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BOOK REVIEWS

Federal Courts and the International Human Rights Paradigm

By Kenneth C. Randall. Durham, North Carolina: Duke University Press, 1991, pp. ix, 295, \$45.00.

World Justice? U.S. Courts and International Human Rights

Edited by Mark Gibney. Boulder, Colorado: Westview Press, 1991, pp. xiv, 178, \$39.95.

*Filartiga v. Pena-Irala*¹ and *Tel-Oren v. Libyan Arab Republic*² are the yin and yang of human rights litigation in the United States. Legal niceties aside, they represent nothing less than the question of the role of the federal judiciary in human rights enforcement and, more generally, in matters of international concern. *Federal Courts and the International Human Rights Paradigm* and *World Justice? U.S. Courts and International Human Rights* (with the notable exception of one essay) are premised on the assumption that an active federal judