Europe, and concluding "that it is foolish . . . to suppose that the whole explanation for our dissatisfaction can be found in a greater commitment to the ideal of justice").

147. See Jörg et al., supra note 46, at 42, 53, 56 ("[A]t some level each system aspires to both the truth and a fair trial."); Schlesinger, supra note 57, at 363 (stating that both methods share roots in "teachings of 18th-century thinkers"); cf. DAMASKA, supra note 48, at 13-14 n.17 (tracing origin of exclusionary rule not to U.S. case law, but rather to centuries-old continental tradition banning evidence obtained in violation of "a defendant's 'natural rights'").
process to respect individual liberty and to guarantee the individual equal footing within the criminal justice administration. Such fairness was to be assured by structural means like separation of powers and procedural means like recognition of the rights of the accused. In common law systems the concept made its debut in the English Magna Carta, won prominence in the U.S. Constitution and Bill of Rights, and reached a zenith in the U.S. Supreme Court doctrine of fundamental fairness.

A prime source for the concept in the civil law systems was the French Revolutionary Déclaration des droits de l'homme et du citoyen. Issued in the same period as the U.S. Declaration of Independence, Constitution, and Bill of Rights, the Déclaration shared aspects with those documents. Like the Declaration of Independence, it proclaimed as “inalienable” rights of individuals concepts like liberty and equality. Like the Constitution, it called for a government in which power would be shared among an executive, legislature, and judiciary. Like the Bill of Rights, it enumerated specific rights, including the freedom of religion and the rights of an accused.

In contrast with the Declaration of Independence, the

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148. Rules of criminal procedure were considered the “first line of defense” against abuse by the government. See Tulkens, supra note 144, at 5-7 (attributing this theory to Enlightenment philosophers such as Beccaria, Voltaire, and Montesquieu).

149. A pact reached in 1215 between the English king and nobles, the Magna Carta provided that “[n]o free man shall be taken, or imprisoned, or disseised, or exiled, or in any way destroyed, nor will we go upon him, nor send upon him, except by the lawful judgment of his peers or by the law of the land.” MAGNA CARTA, ch. 39 (1215), reprinted in WILLIAM SHARP MCKECHNIE, MAGNA CARTA-A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 375 (2d rev. ed. 1914) (bracketed insertions of “and” instead of “or” omitted). An early U.S. Supreme Court opinion traced the Due Process Clause of the Fifth Amendment to the U.S. Constitution to this passage. See Den v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855). For a discussion of fundamental fairness, see supra text accompanying notes 15-31.


151. Compare Declaration of the Rights of Man, supra note 150, at 1 (setting forth “the natural, inalienable, and sacred rights of man”), with THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (proclaiming that “all men . . . are endowed by their Creator with certain unalienable rights”). See also Gerald J. Postema, In Defence of 'French Nonsense': Fundamental Rights in Constitutional Jurisprudence, in ENLIGHTENMENT, RIGHTS AND REVOLUTION, supra note 3, at 107.

152. See Declaration of the Rights of Man, supra note 150, art. 2 (listing liberty as a “natural and imprescriptible right[”]); id. art. 4 (defining liberty); THE DECLARATION OF INDEPENDENCE para. 2 (identifying as natural rights “Life, Liberty, and the pursuit of Happiness”).

153. Compare Declaration of Rights of Man, supra note 150, art. 1 (“Men are born and remain free and equal in rights.”), and id. art. 6 (discussing equality before the law), with THE DECLARATION OF INDEPENDENCE para. 2 (“[A]ll men are created equal . . . .”).

154. See Declaration of the Rights of Man, supra note 150, art. 16 (“A society in which the guarantee of rights is not secured, or the separation of powers not clearly established, has no constitution.”).

155. Compare U.S. Const. amend. I (guaranteeing free exercise of religion and barring
Déclaration, like the U.S. Constitution and Bill of Rights, has the force of law. 156

Protections accorded the individual are explicit in laws elsewhere in Europe. Many constitutions, particularly in states once controlled by authoritarian governments, contain detailed enumerations of fundamental rights. 157 Germany’s Constitution transforms fundamental rights into “positive constitutional law,” directly enforceable against all branches of government. 158 Germany further requires that criminal procedures honor those rights; indeed, its criminal procedure statute has been deemed to implement its Constitution. 159 Accordingly, if indeed the “overall trend” in the civil law and common law systems “is in the direction of a common middle,” 160 a shared legal philosophy, one that should ease convergence, informs that trend.

3. Corpus Juris

One indicator of such a trend began in 1995, when the European Parliament appointed a group of experts to define crimes that threaten the financial health of the European Union and to develop a uniform procedure for investigating, prosecuting,
and punishing those crimes. In an apparent nod to the Justinian code on which many European civil law codes are based, the group titled its 1997 report Corpus Juris. The report first maintained that the removal of barriers to trade among European states had stimulated more cross-border crime. Yet criminal justice administration remains largely an internal matter. Individual states disagree on what conduct constitutes a crime, on rules of criminal procedure and evidence, on appropriate penalties, and on the proper degree of international cooperation. These disagreements not only transform certain states into safe havens for criminals, but also result in unjust, unequal treatment.

The Corpus Juris report rejected three conventional European Union means to coordinate efforts of its member states. "Assimilation"—requiring member states to combat fraud against the Union the same way they would combat domestic fraud—and "cooperation"—use of treaty-based forms of mutual assistance in investigation—both were deemed ineffective. More aggressive alignment of disparate policies—labeled "harmonisation"—was seen as too complex. Thus the report recommended a "radically new" approach, "unification.

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162. See CORPUS JURIS back cover, 6 (Mireille Delmas-Marty ed., 1997).
164. See CORPUS JURIS, supra note 162, at 12; cf Delmas-Marty, supra note 2, at 195 (Delmas-Marty, editor of Corpus Juris, asking, "Who could deny that the opening of the borders, like the development of a criminality called 'transnational,' obligates the European states to arrive at a common criminal law policy?").
165. See CORPUS JURIS, supra note 162, at 14.
166. See id. at 12 n.2, 14; see also id. at 40 (decrying this situation as an "absurdity").
167. See id. at 14, 34-36 (describing injustices worked by disparities in individual states' law of evidence).
168. Id. at 14-18; see id. at 40. Respecting cooperation, the report noted that with the exception of the convention against money laundering, few states had ratified existing mutual legal assistance conventions. See id. at 18. Moreover, cooperation requires officials in one state to interpret disparate doctrines of another state. If states' laws are incompatible, evidence attained in one state will be inadmissible in another. See id. at 26-28.
169. The report described "harmonisation" as a move toward "greater uniformity, in order to reduce the most glaring differences between national laws, without actually going as far as to impose rules that are identical." Id. at 28; cf. GEORGE A. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 79, 429-30 (1993) (describing harmonization as a frequently invoked goal of European Community legislation).
170. CORPUS JURIS, supra note 162, at 40. Because of this complexity, lawyers in individual states had resisted applying this concept. See id. at 38. The promises of harmonization—efficiency and elimination of disparities that work injustices on "economic operators" whose conduct might affect the financial status of the Community—had not been realized. Id. at 38.
171. Id. at 40; cf. Christine Van Den Wyngaert, Une perspective "eurocentrique" sur la répression de la délinquance transnationale européenne: le projet espace judiciaire européen et le corpus juris, in LES SYSTÈMES, supra note 47, at 443, 444 (explaining that "experts introduced a 'vertical' dimension" to combating fraud against the Union in order to sidestep problems with "'horizontal' approach, based on interstate cooperation in penal matters").
national courts to try to accommodate different legal practices, *Corpus Juris* would establish one set of laws to govern a select group of crimes, all of which bring financial harm to the European Union.\(^\text{172}\)

In a truly radical step, the report then proposed a system of investigation and adjudication that would combine aspects of both the accusatorial and the inquisitorial methods.\(^\text{173}\) As in the former, an independent prosecutor, called the European Prosecution Service, would undertake to investigate the case.\(^\text{174}\) As in the latter, a judge would handle the preparatory phase.\(^\text{175}\) This judge would not be an investigator for the state, but rather an independent, impartial judge charged with ensuring that a suspect's rights are not infringed during investigatory matters such as use of wiretaps and issuance of arrest and search warrants.\(^\text{176}\) The judge thus would not be called a *juge d'instruction*, or investigating judge, but rather a *juge des libertés*, or judge of freedoms.\(^\text{177}\) The prosecution service would be "an authority of the European Community," but the judge of freedoms would be part of the member state's judiciary.\(^\text{178}\) Trials and initial appeals would occur in national courts, albeit based on the *Corpus Juris* law and with limited right of appeal to the European Court of Justice.\(^\text{179}\)

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172. *Corpus Juris*, supra note 162, at 40 (including crimes of fraud in the Community budget, market-rigging, corruption, abuse of office, misappropriation of funds, disclosure of secrets pertaining to one's office, money laundering, and conspiracy that harms the Community's budget). The report explained:

This is not a criminal code, nor a unified code of European criminal procedure made directly applicable everywhere by European courts set up for the purpose. What we propose is a set of penal rules, which constitute a kind of corpus juris, limited to the penal protection of the financial interests of the European Union, designed to ensure, in a largely unified European legal area, a fairer, simpler and more efficient system of repression.

*Id.*; see also Mireille Delmas-Marty, *The European Union and Penal Law*, 4 EUR. L.J. 87, 107 (1998) (asserting that unification should take place only with respect to crimes affecting the financial interests of the European Union; in other spheres, states should continue to work to harmonize their criminal procedure).

173. Discounting the differences between the two systems at the trial level, the report commented that the fair trial guarantee in the European Human Rights Convention "tends to bring different national practices closer together, including on how witnesses are heard." *Corpus Juris*, supra note 162, at 116.

174. *See id.* at 82-86. This prosecutor would operate under uniform rules, eliminating the "long, complex procedures of bilateral cooperation" under existing methods, such as mutual legal assistance treaties, extradition, and letters rogatory. *Id.* at 86.

175. *See id.* at 110-12.


177. *See Corpus Juris*, supra note 162, at 110-12; Triffterer, supra note 47, at 489 (approving of term *juge des libertés* for judge whose "role is not to investigate but rather to protect civil liberties and to guarantee procedural rights"); *see also Van Den Wyngaert, supra* note 171, at 445.

178. *Corpus Juris*, supra note 162, at 82-84, 112.

179. *Id.* at 114-22. Only professional judges would be permitted to decide such cases, ostensibly to reduce the risk of error. *See id.* at 118.
A similar blending would occur with respect to fundamental rights. Reflecting the shared commitment to rights of the accused, the report incorporated and expanded upon the rights guaranteed in the ICCPR and the European Convention on Human Rights. An individual would be entitled to full notice of charges, to assistance of counsel, and to remain silent as soon as she were named an accused. An accused also would benefit from an express presumption of innocence, a right not to assist in establishment of her own guilt, limitations on which of her statements might be used against her, and a rule mandating exclusion of evidence obtained in violation of fundamental rights.

Balancing these defense rights would be victim's rights. In accord with civil law practice, the victim of the crime—the European Commission—would have the status of a partie civile, entitled to seek compensation even as the prosecutor sought punishment.

A central value animated the Corpus Juris recommendations. The report argued that the new procedures should evince the principle of procédure contradictoire; that is, that all parties in a criminal proceeding must be allowed full opportunity to be informed of and to contest evidence, in order that a fair and just verdict ensues. Although procédure contradictoire derives from the continental tradition, both civil law and common law systems embrace aspects of the principle, which serves a shared concern for fairness. The report advocated applying the principle at more stages of the proceedings than either system does, enhancing the potential for fairness.

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180. See id. at 40, 122-24.

181. See id. at 124. Corpus Juris sought to correct a fault found in both the European Convention on Human Rights and the ICCPR by requiring that a person be considered "an accused," and thus entitled to all rights of an accused, as soon as a step is taken to develop evidence of guilt against the person. Id. at 124-26.

182. See id. at 130-38.


184. See Corpus Juris, supra note 162, at 80, 124; cf. Delmas-Marty, supra note 2, at 197 ("The ideal is the contradictory debate; that is to say, the rejection of revealed, uncontested truth replaced by facts which are contested and only then established as truths.").

185. See In re Oliver, 333 U.S. 257 (1948) (establishing right to public trial as a central component of due process); Martin Vranken, Fundamentals of European Civil Law 203-04 (1997) (describing the principle of a public trial at which parties may be heard and defend themselves as "a general principle of law" in both France and Germany).

186. See Corpus Juris, supra note 162, at 124. The report elaborated:

The underlying idea is that the evidence will be more reliable if it has been subject to this kind of hearing, which of course it is only to a very partial extent in inquisitorial proceedings, and only very late in the day in accusatorial proceedings—in practice only at the trial. For this reason, the provisions proposed would mean progress everywhere as regards the quality of the proceedings.
Corpus Juris suggested a path to development of a body of criminal procedure that shares not only legal technique, but also legal philosophy. Though still under study, the proposal well may succeed in some form, as existing conventions and case law, ongoing political and economic integration, and the need to combat rising cross-border crime continue to bring European criminal justice systems into tune.

E. Toward Truly International Enforcement

Similar concerns encourage convergence outside the European Union. States across the globe seek to combat crime in a manner that wins them the respect of the world community. Such political acceptance may be a precursor, or a prerequisite, of full integration into the global economic community. As described below, these considerations have given rise to a new era of law enforcement. Individual states, sometimes responding to external pressure, are conforming their criminal justice systems to international standards. Meanwhile, truly international adjudication of crime is under way for the first time since the Nürnberg trials.

1. Influence of Nongovernmental Organizations

States' desire for political and economic discourse often gives nongovernmental human rights organizations a means to goad change. To this end, Amnesty International and Human Rights Watch, among others, publish annual reports reviewing the degree to which each state abides by the fair trial rights embodied in the ICCPR. The American Bar Association helps draft democratic constitutions in

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187. See Van Den Wyngaert, supra note 171, at 445 (stating that Corpus Juris "presupposes a common system of judicial guarantees," one that has in large part been achieved given that all European Union members also are bound to adhere to the European Human Rights Convention); cf. Triffterer, supra note 47, at 488 (maintaining that "if criminal codes are oriented" to ensure rights of suspects, "it does not matter to what extent the adversarial or inquisitorial model is established").

188. The report was presented to the European Parliament in April 1997; subsequently, the Parliament ordered further study of the proposal. See Van Den Wyngaert, supra note 171, at 445-46.

189. See Corpus Juris, supra note 162, at 40, 122-24. Professor Delmas-Marty wrote in an earlier essay:

it is beyond question that, to a degree, everywhere in Europe the criminal process has ceased to function within a closed circuit. ... And the consequences could be remarkable because in detaching itself from the artificial in order to approach the living, the machine of criminal justice could move toward a greater "functioning as a whole" and at the same time a "lesser functioning as its constituent parts." ... A complexity which presages, at the same time—because the evolution is comparable from one country to another—, a new design of the [legal] landscape.

Delmas-Marty, supra note 2, at 195 (alteration in original) (citation omitted).

the former Soviet republics. These groups and others, among them the Lawyers Committee for Human Rights and the Fédération Internationale des Ligues des Droits de l'Homme, distribute analyses of proposals related to international criminal tribunals. Representatives of hundreds of human rights organizations lobbied at the 1998 Rome conference that concluded the statute for the proposed International Criminal Court. Such groups routinely participate, both as lead counsel and as amici curiae, in human rights litigation before national and international courts.

Nongovernmental organizations also try to inculcate international rights of the accused at the grass roots, by representing defendants in national courts and by training others to do so. Thus in Rwanda, Lawyers Without Borders provides legal


191. See Janet Key, CEELI: Old Countries, New Rights, A.B.A. J., May 1994, at 68, 69 (noting as well efforts to combine, in new Eastern European legal systems, the common law and civil law traditions).


193. Hundreds of individuals, representing more than 200 nongovernmental organizations ("NGOs") from throughout the world, took part in the Rome conference. See Some Words from William Pace, Convenor of the Coalition for an International Criminal Court, ON THE RECORD 1, ¶ 2 (Issue 14, July 7, 1998) <http://www.advocacynet.org/cgi-bin/browse.pl?id=icc14.html>. At their center was the NGO Coalition for an International Criminal Court, which had 800 member organizations. See Campaigners Launch a Broadside: Eleven Principles Comprise the NGO Negotiating Position, ON THE RECORD 4, ¶ 8 (Issue 2, June 16, 1998) <http://www.advocacynet.org/cgi-bin/browse.pl?id=icc02.html>. Indeed, NGOs played such a prominent role at the conference that Canada was reported to have named them "the 'new superpower.'" Willem Offenberg, ICC Dream Factory?, ON THE RECORD 1, ¶ 5 (Issue 5, June 19, 1998) <http://www.advocacynet.org/cgi-bin/browse.pl?id=icc05.html>.

194. See, e.g., Saunders v. United Kingdom, 24 Eur. Ct. H.R. at 2063, para. 66 (1996) (discussing European court's acknowledgments of such participation); Rights Int'l, Rights International (visited Mar. 17, 2000) <http://www.rightsinternational.org/> (describing participation in litigation before tribunals including the inter-American and the European human rights courts, both as counsel and as amicus). Recently, Amnesty International was granted permission to argue before the British House of Lords as an intervenor in favor of extraditing Augusto Pinochet to face trial in Spain for human rights abuses that occurred during his reign as Chile's dictator. See Warren Hoge, Pinochet Wins a Round as the Law Lords Void a Ruling, N.Y. TIMES, Dec. 18, 1998, at A3. Although a panel of Law Lords initially ruled 3-2 in favor of extradition, that judgment was voided because of one judge's ties to Amnesty International. See id.; supra note 77 (describing subsequent House of Lords ruling).
representation for defendants charged with participation in the genocide that swept that country in 1994.\textsuperscript{195} It has won some success in introducing new practices, such as cross-examination of witnesses whose reliability is suspect, into the trial procedure.\textsuperscript{196} Meanwhile, in Cambodia, where virtually all the lawyers perished during the Khmer Rouge reign in the 1970s, the Cambodian Defender Project tries to help instill a democratic legal culture founded on a constitutional criminal procedure.\textsuperscript{197} The Project trains Cambodians in all aspects of criminal defense—trial practice, substantive law, and rules of evidence.\textsuperscript{198} Encouraged to stretch accepted practice, defenders have brought motions to suppress postarrest statements, uncommon in Cambodia’s civil law system, and have secured bail for their clients.\textsuperscript{199} As in Rwanda, defenders have persuaded judges to allow them to cross-examine adverse witnesses.\textsuperscript{200} These projects thus work to infuse an international concept of fairness into debilitated criminal justice systems.

2. International Criminal Tribunals

After the close of the Nürnberg era, no more international criminal courts convened, despite atrocities in Cambodia, Latin America, and elsewhere. Then, in the 1990s, two tragedies sparked a new phase in international adjudication of crime. In the Bosnian region of the former Yugoslavia, many thousands suffered displacement, rape, mutilation, and murder as part of a brutal campaign known by the twisted euphemism “ethnic cleansing.”\textsuperscript{201} The death in a plane crash of Rwanda’s president unleashed assaults and killings of perhaps a million members of the Tutsi group by the more populous Hutu.\textsuperscript{202} The U.N. Security Council established two tribunals—the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—to investigate, prosecute, and

\textsuperscript{195} See James C. McKinley, Jr., \textit{Massacre Trials in Rwanda Have Courts on Overload}, \textsc{N.Y. Times}, Nov. 2, 1997, at 3. They represent far fewer defendants than necessary for the hundreds of thousands of pending cases, however. \textit{See id.}

\textsuperscript{196} \textit{See id.}

\textsuperscript{197} \textit{See Interview with Linda Kremer, former director of the Cambodian Defenders Project, in Berkeley, Cal. (June 19, 1997)[hereinafter Kremer interview]. For a discussion of the civil dislocation that lingers 20 years after the defeat of the Khmer Rouge, see Seth Mydans, \textit{The Khmer Rouge Legacy: In the Killing Fields, Even the Future Died}, \textsc{N.Y. Times}, Jan. 10, 1999, \S 4, at 1.}

\textsuperscript{198} \textit{See Kremer interview, supra note 197. The Project, one of a few operating in Cambodia, was founded by the International Human Rights Law Group. \textit{See id.}}

\textsuperscript{199} \textit{See id.}

\textsuperscript{200} \textit{See id.}

\textsuperscript{201} \textit{See Carol J. Williams, \textit{Bosnian Serbs Snub U.N. Chief}, \textsc{L.A. Times}, Dec. 1, 1994, at A1 (stating that “ethnic cleansing” had left two million Bosnians homeless and two hundred thousand dead or missing).}

punish those responsible for these atrocities.\textsuperscript{203} Both tribunals had halting starts but gained respect as more suspects were captured and more trials commenced.\textsuperscript{204} Comparable tribunals have been proposed for adjudication of other international crimes.\textsuperscript{205}

Like the London Charter, the Yugoslavia and Rwanda tribunals' statutes and rules combine aspects of the common law, civil law, and military law.\textsuperscript{206} As in the common law systems, an independent prosecutor leads investigation of alleged crimes,\textsuperscript{207} and cases may end with guilty pleas.\textsuperscript{208} In trials, attorneys call, examine, and cross-examine witnesses.\textsuperscript{209} As in the civil law systems, judges decide whether charges should go forward,\textsuperscript{210} at trial, judges, rather than lay jurors, decide guilt or

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\textsuperscript{205} A panel of experts recommended that the United Nations establish another such tribunal to try Khmer Rouge leaders who ordered massacres in the late 1970s, but the Cambodian government so far has rejected the plan. See Seth Mydans, Terms of Khmer Rouge Trials Still Elude U.N. and Cambodia, N.Y.TIMES, Mar. 23, 2000, at A3. In contrast, international prosecution of two Libyan nationals accused of bombing an airliner over Lockerbie, Scotland, is under way. See supra note 78.


\textsuperscript{207} See ICTY Statute, supra note 203, art. 18; ICTR Statute, supra note 203, art. 17; ICTY Rules, supra note 206, Rules 39-41; ICTR Rules, supra note 206, Rules 39-41.


\textsuperscript{209} See ICTY Statute, supra note 203, art. 21(e); ICTR Statute, supra note 203, art. 20(e); ICTY Rules, supra note 206, Rule 85; ICTR Rules, supra note 206, Rule 85.

\textsuperscript{210} See ICTY Statute, supra note 203, art. 19; ICTR Statute, supra note 203, art. 18; ICTY Rules, supra note 206, Rule 47; ICTR Rules, supra note 206, Rule 47.
\end{footnotesize}
innocence. An indication of the hybrid nature of the tribunals' procedures may be the disagreement whether those procedures are predominantly inquisitorial or accusatorial. An ICTY President has characterized the rules as "largely adversarial," while a leading comparative evidence scholar has described them as "continental in orientation." 

In any event, more is at play than a mechanical pasting-together of dissimilar systems. Uniting the tribunals' statutes and rules is a commitment to fundamental fairness. The U.N. Secretary General, in his report on the ICTY statute, declared it to be "axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings." Similarly, the tribunals' Appeals Chamber has written that the ICTY was established "in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments." Thus these ad hoc tribunals must abide not only by their own statutes and rules of procedure and evidence, but also by the fair trial guarantees in the ICCPR. It is this emphasis on human rights that accords the convergence of criminal procedure occurring in these tribunals a constitutional status with far-reaching implications.

211. See ICTY Statute, supra note 203, art. 23; ICTR Statute, supra note 203, art. 22; ICTY Rules, supra note 206, Rule 87; ICTR Rules, supra note 206, Rules 87-88.


213. Mirjan R. Damaška, Propensity Evidence in Continental Legal Systems, 70 CHI.-KENT L. REV. 55, 61 n.16 (1994). Nonetheless, Professor Damaška discerned common law influences in several places, among them "the provision that allows evidence of a 'consistent pattern of conduct' to be introduced at trial whenever its introduction is mandated by the 'interest of justice.'" Id. (citing ICTY Rules, supra note 206, Rule 93).


216. See id. paras. 45-46; Secretary General's Report, supra note 214, para. 106; cf. Prosecutor v. Akayesu, No. 96-4-T, Judgement, § 1.4.1 (Sept. 2, 1998), available in <http://www.un.org/ictr/english/judgments/akayesu.html> (stating that in pretrial litigation the ICTR, relying on its own statute and the ICCPR, had refused to compel another accused individual to give expert testimony at trial at bar).

217. See Theodor Meron, War Crimes Law Comes of Age, 92 AM. J. INT'L L. 462, 463 (1998) ("[T]he rules of procedure and evidence each Tribunal has adopted now form the vital
3. Proposed International Criminal Court

A profound step toward convergence occurred in Rome in the summer of 1998. Culminating more than 50 years of debate,²¹⁸ delegates from more than 150 countries concluded a treaty containing the statute of the proposed International Criminal Court, or ICC.²¹⁹ Scores of states already have signed, and several have ratified, the treaty.²²⁰

Like the ad hoc tribunals, the ICC would apply hybrid procedures. As in the common law system, defendants could plead guilty;²²¹ if they chose trial, they would enjoy the right to cross-examine witnesses.²²² As in the civil law system, the ICC statute provides for judicial review to decide whether a case should proceed to trial.²²³ Trial itself would take place before a panel of judges, whom victims' legal representatives would be permitted to address.²²⁴ The full extent to which the two systems have been combined will not be clear until adoption of procedural and evidentiary rules, now under Preparatory Commission discussion.²²⁵

Core of an international code of criminal procedure and evidence that will doubtless have an important impact on the rules of the future international criminal court (giving definition to term "constitutional").


220. See CICC International Criminal Court Home Page, (visited Apr. 25, 2000) <http://www.igc.org/icc> (reporting that 96 countries have signed and 8 have ratified). Sixty states must ratify the treaty for it to enter into force. ICC Statute, supra note 219, art. 126. Even if supporting states move quickly, ratification could take at least five years. See Prepared Remarks of Professor Michael P. Scharf before the International Operations Subcommittee of the U.S. Senate Committee on Foreign Relations (July 23, 1998), available in 1998 WL 425944.

221. See ICC Statute, supra note 219, art. 65; cf: Roger S. Clark, The Proposed International Criminal Court: Its Establishment and Its Relationship with the United Nations, 8 CRIM. L.F. 411, 430 n.64 (1997) (stating that an early proposal to let defendants before the international criminal court plead guilty rather than stand trial drew "puzzled comments from civil and Islamic lawyers").

222. See ICC Statute, supra note 219, art. 67(c).

223. See id. art. 61. Such review by a Pre-Trial Chamber won wide support not only because it coincided with civil law tradition, but also because it was seen as an additional safeguard against overzealous, inappropriate prosecution. See Support Growing for an Independent Prosecutor: Make or Break Issue for NGO Coalition, ON THE RECORD 1 (Issue 7, June 23, 1998) <http://www.advocacynet.org/cgi-bin/browse.pl?id=icc07.html>.

224. See ICC Statute, supra note 219, arts. 62-76 (describing role of Trial Chamber).

225. See id. art. 68(3).

226. See generally Draft Rules of Procedure and Evidence of the International Criminal
Like the London Charter, the ICC Statute has constitutional aspects: the aspirational phrases with which it begins;\textsuperscript{227} the delineations of the separate duties of its constituent organs;\textsuperscript{228} and the commitment to serve fundamental values like due process of law and equal protection under the laws.\textsuperscript{229} The statute includes a lengthy list of "minimum guarantees" to be afforded an accused,\textsuperscript{230} and has won praise for incorporating the "principles of fairness" contained in international human rights instruments.\textsuperscript{231} Though it may be years before the ICC becomes a reality, the statute's description of fair trial rights may be seen to reflect a truly international convergence.\textsuperscript{232}

\textsuperscript{227} The statute states that the parties agree to establish the ICC as a means of punishing "the most serious crimes of concern to the international community as a whole . . . [c]onscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time" and "[m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity," with an eye to "[r]eaffirming the Purposes and Principles of the Charter of the United Nations," and "[r]esolved to guarantee lasting respect for the enforcement of international justice." ICC Statute, supra note 219, pmbl.

\textsuperscript{228} See id. arts. 34-43.

\textsuperscript{229} See, e.g., id. art. 21(3) ("The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, . . . age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."); id. art. 55(1)(d) (barring deprivation of liberty of suspect under investigation "except on such grounds and in accordance with such procedures as are established in the Statute"); id. art. 64(2) ("The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused . . . .")

\textsuperscript{230} Id. art. 67(1); see also id., arts. 55, 63, 64(2), 66-69 (setting forth rights of suspects and defendants, many similar to those in ICCPR, supra note 99, art. 14).

\textsuperscript{231} La Fédération Internationale des Ligues des Droits de l'Homme, supra note 192. But see infra note 251 (describing concerns with fairness of ICC Statute).

\textsuperscript{232} The very setting of normative standards aids progress toward harmony in international law. See BASSIOUNI, supra note 103, at 4 (stating that process by which certain crimes assume international character begins with theoretical writings, then to treaties and other international undertakings, then to setting of norms, and finally to mechanisms for enforcement of those norms); BURNS H. WESTON, INTERNATIONAL LAW AND WORLD ORDER 733 (2d ed. 1990) (noting that international conventions, even if not fully effective, may act as "obstacle to retrogression" in human rights doctrines).
III. NOTES OF DISCORD: RESISTANCE TO A GLOBAL CRIMINAL PROCEDURE

Clearly, components of convergence in criminal procedure abound. Their movement has been, as transnational legal process theory would predict, dynamic: forces have operated at the same time, yet in different places and forums, on both horizontal and vertical planes, and have been spurred by different actors. Thus, even as states have negotiated bilateral agreements on some procedures, nonstate entities like human rights groups, supranational courts, and states' own citizens have urged adoption of a spectrum of human rights norms.

Most watershed moments of convergence—the reforms just after the French Revolution, the Nürnberg trials, the rise of individual rights as a proper subject of international law, and European integration—transpired within a shared tradition, one that considers certain fundamental rights, such as fairness, liberty, and equality, inalienable. This is most true in Europe, where that tradition, coupled with political and economic incentives to integrate, seems likely to surmount differences in criminal procedure once deemed intractable. There, convergence may proceed quickly and harmoniously.

But what of states in which the fundamental rights tradition is less than firmly rooted? Will convergence pass them by, or might other elements of harmony nonetheless provoke convergence? Conversely, does an avowed commitment to principles of inalienable rights ensure that a state will stay in tune with international movements toward convergence? Or might some other factor, some element of disharmony, cause a state to diverge?

Implicit in these questions is an acknowledgment of state sovereignty. It is true that in the last half-century informal cooperation, multilateral treaties, and international organizations have drawn states into a web of interlocking obligations. And a state now may be called to account for mistreating one of its own nationals, not only by the individual, but also by other states. Such developments impinge on a state's sovereignty. In most cases, however, states retain the attributes of sovereignty that they have enjoyed for centuries. A state thus may choose to ignore global pulls toward compliance in service of perceived self-interest.

In the criminal procedure arena, notes of discord may be divided loosely into the "temporal"—those that may change or pass away with time—and "structural"—

233. See supra text accompanying notes 35-43 (describing Professor Koh's theory of transnational legal process).
234. See supra text accompanying notes 56-73, 90-189.
235. See supra text accompanying note 64.
236. The following are among the attributes commonly attached to the concept of "sovereignty": independence and autonomy from other entities in the world community, equality with other states, the legal status of an artificial person, territorial integrity, and inviolability of society and citizens as well as territory. See LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 10-12 (1995).
237. Cf. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 10, 24 (1990) (positing that legitimacy—the perception that a rule or institution accords with generally accepted principles—"has the power to pull toward compliance those who cannot be compelled").
those that are believed to affect the structure of the state and thus to resist resolution.

A. Temporal Notes

Any number of transient, or temporal, hindrances may arise on the path to convergence. Among them are reactions to rising crime rates, lack of resources, and nagging problems remaining after uneasy political compromises.

1. Crime

As shown above, rising global crime has encouraged coordinated law enforcement; coordination, in turn, may encourage states to bring divergent procedures into tune.\(^{238}\) Thus may rising crime compel convergence toward a global criminal procedure.

But these same developments work against what this Article has called constitutional criminal procedure—a body of law founded on principles of fundamental fairness.\(^{239}\) For with global cooperation comes a new threat to individual liberty. Cooperating officers are more likely to have access to the latest techniques for surveillance, techniques that encroach on individual privacy rights. And there is a sense that global criminals, because of their itinerant nature and because their conduct may have created mass fear or outrage, are less deserving of protection.

Accordingly, in states like the Republic of South Africa, still basking in praise for a constitution that enshrines individual liberties, escalating crime provokes calls for curtailment of rights.\(^{240}\) Other states, claiming relatively low crime rates, spurn criticism of severe punishments.\(^{241}\) On an international level, terrorism and drug trafficking may have replaced totalitarianism as problems believed to justify limits on civil liberties.\(^{242}\) Concerned about “the danger of overreaction in responses to . . . organized crime,” the International Association of Penal Law devoted its 1999 conference in Budapest to international law enforcement, “mainly in order to sound alarm bells about the extent to which the world-wide legislative reaction” contradicts “respect for the rule of law and the rights of the accused.”\(^{243}\)

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238. See supra text accompanying notes 75-89.
239. See supra text accompanying notes 15-31.
241. See LIPPMAN ET AL., supra note 45, at 2-3 (attributing this claim to Islamic states imposing “relatively harsh Koranic penalties”); Crime Drop in Sudan Credited to Islamic Law, SEATTLE TIMES, Mar. 31, 1985, at A6 (reporting that state attributed transformation of once-violent capital, Khartoum, into one of Africa's safest cities to adoption of strict Islamic laws).
242. See Delmas-Marti, supra note 2, at 195 (“The terrorism of the large international narcotics trafficking rings seems, in extreme cases, to threaten the foundations, even of the state.”); Raymond, supra note 92, at 1261-62 & n.248 (“‘Terrorism’ might be the next shared ‘context’ on which background the criminal procedure amendments are interpreted.”).
2. Lack of Resources

Adherence to a constitutional criminal procedure—with its requirements of an impartial judiciary, independent defense attorneys, and rights to a meaningful hearing and to appeal—may be costly and cumbersome. Some states may resist convergence toward such a model simply because they lack the financial or structural resources to comply.244 Thus in Rwanda, where 100,000 detainees await trial in national courts on charges related to the 1994 massacres, a justice official questioned outside pressures to ensure defense counsel.245 Noting that few defendants had lawyers before 1994, he asked, "'Can you say that we should not punish genocide just because our country doesn't have enough lawyers?' "246

3. Uneasy Compromises

The Rwandan official's question speaks of more than lack of resources. It also suggests discomfort with insistence that Rwanda adopt certain rights of the accused, even though Rwanda to some degree has invited attention by accepting outside aid.247 Such uneasy political compromises often coincide with movements toward convergence in criminal procedure.

Even within Europe, there is unease. The Corpus Juris report,248 for example, set off a flurry of debate in London newspapers. One author warned that adoption of Corpus Juris would eviscerate English legal traditions,249 while another praised the report as "a synthesis of the best features of the rules of criminal procedure . . . on both sides of the Channel."250

Indeed, combination of the inquisitorial and accusatorial methods carries with it the seeds of unease. In the ICTR and ICTY, governed by statutes with expansive lists of

244. Alternatively, a state may choose to apply what limited resources it has to other needs considered more pressing. What kinds of rights deserve priority is a recurring question in the debates between universalists and cultural relativists, discussed infra text accompanying notes 263-66. See also Bangkok Declaration para. 6, in HUMAN RIGHTS AND CHINESE VALUES app. (Michael C. Davis ed., 1995) [hereinafter Bangkok Declaration] (asserting that "countries, large and small, have the right to . . . control and freely utilize their resources").


246. McKinley, supra note 195, at 3 (quoting Gerald Gahima, "a high-ranking justice official").


248. See supra text accompanying notes 162-89 (discussing report).

249. See Philip Johnston, Alarm over Euro-wide Justice Plan Threat to British Trial-by-Jury System, DAILY TELEGRAPH (London), Nov. 30, 1998, at 1 (contending that the Corpus Juris recommendations "would mark an end to historic British rights, including habeas corpus . . . and trial by jury").

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rights, proceedings have drawn criticism. Duško Tadić, the first defendant to appear before the ICTY, challenged limits on defense examination of prosecution witnesses and the inability of the defense to secure its own witnesses. In both instances, parties and judges struggled to adapt a mix of legal doctrines to a hybrid situation.

251. A report issued as the Rome ICC conference began stated that there was widespread agreement on issues related to the rights of the accused, many of which “are clearly set out in international treaties”; nevertheless,

[n]ot everyone is happy with the evolution of international criminal procedure in the Hague and Arusha courts. The French are concerned with what they view as an erosion of the continental (civil) system. The Americans feel that the proposed ICC procedures need to be more rigorously defined. They also worry that some constitutional rights might be ignored (such as the right of a defendant to know the identity of his accuser).

The Case for an International Court, On the Record, 2, ¶ 16 (Issue 1, June 14, 1998) <http://www.advocacynet.org/cgi-bin/browse.pl?id=icc01.html>. For a recent commentary expressing concerns that the ICC will fail adequately to protect the accused, see Panel Discussion, Association of American Law Schools Panel on the International Criminal Court, 36 AM. CRIM. L. REV. 223, 235-38, 251-56 (1999) [hereinafter Blakesley remarks] (remarks by Professor Christopher L. Blakesley criticizing, inter alia, absence of search-and-seizure protections, inadequate pretrial protections, and vague language in ICC statute).


253. The defense contended that the principle of equality of arms had been violated because Republika Srpska’s refusal to help had prevented the defense from calling certain witnesses. See Tadić Appeals Chamber Judgement, supra note 252, paras. 43-55. The Appeals Chamber agreed that this principle, which forbids placing a defendant at an unduly unfair disadvantage, falls within the ICTY statute’s guarantee of a “fair and expeditious” trial. Id. para. 43 (quoting ICTY Statute, supra note 203, art. 20(1)). It added that it could “conceive of situations where a fair trial is not possible because witnesses central to the defence case do not appear due to the obstructionist efforts of a State.” Id. para. 55. Yet it ruled against the defense on the grounds that the Trial Chamber had done all it could to assist, and that the defense had failed to seek a stay of proceedings when the difficulty arose. See id. paras. 53-55.

254. The term “equality of arms,” for example, is not commonly used in U.S. criminal procedure, although the U.S. law requires equality as well as fairness. See Griffin v. Illinois, 351 U.S. 12, 17 (1956) (“Both due process and equal protection emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice . . . .”) (internal quotation marks and citation
Others complain that hybrids too readily embrace common law norms, and so deprive a defendant of some of the fairness basic to the civil law system.255 The defense attorney for a former Rwandan prefect on trial before the ICTR gave voice to these complaints. In the inquisitorial method, all parties have equal access to the entire dossier. But the ICTR, following the adversarial method, permitted documents to be furnished even after witnesses had testified.256 This, the attorney argued, rendered the defense powerless against the ICTR’s “army of police, of investigators, of prosecutors.”257 To remedy defense difficulties in obtaining documents and information from the prosecution, the attorney asked for appointment of a juge d'instruction who would inquire on behalf of both parties and make a report of the elements of the charge and of the defense.258 This request, which was not attuned to the system that had been adopted for the ad hoc tribunal, was denied.259

The obstacles just discussed are not insignificant. Nor do they seem insurmountable. Public opinion about proper crime fighting techniques, for example, could change over time, perhaps influenced by alarms sounded at events like the

omitted); see also supra note 15. Undue circumscription of defense examination rights countermands common law doctrine that considers confrontation a fundamental right. See, e.g., U.S. CONST. amend. VI (guaranteeing an accused the right to confront adverse witnesses). Even in the United States, however, this right may give way to countervailing interests. See White v. Illinois, 502 U.S. 346 (1992) (sustaining child molestation conviction based on out-of-court statements of four-year-old complainant). In contrast, it is not unusual in civil law systems for a judge to conduct nearly all examinations of witnesses. See Richard S. Frase & Thomas Weigend, German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?, 18 B.C. INT’L & COMP. L. REV. 317, 357 (1995) (noting that German attorneys seldom exercise their right to question witnesses). With regard to this dispute, therefore, Tadić, who was tried before a panel of professional judges according to the civil law tradition, effectively sought the benefit of common law protections developed in a different context.


257. La défense, supra note 256. The attorney further complained that necessary documents were furnished late and in English rather than French, and that he had found it difficult to locate and secure the appearance of witnesses for the defense. See id. Similar complaints have been made by the lead trial attorney in the first ICTY trial. See The Prosecutor v. Dusko Tadic, 13 AM. U. INT’L L. REV. 1441, 1450, 1452 (1998) [hereinafter Wladimiroff] (presentation by Michail Wladimiroff); cf. Jörg et al., supra note 46, at 55 (stating that “criminal procedure in the United Kingdom has been seriously discredited by a number of miscarriages of justice that show that, without equality of arms in investigation, the partisan assumptions of the adversarial process can make a nonsense of both truth and procedural safeguards”).

258. See La défense, supra note 256.

259. See id. But see Wladimiroff, supra note 257, at 1451 (recommending that ICTY consider appointing such judges for hearing certain evidence).
Budapest conference. Assistance, from governmental and nongovernmental organizations alike, could supply states with the resources they need to comply with international standards. Finally, further negotiation could produce more palatable political compromises. Ongoing dialogue among the European states could resolve concerns about Corpus Juris.\textsuperscript{260} Hybrid tribunals, meanwhile, could fashion institutions that protect individual liberty more than the criminal procedure methods from which they derive. Criticism of the lack of equal investigative footing, for example, might lead to appointment of a judge to oversee the pretrial process.\textsuperscript{261} In light of criticism of the civil law juge d'instruction, this might be a fully independent judge, like the Corpus Juris judge of freedoms.\textsuperscript{262} With such innovations, temporal discord may pass.

\textbf{B. Structural Notes}

Other notes of discord seem less amenable to change. Convergence will be impaired, for instance, if a state asked to adopt an international norm does not share the legal tradition that produced the norm, or if the state believes that adoption will threaten the state's own security or position within the world community. At the root of such resistance is a concern that adoption of the norm undermines sovereignty—the state's position of power, or its cultural identity—to a degree the state finds intolerable. Built into the nature of the state, such "structural" notes may prove difficult to dismantle.

\textbf{1. Lack of Shared Traditions}

Obviously, states that do not share a tradition of fundamental rights are less likely to move swiftly and harmoniously toward a constitutional model of criminal procedure. This disinclination implicates the enduring debate about the nature of human rights. Western tradition asserts that international conventions articulate natural, inalienable rights abiding in all cultures;\textsuperscript{263} non-Western writers and states,

\textsuperscript{260} Cf. Van Den Wyngaert, supra note 171, at 446 (acknowledgment, by one of the experts who prepared report, of room for refinement of Corpus Juris proposals).

\textsuperscript{261} Cf. Blakesley remarks, supra note 251, at 251-52 (questioning ability of ICC prosecutor to act impartially in pretrial setting); Letter from M. Cherif Bassiouni, Professor of Law, DePaul University, to Author (Mar. 21, 1999) (on file with author) (observing that defendants' rights may not be protected when prosecutor alone conducts investigations, for instance of "a mass grave investigation . . . in a far away place which is not accessible to the defense," and suggesting appointment of a judge to supervise prosecutor's adherence to standards established for conducting such investigations and to ensure that all relevant information is disclosed to defense). One commentator argues that the ICC's unique nature should require special vigilance against threats to the rights of the accused and, further, should preclude any derogation from fair trial guarantees. See Sara Stapleton, Note, Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation, 31 N.Y.U. J. INT'L L. & POL. 535 (1999).

\textsuperscript{262} See supra text accompanying note 145 (discussing criticism of juge d'instruction); see also supra text accompanying notes 175-78 (discussing Corpus Juris's judge of freedoms).

\textsuperscript{263} See, e.g., supra text accompanying notes 96-97 (discussing Universal Declaration of
however, often disagree. Some aver that the "conception of rights is universal," but contend that its manifestation in many international instruments too heavily reflects Western influence.\(^{264}\) Others acknowledge the importance of civil and political rights, yet argue that other rights, such as the right to economic development, have priority.\(^{265}\) Still others maintain that how a state treats its nationals is exclusively an internal, culturally determined matter.\(^{266}\)

a. Islamic States

Many of these dissenting strains resound in Islam, a tradition far different from that of the West. Western culture is based on separation of church and state.\(^{267}\) But in Islam, "government, religion, and law are inseparable."\(^{268}\) The Islamic state thus discharges divine will.\(^{269}\) Contrary to the Western emphasis on fundamental rights that a state may not invade without justification, Islam stresses the duties individuals owe to the state and society.\(^{270}\) Islamic law, the *Shari'a*, derives not from human

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\(^{264}\) Mahmood Mamdani, *Social Movements and Constitutionalism: The African Context, in CONSTITUTIONALISM AND DEMOCRACY* 172, 172 (Douglas Greenberg et al. eds., 1993) (arguing that a sense of rights arose out of oppression, and that only by ignoring ""universal fact of revolt . . . is it possible to make human rights an invention of Western culture") (omission added) (quoting philosopher Paulin Hountondji); accord *id.* at 174-78 (maintaining that Western states often advanced their own notions of human rights for political aims, such as "to substitute the discourse of reform for the discourse of revolution" and to promote "a sharp and relevant ideological critique of Soviet practice," and thus shunned interpretations of human rights more appropriate to developing world).

\(^{265}\) See, e.g., *Bangkok Declaration*, *supra* note 244, app. (1993 declaration of 49 Asian states, just before international conference on human rights, placing domestic concerns before civil and political rights).

\(^{266}\) See, e.g., China Society for Human Rights Studies, *Comments on U.S. State Department Human Rights Report on China*, Xinhua News Agency, June 8, 1994, *available in LEXIS*, Asiapc Library, Xinhua File, File No. 0608110 (making this argument, "non-governmental academic society dedicated to study human rights" relies on Article 2 of the U.N. Charter, which grants member states ""sovereign equality"" and provides that the United Nations may not ""intervene in matters which are essentially within the domestic jurisdiction of any state""); see also *infra* text accompanying notes 295-96.

\(^{267}\) See *supra* text accompanying notes 9, 155 (describing Western secularism).

\(^{268}\) Gravelle, *supra* note 9, at 1; see *id.* at 2 (declaring that nearly every Muslim state had "established Islam as the state religion"); cf. Shaheen Sardar Ali, *The Conceptual Foundations of Human Rights: A Comparative Perspective*, 3 EUR. PUB. L. 261, 270-71 (1997) ( remarking that many scholars see secularism as source of Islamic resistance to Western human rights tradition).

\(^{269}\) See Bassiouni, *supra* note 9, at 8 (explaining that in Islam, Allah is the state's ""raison d'être"); Gravelle, *supra* note 9, at 1-2 (noting that in most conservative Islamic states, religious leaders often also are political leaders).

\(^{270}\) See *UNIVERSAL ISLAMIC DECLARATION OF HUMAN RIGHTS*, Sept. 19, 1981, art. 19, quoted in Farhad Malekian, *The Concept of Islamic International Criminal Law* 191 app. n.3 (1994) (stating that rights are limited as needed to serve "morality, public order and the general welfare of the Community"); Bassiouni, *supra* note 9, at 13 ("Unlike other sources of law, the *Qu'ran* emphasizes duties rather than rights. It insists upon the fulfillment of
judgment and compromise, as in the Western view, but rather from divine revelations contained in sacred and near-sacred texts like the Qu'ran and Sunna.271 In some Islamic states interpretations of these texts have produced laws alien to a Westerner: an inferior place for women, classification of crimes according to the degree to which they offend Allah, and punishments like the cutting off of thieves’ hands.272 Unlike Western states, where laws may be changed rather easily by the humans who made them, in Islamic states claims of divine mandate may thwart reform.273

Exacerbating these differences, a tense rhetoric permeates relations between the Western and the Islamic world. The West’s apprehension has grown since the 1970s, when fundamentalist Muslims took over the U.S. Embassy in Iran.274 Thus the West, particularly the United States, targets antiterrorism campaigns against Islamic regions.275 Western states and organizations frequently denounce Islamic states’ human rights records.276 Muslim writers, meanwhile, express bitterness about individual obligations before the individual can claim his privileges.”); id. at 23 (stating that unlike in the West, in Islam the “individual does not stand in an adversary position vis à vis the state but is an integral part thereof”); see also supra text accompanying notes 15-31, 147-61 (discussing Western fundamental rights tradition); cf. Ali, supra note 268 (noting that concepts of duty and morality also have a place in Western culture, though a place less prominent than in Islam).

271. See LIPPMAN ET AL., supra note 45, at 2 (observing that Islamic “law’s religious derivation and purposes are the basis of its authority, in contrast to European legal systems which derive their standing from an association with the state and its political processes”); see also Ali, supra note 268, at 265 (outlining sources of Islamic law); Bassiouni, Introduction to THE ISLAMIC CRIMINAL JUSTICE SYSTEM, supra note 9, at i, xiii-xiv; supra text accompanying notes 6, 151-54 (describing Western concept of law). But see Abdullah A. An-Na’im, The Spirit of the Ghost of Islamic Law?, 2 GREEN BAG 2d 441, 443 (1999) (stating that these texts were themselves the product of human judgment).

272. See LIPPMAN ET AL., supra note 45, at 37-53 (explaining categories of crime and prescribed punishments); id. at 61 (noting that because of lesser status, a woman may not testify in an Islamic court; the testimony of two women, however, may substitute for that of one man).

273. See id. at 2 (stating that Islamic criminal law’s essentially religious nature has made it “virtually unchangeable”).

274. See LIPPMAN ET AL., supra note 45, at ix (noting that events like the embassy takeover and the Lebanese war had distorted Westerners’ view of Islam).


276. Among the states that the U.S. State Department recently cited for human rights abuses—including harassment, arbitrary arrest and detention, beatings, summary judicial proceedings, suppression of dissent, and discrimination on the basis of religion and gender—were Afghanistan, Egypt, Iran, Iraq, Pakistan, Saudi Arabia, Turkey, and Yemen. See U.S. Dep’t of State, 1999 Country Reports on Human Rights Practices (visited Apr. 14, 2000)
oppression that Islamic regions suffered under European colonization. They contend that even in the post-colonial world, the West cares more to impose its own views than to reach compromise. Some Islamic states, like Afghanistan, ride the recent fundamentalist surge to a parochial civil society. These notes of discord do not promise a swift and smooth convergence of Islamic and Western criminal procedure.

Nonetheless, developments in political, legal, and intellectual spheres counsel against a jump to conclude that convergence is impossible. On a political level, the Islamic world spans several continents and subcultures, and not all states with majority Muslim populations have systems as strict as that in, say, Saudi Arabia. The more secular states have made some moves to accommodate views of human rights that prevail outside the Islamic world. Egypt, for example, has permitted women to sue for divorce, while Turkey has agreed to obey the requirements of the European Human Rights Convention.


277. See Ali, supra note 268, at 282 (stating that the “human rights discourse in the Islamic tradition has not been approached in the true intellectual spirit of engaging in a dialogue of ‘equals,’” and suggesting that the legacy of European colonialism of Islamic regions promotes this unevenness); accord Bassiouni, supra note 9, at 18 (observing that “western Orientalists” still call for Islamic law to “modernize in the sense of becoming secular”).

278. See Dexter Filkins, Afghans Pay Dearly for Peace, L.A. TIMES, Oct. 22, 1998, at A1 (describing seizure of power by Taliban, an “extreme” Islamic group); see also Bassiouni, supra note 271, at ix (commenting that Iran, Pakistan, and Sudan recently replaced secular with Islamic law); Gravelle, supra note 9, at 1 (noting recent rise of Islamic fundamentalism, and consequent adoption of Shari’a, in parts of the Mideast, West Africa, and the Philippines).

279. See LIPPMAN ET AL., supra note 45, at 53 (stating that there are 800 million Muslims in the world, constituting a majority in 35 states and a large minority in 20 others); Bassiouni, supra note 271, at xiv-xvi (noting many variations of Islam); Gravelle, supra note 9, at 2 (dividing Islamic states into four groups, ranging from most religious, such as Saudi Arabia and Afghanistan, to most secular, Turkey).

280. See Susan Sachs, Egypt’s Women Win Equal Rights to Divorce, N.Y. TIMES, Mar. 1, 2000, at A1; see also Koh, supra note 35, at 675 n.257, 677; supra note 123 (listing Turkey among states that have submitted to jurisdiction of European Court of Human Rights). Despite some concern that integration of Turkey may “water down” European human rights standards, the Court of Human Rights has issued sanctions against Turkey for violation of the European Convention. See, e.g., Aydin v. Turkey, App. No. 23178/94, 25 Eur. H.R. Rep. 251, 251 (1998) (ordering compensation for woman raped in custody, in violation of Convention’s prohibition against torture); Koh, supra note 35, at 677 (stating concern, yet noting that movement will occur in other direction as well).

281. See MALEKIAN, supra note 270, at 165 (stating that differences in procedure are “slight”); Bassiouni, supra note 9, at 41 (remarking that in many Muslim states, judicial procedures follow a “western model”). Notably, the Shari’a and similar texts say little about criminal procedure; in this field, therefore, claims that a certain procedure has divine origin are weak. See id. at 39; Tâhâ J al ‘Alwânî, The Rights of the Accused in Islam, 10 ARAB L.Q. 3, 7 (1995); Awad M. Awad, The Rights of the Accused Under Islamic Criminal Procedure, in
former, a judicial officer oversees proceedings. As in the latter, an adversarial confrontation between accuser and accused is a cornerstone of procedure. Even more than in the common law systems, however, Islamic rules limit evidence at trial to that considered most reliable: eyewitness testimony, confessions, and oath-taking. Judgment is to be based on this evidence alone.

On an intellectual level, some Muslim scholars stress that the Shari’a is an interpretation of divine law, not divine law itself, and thus argue that it may be reformed. These scholars find in the Islamic texts a core commitment to the dignity of the individual, one that demands the protection of human rights. Included are
fair trial rights, among them a right to remain silent, the rights to be free from torture or arbitrary detention, a presumption of innocence, and a right to assistance of counsel.

b. China

As a state with a cultural tradition at odds with that of the West, China represents an archetype of how structural obstacles may affect convergence. Unlike the Western philosophy of individual autonomy, in Chinese culture the individual must serve the interests of the collectivity. The priority of the state is a tenet of ancient Confucianism, one that has survived in the Communist concept of democratic centralism.

For the first three decades of Communist rule, China had no criminal code or set of criminal laws, a situation one author attributed to Mao Zedong’s “preference for ‘rule by man’ . . . over ‘rule of law.’” The criminal procedure code instituted in the
late 1970s differed greatly from the constitutional criminal procedure model; moreover, defendants enjoyed no privilege against self-incrimination, no presumption of innocence. Critics, including some U.S. government officials and numerous nongovernmental organizations, have contended that China abuses the human rights of its people.

China has rebuffed such criticism, arguing that human rights are not universal but culturally determined. It has insisted that critics improperly tread on its sovereignty and meddle in its internal affairs. At a 1993 conference in Bangkok, it persuaded forty-nine Asian states to sign a declaration placing domestic concerns such as sovereignty and development before civil and political rights. And the Chinese have accused the United States, in particular, of using “dual criteria on the issue of human rights” by condemning China in areas in which the U.S. record is not untarnished.

1998 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 479, 480 (stating that before enactment of first code, politics played a principal role in punishment of crime); cf. Min, supra note 291, at 165, 182 (finding seeds of rule by man in generations of imperial rule and in absence of procedural laws).

293. See Yingyi Situ & Weizheng Liu, An Overview of the Chinese Criminal Justice System, in COMPARATIVE AND INTERNATIONAL CRIMINAL JUSTICE SYSTEMS: POLICING, JUDICIARY AND CORRECTIONS, supra note 291, at 125, 130. Work began on the first code in 1950, but it went through 38 revisions before it was enacted 29 years later. See Gao & Zhao, supra note 292, at 479.


295. See supra text accompanying notes 263-66 (setting forth contentions of cultural relativists, all of which China has advanced).

296. See Michael C. Davis, Chinese Perspectives on Human Rights, in HUMAN RIGHTS AND CHINESE VALUES, supra note 244, at 3, 17 (quoting the foremost Chinese delegate at a 1993 U.N. human rights conference in Vienna as saying that “'[t]o wantonly accuse another country of abuse of human rights and impose the human rights criteria of one’s own country or region on other countries or regions are tantamount to an infringement upon the sovereignty of other countries and interference in the latter’s internal affairs'”) (alteration added).

297. See Bangkok Declaration, supra note 244; see also China Carries the Day at Human Rights Conference, AGENCIE FRANCE-PRESSE, Apr. 3, 1993, available in 1993 WL 10706532 (describing China's lead, supported primarily by Burma, Indonesia, and Singapore, but opposed by Japan).

298. China Society for Human Rights Studies, supra note 266. A Chinese report noted that the United States has criticized China for prosecuting “counter-revolutionary criminals,” even though U.S. law also makes insurrection a crime, and for “indiscriminately and wantonly arresting and maltreating criminals,” even though U.S. prisons hold a far higher percentage of
China nonetheless has made overtures to placate its critics.\textsuperscript{299} Even as the Bangkok Declaration asserted sovereign control over human rights, for example, it acknowledged that human rights have a universal nature.\textsuperscript{300} In 1988, China joined the international convention condemning official torture.\textsuperscript{301} In 1996, it adopted a new Criminal Procedure Law, with features that included an expanded right to counsel, a right to active legal defense, and an express prohibition on coerced confessions.\textsuperscript{302} "If fully implemented," the U.S. State Department has written, "this law would bring criminal laws closer toward compliance with international norms."\textsuperscript{303} The number of executions appears to have dropped markedly.\textsuperscript{304} China has established a legal aid
foundation and has explored with Western jurists different methods of trying criminal cases. After a 1998 visit by Mary Robinson, the U.N. High Commissioner for Human Rights, China signed the International Covenant for Civil and Political Rights. Ratification would obligate China to abide by a host of fair trial rights.

Stimulating change has been China's "opening to the outside world"; that is, its desire for a larger role in the world economic arena. In recent decades China has cultivated a domestic market economy and secured avenues for overseas trade. It seeks entry into the World Trade Organization. This new discourse with the external world has fostered internal interest in Western concepts of democracy and human rights. Indeed, two Chinese law professors recently asserted that the interpenetration of domestic and foreign criminal laws, in a manner that will lead to greater democracy in China, is "an irreversible trend."

But the new Criminal Procedure Law does not fully embrace the notion that an individual enjoys fundamental rights against the state. In accord with Chinese collectivist tradition, reportage about the law speaks of "legitimate rights" or "rights as established by law." These terms connote rights that the state confers and may
revoke, unlike the "inalienable" or "natural" rights at the heart of the Western
tradition.315 Furthermore, the prefatory paragraphs of the new law list ten societal
goals, such as protection of the state and the people. In contrast, only one goal,
avoidance of prosecuting the innocent, clearly implies a right of the individual against
the state.316 Rights that a defendant may have under the new law sometimes must be
inferred, and there is no enumeration of rights comparable to those in international
instruments.317 Nor do the passages resonate with the values underlying the
constitutional criminal procedure model. For example, Article 12 states: "No-one
shall be convicted without a verdict pronounced by a people's court according to the
law," a statement that might imply a guarantee of due process.318 Nowhere, however,

established by law"); Judicial Guarantees for Human Rights Strengthened in China: Paper,
XINHUA NEWS AGENCY, Mar. 31, 1997, available in LEXIS, Asiapc Library, Xinhua File,
Item No. 0331039 [hereinafter Judicial Guarantees] ("legitimate rights and interests of
citizens"); Commentary: Law Amendments for Better Checks and Balances, XINHUA NEWS
AGENCY, Mar. 14, 1996, available in LEXIS, Asiapc Library, Xinhua File, Item No. 0314225
[hereinafter Commentary] (same).

315. See supra text accompanying notes 150-56 (discussing U.S. Declaration of
Independence and French Déclaration des Droits de l'Homme); Davis, supra note 296, at 11
(stating that in China, "rights are not inherent in humanhood as under natural rights doctrine
but are created by the State").

316. The new Chinese procedural law states:

ARTICLE 1. This law is enacted in accordance with the constitution to guarantee
the correct implementation of criminal laws; punish crimes; protect the people;
safeguard state, social and public security; and maintain the order of the socialist
society.

ARTICLE 2. The Tasks of the Criminal Procedure Law of the People's Republic
of China are to guarantee accurate and timely clarification of the facts of crimes,
to apply the law correctly, to punish criminal elements, to safeguard innocent
people from criminal prosecution, to educate citizens to observe the law
voluntarily and to actively struggle against criminal conducts; so as to uphold the
socialist legal system, to protect the citizens' personal, property, democratic and
other rights and to guarantee the smooth progress of socialist construction.

PRC Criminal Procedure Law, supra note 302, arts. 1-2. Underscoring this collectivist
emphasis, a recent government release cited not only its revised criminal laws, but also its
"severe crackdown on crimes" as achievements on behalf of "the human rights of the people
all over the country," Judicial Guarantees, supra note 314.

317. The existence of a presumption of innocence, for example, has been inferred from the
new use of the term "defendant," instead of "offender," and from its statement that "[n]o-one
shall be convicted without a verdict pronounced by a people's court according to the law."
PRC Criminal Procedure Law, supra note 302, art. 12; see also Huang, supra note 294, at 181.
The law omits a right to silence; in fact, it requires a defendant to submit to questioning during
the investigative, prosecutorial, adjudicatory, and appellate stages of a criminal proceeding.
See PRC Criminal Procedure Law, supra note 302, arts. 72, 91-96, 139, 155, 187.

318. PRC Criminal Procedure Law, supra note 302, art. 12. The Chinese Constitution
similarly provides, "No citizen may be arrested except with the approval or by decision of a
people's protectorate or by decision of a people's court, and arrests must be made by a public
security organ." Min, supra note 291, at 220 (quoting XIANFA arts. 37, 40 (1982)) (observing
that such phrasing "only points out the overall process without clarifying the due process
concept"). Cf. McKECHNIE, supra note 149 (quoting provision of the English Magna Carta
does the law say that a trial must be fair or equitable.\textsuperscript{319} The new law thus mingle,
but does not mesh, the Chinese and Western traditions.

That mingling has not satisfied Western human rights advocates. China’s handling
of political trials piques disapproval;\textsuperscript{320} recently, China thwarted efforts of political
dissidents to secure counsel.\textsuperscript{321} The U.S. State Department recently proclaimed that
enforcement of criminal law reforms is “poor,” and stated that defendants frequently
suffer “torture and mistreatment,” “forced confessions, arbitrary arrest and detention,
lengthy incommunicado detention, and denial of due process.”\textsuperscript{322} Although the new
Criminal Procedure Law forbids some of these practices, given the absence of explicit
remedies\textsuperscript{323} and of an independent judiciary,\textsuperscript{324} it remains to be seen whether the

\begin{itemize}
\item 319. News reports sometimes did use similar terms. See, e.g., \textit{Major Step to Maturity in
Library, Xinhua File, Item No. 0314146 [hereinafter \textit{Major Step}] (stating that the law will
“ensure judicial fairness”); \textit{Commentary, supra} note 314 (referring to “fair trial”). Moreover,
the revised criminal law enacted a year after the new PRC Criminal Procedure Law espoused
the principle of “equality for all before the law”—a principle that the head of the Chinese
lawyers’ association deemed of “great significance to preventing abuse of power by judicial
departments and safeguarding citizens’ legitimate rights.” \textit{Major Step, supra} (quoting Zhang
Bingsheng, Vice-Chairman of the All-China Lawyers Association).
\item 320. See, e.g., Erik Eckholm, \textit{Beijing Sends Potential Dissidents a Message: Don’t}, N.Y.
Times, Dec. 25, 1998, at A3 (reporting that in face of criticism for its stepped-up prosecution
of dissidents, China maintains that it is adhering to the ICCPR); \textit{Amnesty International, Annual
17.htm> (stating that “[p]olitical trials continued to fall far short of international standards”)
[hereinafter \textit{China Report}].
\item 321. See \textit{China Country Report, supra} note 303, § 1(e) (stating that the new Criminal Procedure Law still falls short of international norms in part because it permits the government to deny suspects in “state secrets” cases access to lawyers).
\item 322. \textit{China Country Report, supra} note 303, intro. The U.S. State Department’s report
continued: “In many cases, particularly sensitive political cases, the judicial system denies
criminal defendants basic legal safeguards and due process because authorities attach higher
priority to maintaining public order and suppressing political opposition than to enforcing legal
norms.” \textit{Id}.
\item 323. Although the law bans coerced confessions, it prescribes no remedy for violation. See
PRC Criminal Procedure Law, \textit{supra} note 302, art. 43. An analysis by China’s Supreme Court
calls for exclusion of oral testimony based on coerced confessions, but would permit physical
evidence obtained from leads such confessions generate. See Liling Yue, \textit{China, in Criminal
PROCEDURE: A WORLDWIDE STUDY}, \textit{supra} note 139, at 81, 85. No case has reported exclusion
of evidence on this ground since enactment of the new criminal procedure law. \textit{See id.; see also
Min, supra} note 291, at 248 (stating that the Chinese “police force is not well-regulated, and
there are no effective restraints” on police misconduct); \textit{China Report, supra} note 320
claiming that China seldom sanctions those who extract confessions by torture).
\item 324. \textit{See China Country Report, supra} note 303, § 1(e) (stating that China’s judiciary “is
subject to policy guidance from both the Government and the Communist Party”); \textit{Min, supra}
note 291, at 223-24, 248-49 (explaining that, in furtherance of democratic centralism, elected
National People’s Congress supervises judiciary, and calling for judicial review of
governmental conduct); Huang, \textit{supra} note 294, at 172, 181-82, 187-88.
\end{itemize}
newly codified legal reforms will bring such practices to an end.

These examinations of the Islamic and Chinese systems reveal pulls both away from and toward a constitutional model of criminal procedure. Both the Islamic and Chinese systems entail an exaltation of the state, and law, as well as an emphasis on the needs of the collectivity over those of the individual. Westerners imbued in a tradition of inalienable rights find much that is unfamiliar or unacceptable in the ideals of Communist China and Islamic theocracies. Some Chinese and Muslims, meanwhile, resent pressure to adopt Western ideals without modification. These differences sometimes spawn open political hostility, and clearly work against convergence. But other factors work in favor. Despite differences about the nature of law and the state, at least in the area of criminal procedure, both the Islamic and Chinese systems contain provisions similar to those in the West. Domestic legal reform has arisen out of efforts to increase economic and political discourse with the outside world via overseas trade and membership in multinational organizations. Some Chinese and Islamic scholars have begun to espouse cosmopolitan views about human rights. These interchanges likewise may force change, or compromise, in the West. In sum, despite structural notes of discord, continued interaction may bring continued movement toward a kind of harmony.

2. Erosion of State Status

A state likely will voice loud objections to any component of convergence perceived to threaten its security or position in the world. The resistance of some states to the proposed International Criminal Court and the isolationist leanings of the United States exemplify this structural note of discord.

a. Proposed International Criminal Court

Although the statute for the Yugoslav Tribunal has been heralded as embodying generally accepted international principles, the Rome Statute of the proposed International Criminal Court is a political pact, an expression of the principles on which sovereign powers, aware that their nationals might one day face prosecution, could agree.326

325. See supra text accompanying note 214.

326. Referring to compromises made in the definitions of war crimes—some of which cut back on existing perceptions of customary international law—a commentator wrote:

At this early stage it is impossible to predict what impact these new definitions will have. One important article states clearly that nothing in the statute will affect current or future international law. But the [Red Cross] is apprehensive that it may complicate its efforts to promote the Geneva Conventions and additional protocols.

An example is France, a leading Western democracy and the home of Enlightenment philosophers, of the Declaration des Droits de l'Homme, and of post-revolutionary criminal procedure reforms. Though it had favored revival of proposals for an ICC, for a time France sought the power to use the U.N. Security Council both to veto investigations and to decide whether to consent to prosecution of its nationals. At Rome, France successfully conditioned its endorsement of the ICC Statute on two concessions: first, installation of a Pre-Trial Chamber of judges to review the validity of investigations initiated by the prosecutor; and second, allowance of a seven-year period during which a member state could prevent the ICC from prosecuting its nationals for war crimes. Provoking French resistance was the army, which feared that its soldiers might be haled before the court. Worries about military strength struck at the heart of a state's sovereign being, and so posed a structural obstacle to any convergence that the ICC might foster. Its liberal tradition notwithstanding, France withheld support until a compromise alleviated its concerns.

Not all states agreed with the eventual compromise. Even as 120 states, including France, voted for the ICC Statute, 7 nay-sayers and 21 abstainers harbored misgivings. Some of the doubters were states that had signed the 1993 Bangkok Declaration limiting the international applicability of civil and political rights. China and Turkey protested the independence accorded the ICC prosecutor. China continued to demand that a state's national be subject to the court's jurisdiction only if the state has consented, and Turkey argued that the ICC Statute should have

327. See supra text accompanying notes 56-61, 150-56.
329. See ICC Statute, supra note 219, arts. 15, 18, 19, 39, 53, 54, 56-61, 64, 72 (containing references to role of Pre-Trial Chamber); id. art. 124 (explaining opt-out provision); see also Dutch Disbelief at American "Defeatism": US Concern at Independent Prosecutor Irritate Allies, ON THE RECORD 3, ¶ 8 (Issue 4, June 18, 1998) <http://www.advocacynet.org/cgi-bin/browse.pl?id=icc04.html> (citing French support for "the idea of a pretrial chamber that would review proposals by the prosecution before any investigation goes forward"). Regarding the French position on war crimes, see Jude Webber, U.S. Accused of Derailing World Court, WASH. POST, July 15, 1998, at A25 (reporting attempt by France and the United States to allow states to opt out fully from responsibility for war crimes), and Jude Webber, US War Crimes Bid Backfires, S. CHINA MORNING POST, July 19, 1998, at 7 (stating that France had abandoned U.S. position and voted for treaty, which included the seven-year opt-out provision).
330. See Epstein, supra note 328, at 85; France Softens Opposition to World-Court Plan, supra note 328, at A19.
331. See Viit Muntarbhorn, Overcoming Reticence on International Criminal Court, NATION, May 5, 1999, available in 1999 WL 15653415 (naming Iraq, Libya, China, Israel, Yemen, Qatar, and the United States as the seven opponents, and India, Turkey, and Singapore as among the abstainers).
332. See Bangkok Declaration, supra note 244; see also text accompanying notes 244, 265, 297 (discussing declaration).
333. See Muntarbhorn, supra note 331.
334. See id.; cf. ICC Statute, supra note 219, art. 12(2)(a) (permitting court to exercise jurisdiction if conduct occurs on territory of member state, even if accused is a national of a
tempered war crimes prohibitions with "language stating that the court will not have anything to do with internal matters of states."335 Israel, site of a protracted land war, complained about the inclusion of a proscription against transferring population into occupied territory,336 while India, engaged in a nuclear testing campaign against Pakistan, objected to the omission of a ban on using weapons of mass destruction.337 Common to each complaint was "fear that the court would impinge strongly on national sovereignty."338 The states refused to accede to a treaty that required them to compromise but did not include provisions they deemed essential. As had France, some states worried that their nationals might improperly be subjected to ICC prosecution, perhaps for conduct the states did not consider criminal. But it seems unlikely that these states—some less developed, some with non-Western traditions—will be able, like France, to secure concessions. They may be left with a choice of joining the ICC, at the expense of perceived sovereign interests, or facing isolation from a new world community.

b. United States

In contrast with many ICC opponents, the United States has a singular status as the world superpower. At counterpoint, however, is a persistent isolationism. Just as China stood out for its distinct cultural tradition, the United States represents an archetype of a state in which desire to retain its position may compel it to diverge from global trends it might otherwise follow.

Unlike China and Islamic states, the United States was founded on the philosophy that the individual has natural rights that the state must honor. The model of constitutional criminal procedure, which embodies this philosophy, reached a crescendo in a series of U.S. Supreme Court opinions articulating the doctrine of fundamental fairness.339 The dissemination of that model across the globe is due in no small part to "messianic" U.S. efforts.340 The United States has led the drafting and
negotiating of international instruments that afford accused individuals a panoply of rights.\textsuperscript{341} It has spoken out against human rights abuses by other states.\textsuperscript{342} It has played a key role not only in developing transnational law enforcement cooperation, but also in forming, funding, and staffing the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda.\textsuperscript{343}

Not unlike China and other states, however, the United States resists external pressure to conform its own criminal justice system to international standards. It too has bristled at those who have scrutinized U.S. practices—most recently, at a U.N. investigation into racial disparities in administration of the death penalty.\textsuperscript{344} And despite its liberal legal tradition and active participation in global crime-fighting, the United States ranks among the ICC treaty’s few opponents.\textsuperscript{345}

world as a “kind of imperialism, particularly rooted in the liberal intelligentsia, . . . not essentially economic, but rather cultural, idealistic, self-righteous, moral”). A recent poll indicates that these views also pervade the public at large. See Linda Greenhouse, Forty-Seven Percent in Poll View Legal System as Unfair to Poor and Minorities, N.Y. Times, Feb. 24, 1999, at A12 (quoting American Bar Association poll indicating that 80% of those polled agreed that “in spite of its problems, the American justice system is still the best in the world”).


343. See supra note 212, at 171-74 (discussing U.S. involvement in tribunal); supra text accompanying notes 80-81 (outlining U.S. role in law-enforcement cooperation).


345. See supra text accompanying note 331 (tallying vote on ICC treaty and naming opposing states). Nevertheless, despite the outspoken opposition of the head of the Senate Foreign Relations Committee, the Clinton Administration continues to seek changes that would allow it to sign. See Gap Can Be Closed on ICC: Top US Negotiator, AGENE FRANCE-PRESS Aug. 13, 1999, available in 1999 WL 2654340. The United States thus continues to participate in negotiations on unresolved issues: a definition for aggression, one of the five crimes within the ICC’s jurisdiction; agreement on the elements comprising each crime; and creation of rules of evidence and procedure. See ICC Statute, supra note 219, arts. 5, 9, 51; David J. Scheffer,
It is true that the U.S. Constitution places treaties on the same level as statutes, and that the U.S. Supreme Court has described international law as "part of our law." Yet U.S. ratifications of human rights treaties have come slowly, and burdened with reservations limiting the treaties' effect. Judge-made doctrines, like that requiring treaties to be either self-executing or supplemented by statutes, further circumscribe the application of international law in U.S. courts. Most U.S. courts do seem to agree that international law can give meaning to fundamental fairness and other constitutional principles. But while the Supreme Court at one time frequently drew support from global trends, today at least three U.S. Supreme Court Justices...


346. See U.S. CONST. art. VI.

347. See The Paquete Habana, 175 U.S. 677, 700 (1900).


349. See RESTATEMENT, supra note 79, § 111 (explaining doctrine of non-self-executing treaties); accord Thomas M. Franck, Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh’s Optimism, 35 Hous. L. Rev. 684, 688 (1998) (commenting that such doctrines “have made Swiss cheese of the notion that international law is part of the law of the United States”).


351. For example, in Miranda v. Arizona, 384 U.S. 436, 444 (1966), the Court borrowed from discretionary rules devised in 1912 by English judges to hold that police should advise interrogees of their right to remain silent, of the consequences of speaking, and of their right to counsel. See also Culombe v. Connecticut, 367 U.S. 568, 595-98 (1961) (discussing these judges rules at length). In a series of other opinions, it looked to international law in deciding whether conduct violated the Eighth Amendment’s ban on cruel and unusual punishment. See, e.g., Emmund v. Florida, 458 U.S. 782, 796-97 n.22 (1982); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977); Trop v. Dulles, 356 U.S. 86, 102 & n.35 (1958).
deem it inappropriate to consult international law in resolving constitutional questions.\footnote{352. See Amann, supra note 4, at 1259-60 n.356 (analyzing current Justices’ attitudes toward international law, and noting that Justice Scalia and Chief Justice Rehnquist “routinely reject” consideration of international law); infra note 356 (discussing Justice Thomas’s position); cf. Vicki C. Jackson, Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on “Proportionality,” Rights and Federalism, 1 U.PA.J. CONST. L. 583, 584-99 (1999) (describing U.S. judiciary’s general resistance to comparative constitutional analysis, yet noting that on occasion even Justice Scalia and Chief Justice Rehnquist have expressed interest in the method).}

Given the crabbed role courts have ascribed to it, international law seldom sways U.S. decisions. Thus the Supreme Court held, without considering international law, that the Fourth Amendment does not protect aliens who have no substantial U.S. ties against unreasonable, U.S.-aided searches and seizures outside U.S. territory.\footnote{353. See United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). Whether the Bill of Rights applies overseas remains in question. See Bryan William Horn, Note, The Extraterritorial Application of the Fifth Amendment Protection Against Coerced Self-Incrimination, 2 DUKE J. COMP. & INT’L L. 367 (1992) (outlining competing theories of minimal versus maximal protection).} The Court held that the Eighth Amendment permits execution of children as young as sixteen, notwithstanding contrary international authorities.\footnote{354. See Stanford v. Kentucky, 492 U.S. 361, 389-90, 405 (1989) (Brennan, J., dissenting) (criticizing Court’s judgment, and arguing that such executions are unconstitutional, in part because of international trends).} Declining to consider the existence of an international right to silence and deferring to the government’s predictions of harm to domestic law enforcement, the Court held that the Self-Incrimination Clause does not bar a U.S. court from forcing a witness to give testimony that might be used to convict him in a foreign court.\footnote{355. See United States v. Balsys, 524 U.S. 666 (1998). “In any event,” the Court reasoned, “Balsys has made no claim under the Covenant, and its current enforceability in the courts of the signatories is an issue that is not before us.” Id. at 695 n.16. The Court expressed reluctance to infringe on political branches’ foreign-relations policies and justified its decision to avoid “serious consequences” to “domestic law enforcement.” Id. at 698. Justice Stevens also agreed with the result on the ground that it would “not have any adverse impact on the fairness of American criminal trials.” Id. at 770 (Stevens, J., concurring) (emphasis added). For a critique of this opinion, see generally Diane Marie Amann, International Decisions: United States v. Balsys, 92 AM. J. INT’L L. 759 (1998).} The Court turned away bids to apply the international concept of degrading treatment, established by the European Court of Human Rights, in death-penalty cases.\footnote{356. See Knight v. Florida, 120 S. Ct. 459 (1999); Lackey v. Texas, 514 U.S. 1045 (1995). In each case, a majority of the Court denied petitions for review in which condemned prisoners asserted that they had been wrongfully subjected to a complex of conditions known as the “death-row phenomenon.” Lackey, 514 U.S. at 1045-46 (Stevens, J., joined by Breyer, J.) (mem.) (respecting denial of cert.); see Knight, 120 S. Ct. at 461-65 (Breyer, J., dissenting from denial of cert.). In 1989, the European Court of Human Rights had held that this phenomenon violated international standards. See Soering v. United Kingdom, 11 Eur. Ct. H.R. (ser. A) at 439; see supra text accompanying notes 113, 128 (discussing Soering and its influence in courts outside Europe). In Knight, Justice Thomas argued that only domestic precedents ought to matter; Justice Breyer disagreed. Compare Knight, 120 S. Ct. at 459 (Thomas, J., concurring).}
International Court of Justice order and declined to consider whether an admitted violation of an alien defendant's treaty-based right to meet with consular officials precluded execution.\textsuperscript{357}

Motivating such resistance to international influence is a sense of a unique global status. After World War II and throughout the Cold War, the United States saw itself as the leader in democratic ideals, a champion for "the free and fair American system of justice."\textsuperscript{358} Acknowledgment that others may have developed freer, fairer techniques would have been alien to that view. With the collapse of the Soviet Union, the United States has adjusted its role. No longer the free-world superpower, it sees itself as the lone remaining superpower, responsible for maintaining order within the world community, and thus deserving of special considerations.\textsuperscript{359} U.S. officials have used this image to justify the U.S. refusal, in spite of sharp criticism, to join a global ban on land mines or to establish a permanent, international criminal court.\textsuperscript{360} Such refusals are fueled by an insularity that lingered even after the United States assumed a world role. The U.S. legal profession, for example, knows little about international law, and U.S. courts stand ready to defer to political-branch decisions about matters

\begin{footnotesize}

\textsuperscript{358} Raymond, supra note 92, at 1245. Such a view was articulated in 1948: "'It has been given to us, as the world's greatest democracy, a post of leadership in the all-important task of establishing our doctrines of civil liberty throughout the world as working principles by which the lives of free nations are to be governed.'" Id. at 1245 n.180 (quoting Professor Robert E. Cushman).  

\textsuperscript{359} Stating that the United States often prefers to act unilaterally if its self-interest does not coincide with those of other states, Professor Franck observed:  

\begin{quote}
The first structural obstacle is that, for good or ill, we are the world's only remaining superpower . . . . Having to make our case for a course of action not only to Congress, but also to the various executive departments, agencies, and courts is time-consuming enough, without also having to argue the case before the United Nations Security Council, the General Assembly, the Organization of American States, the International Atomic Energy Agency, and, worst of all, the fifteen world jurists of the [International Court of Justice].  
\end{quote}

Franck, supra note 349, at 692.  

\textsuperscript{360} See, e.g., Eric Schmitt, Why Clinton Plea on Pact Left Lott Unmoved, N.Y. TIMES, Oct. 15, 1999, at A11 (quoting Pennsylvania Sen. Arlen Specter's comment that some of the Comprehensive Test Ban Treaty's opponents "just want to have Fortress America"); Mark Fritz, Pentagon Seeks Funds for New Type of Land Mine Arms, L.A. TIMES, Feb. 20, 1999, at A1 (reporting that Clinton administration, having refused to sign a landmine treaty in 1997 on the ground that it needed to protect its troops in Korea, now is seeking funds to develop a new type of land mine); Thomas W. Lippman, America Avoids the Stand: Why the U.S. Objects to a World Criminal Court, WASH. POST, July 26, 1998, at C1 (stating that during ICC negotiations in Rome, the United States "argued, in effect, that 'we're the ones who respond when the world dials 911, and if you want us to keep responding, you should accommodate our views'"").
\end{footnotesize}
CONSTITUTIONAL CRIMINAL PROCEDURE

...touching on foreign affairs. But those branches are likely to repel efforts to conform their conduct to "foreign values," and, in any event, to place domestic over international concerns.

So long as it clings to this self-image—so long as it retains the power to do so—the United States, despite its fundamental rights tradition, is likely to continue to break the rhythm of global convergence in the name of national sovereignty.

IV. TOWARD HARMONY? PROSPECTS FOR A SHARED, CONSTITUTIONAL CRIMINAL PROCEDURE

Changes swirl about the world of criminal justice. Once solely within individual states' control, crime-fighting has become a global venture. There is increased attention to global crime—to anonymous crimes like money laundering and to high-profile crimes like the Lockerbie bombing and the atrocities for which Milosovic and Pinochet may one day stand trial. States band together against criminal activity that, more and more, knows no borders. Coinciding with these horizontal relationships is a vertical axis, exemplified by the establishment of tribunals to investigate, prosecute, and punish individuals for conduct that offends the international community. In keeping with transnational legal process theory, these repeated interactions, between states and among states and other entities, have prompted renewed scrutiny of the means used to fight crime.

Such means often are measured against a keynote: a model of constitutional criminal procedure. The model features, to use Professor Craig M. Bradley's apt phrase, a "quiver of rights"—rights to counsel, to remain silent, to be free from unreasonable searches and seizure—with which an accused person may defend

361. On this point, Professor Franck has written:
[T]o the extent that our judges have "internalized" anything about the world external to the United States, it is that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."

Franck, supra note 349, at 695 (alteration in original) (quoting Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918); cf supra text accompanying note 355 (remarking on Court's expressed deference to political branches in holding that Self-Incrimination Clause has no extraterritorial effect).

362. Jordan J. Paust, Customary International Law in the United States: Clean and Dirty Laundry, 40 GERMAN Y.B. INT'L L. 78, 105 (1998) ("The fear of foreign values can also be identified as a factor contributing to current stress on the efficacy of customary international law within the United States."); see id. at 103-06 (discussing perception of U.S. political elites that enforcement of such law would endanger their political power).

363. See Franck, supra note 349, at 697-98 (concluding that "[i]n the American instance, at least, the democratic structure appears to make the legal culture especially impenetrable").

364. See supra text accompanying notes 75-89, 201-32.

365. See supra text accompanying notes 40-42 (positing that repeated horizontal and vertical interactions with other states and international entities is likely to lead a state to obey international law).

against the state's prosecutorial arsenal. The model has origins in Europe, in the works of medieval natural law theorists and Enlightenment philosophers, and in the revolutionary unrest of the late eighteenth century. It matured in the United States. There a Bill of Rights first expressly prescribed how the government may administer criminal justice. These prescriptions are not, however, just techniques. As the U.S. Supreme Court reiterated, they enunciate rules fundamental to the constitutional admonition that no one may lose life, liberty, or property without due process of law. Governmental interpretations of the principles of equality and fundamental fairness thus have resulted in rules of criminal procedure with a strong substantive component. Though they need not be found in an explicit passage of a constitution, such rules comprise a "constitutional" criminal procedure because they are constitutive of civil society based on the fundamental rights tradition.

Writings in the United States sometimes suggest that this model of constitutional criminal procedure is unique. That is far from the case. Even as the U.S. Supreme Court opinions in the first half of the twentieth century shaped the model, there were global movements toward convergence around such a model. Notes of concordance had sounded in Europe in the early 1800s, when post-revolutionary reforms introduced aspects of the accusatorial criminal procedure method, used in common law systems, into the inquisitorial method that had prevailed on the European continent. They sounded again in the mid-twentieth century, when Allied efforts to bring to trial individuals accused of World War II atrocities produced a code of criminal procedure that further blended the two methods. In the postwar era a new community of values, based on the view that the international law must respect the rights of the individual as well as the interests of the state, emerged. On a horizontal plane, states joined human rights treaties that repeated many of the fair-trial guarantees contained in the U.S. Bill of Rights. States that had embraced human rights norms conditioned other states' receipt of benefits such as foreign aid on adoption of those norms. On a vertical dimension, just as civil liberties groups aided development of a U.S. constitutional criminal procedure, nongovernmental groups and individuals used public criticism, lobbying and litigation, and grass-roots activism to press states and international organizations to honor rights of the accused.

Evolution of a global criminal procedure is perhaps most advanced in two supranational settings: in Europe, the scene of intense regional integration, and in the resurgence of international criminal tribunals. Opinions of the European Court of Human Rights have required states to comply with the European Human Rights Convention, which contains many of the rights emblematic of constitutional criminal procedure. Efforts are under way within the quasi-federal European Union to distill from the accusatorial and inquisitorial methods a single body of procedure for adjudicating financial crimes. Meanwhile, the ad hoc Rwanda and Yugoslav tribunals employ hybrid procedural codes, expressly founded on respect for the rights of the individual, to bring international criminals to justice. The proposed permanent International Criminal Court may follow that lead. Present in both examples are the

367. See Bradley, Convergence, supra note 1, at 473.
368. See supra text accompanying notes 33-232.
369. Cf supra text accompanying note 39 (mentioning "communitarian Grotian" theory that stresses development of common values within international society).
kind of political and economic interactions that should lead, according to
transnational legal process theory, to compliance with international legal norms. But
reference to these interactions alone pretermits a critical element of harmony, one that
transnational legal process theory has been criticized for downplaying.\footnote{370}

That element, adherence to a shared liberal, democratic tradition, has appeared at
watershed moments of convergence. Animating the reforms just after the French
Revolution was the Déclaration des Droits de l'Homme, with its proclamations of
inalienable individual rights to liberty and equality. The charters establishing the post-
World War II trials at Nürnberg and Tokyo promised defendants a "fair trial." Subsequent international documents enunciated the rise of individual rights as a
proper subject of international law. In both European integration and the development
of the international tribunals, the dominance of the fundamental rights tradition has
won express approval. It seems clear, therefore, that criminal procedure will move
most swiftly and smoothly if sufficient political or economic discourse and a shared
legal tradition are present.

If one of these elements is impaired, discordant notes may be heard. Some appear
temporal, able to alter with time.\footnote{371 For example, rights central to a constitutional
criminal procedure model may be threatened by increased surveillance to combat
global crime. But a change in attitude—a sense that the crime rate has steadied, or
that police work ought not to violate individual rights—could repair the harm to the
fundamental rights tradition. Similarly, infusion of resources from the international
community could end divergence caused by an inadequate interaction; that is, by a
dearth of money or institutions to implement international norms. Finally, voices
raised against the compromises inherent in establishment of hybrid organs could spur
innovations that protect human rights even more than the methods from which those
hybrids derived.}

Other impediments to harmony do not admit easy solutions. Such structural notes
of discord arise when an innovation intrudes on a state's individual sovereignty; for
example, by requiring a state to deviate from entrenched cultural tradition.\footnote{372}
Although international conventions profess to enshrine universally accepted human
rights, some find in those articulations too strong a Western influence. Examples may
be found in the Islamic states and in China, both of which have legal traditions far
different from that of the West. The emphasis on the state and collectivity in the
former clashes with the emphasis on the individual in the latter. This basic difference,
sometimes coupled with lingering post-colonial resentments, provokes recriminations
about each group's human rights records. At times overt political disputes break out.

\footnote{370 See Koh, supra note 35, at 674-77 (maintaining that other elements of repeated
transnational interaction will bring about obedience to international norms, even in "illiberal"
states); see also supra text accompanying note 38 (describing "liberal Kantian" theory, which
stresses importance of commitment to fairness and related principles). \textit{But see} Robert O.
(criticizing Professor Koh for minimizing importance of state's legal structure, and listing
characteristics of liberal states that increase likelihood of state's obedience to international
norms).}

\footnote{371 See supra text accompanying notes 238-62.}

\footnote{372 See supra text accompanying notes 263-324.}
In such a climate, convergence toward a constitutional criminal procedure model seems unlikely.

And yet there is such movement. More secular Muslim states have promised to conform aspects of their criminal justice systems to prevailing international norms. Some scholars contend that a desire for individual rights is not unique to the West, and some Muslim scholars push for integration of international human rights norms into Islamic law. In the area of criminal procedure, there are significant similarities between the Western and the Islamic methods. Although these factors suggest common ground on which convergence might occur, diversity among Islamic states and political volatility make predictions about convergence seem rash.

A more focused inquiry is possible in China, which has sought greater status within the international community. Change is most salient in the economic arena, where China has cultivated a domestic market economy, secured overseas trading partners, and applied to join the World Trade Organization. These interactions seem already to have prompted some convergence: in the late 1990s China endorsed a number of rights of the accused by passing a new Criminal Procedure Law and by signing the ICCPR. Transnational legal process theory would seem to predict that, at least in the long term, China will join the international trend toward convergence in criminal procedure.\(^3\)

Still, formidable structural obstacles remain. The constitutional criminal procedure model depends on a separation of powers, in particular on an independent judiciary, which does not exist in China. Not surprisingly, Chinese reports on the new Criminal Procedure Law described the rights of the accused not as "inalienable," but rather as "legitimate," a word implying privilege rather than entitlement. The description conforms to China's centuries-old tradition of valuing the needs of the collectivity over those of the individual, and demonstrates the limited applicability of a Western-style, rights-based discourse to contemporary Chinese culture. It thus would be foolhardy to expect that the Criminal Procedure Law's articulation of, say, a right to counsel will produce the kind of defense now considered the norm in Western legal culture.\(^4\)

In sum, repeated interaction between China and the West will set off a web of horizontal and vertical relationships and thus foster greater attention to and adaptation of Western legal norms. But the day seems distant when such relationships will transform China's national identity enough to embrace fully the fundamental rights tradition on which the constitutional criminal procedure model is based.

Conversely, the presence of both a fundamental rights tradition and repeated interactions with the world community does not guarantee convergence. If a state believes that a certain innovation will threaten its security or otherwise undercut its

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373. See Koh, supra note 35, at 675-76 (stating that "over time," China's interactions with the outside world will prompt pressures, from within and without, to adopt international norms); see also supra text accompanying note 313.

374. Cf. Christopher Harding et al., Conclusion—Europeanization and Convergence: The Lessons of Comparative Study, in CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY, supra note 46, at 379, 386 (warning that, as a result of the "deep-rooted nature of certain national concepts, procedures, and institutions, there may be dangers in transposing the approach of other systems without taking into account the depth of national tradition and outlook"); Wladimiroff, supra note 257, at 1449 ("The problem is that the concept of a fair trial should and can only be understood in the context of the system in which it functions.").
position within the international community, the state will resist. Thus France, a
center of diplomacy and a birthplace of the fundamental rights tradition, balked at the
Statute of the proposed International Criminal Court until it received assurances that
its nationals would not be prosecuted unduly. The United States, site of refinement
of a constitutional criminal procedure model, evinces significant isolationist leanings.
Along with a handful of smaller states, it continues to oppose the ICC. Its rejections
of bids to obey international norms that offer the individual greater protection than
does U.S. law attract criticism. Such conflicts are likely to persist, given new assaults
on the constitutional criminal procedure model within the United States. Thus the
United States stands as an archetypical example of how, despite many elements of
harmony, perceived threats to national sovereignty can strike discord in the trend
toward convergence in criminal procedure.

375. See supra text accompanying notes 325-63.
376. For the other states, the cost of opposition may be too high, in the form of fears that
their nationals brought before the court would suffer because of their nonparticipation, or of
fears that the international community might withhold other benefits from them. Eventually
these states might prefer acquiescing in an imperfect ICC to suffering some harm to self-
interest. Cf. Keohane, supra note 370, at 704 (positing that a state may adhere to rules rather
than face “exclusion from the club,” even as “participants bask in the benefits of coordination”); Koh, supra note 35, at 634 (discussing theories of “realists,” who maintain that
a state complies when it believes it has no choice, and “rationalists,” who contend that a state
obeys if it decides, even if grudgingly, that compliance is in its best interest). It seems less
likely that such considerations would goad the United States into joining the ICC, given its
chronic isolationism and its unique superpower status.
377. See, e.g., United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999), cert. granted, 120
S.Ct. 578 (1999) (holding that a 1968 federal statute that prescribes “voluntariness” as the test
for admitting confessions supersedes the more stringent requirements of the landmark
constitutional criminal procedure doctrine enunciated in Miranda v. Arizona, 384 U.S. 436
(1966)); Kahan & Meares, supra note 16, at 1153 (arguing that some aspects of the model
“have outlived their utility”); Raymond, supra note 92, at 1234 (“The constitutional
protections were motivated by a profound suspicion of government authority that the public
may no longer feel.”); Steiker, supra note 31, at 2469 (stating that the U.S. Supreme Court has
retained that part of the model “governing investigative techniques,” but “has revolutionized
the consequences of deeming conduct unconstitutional”).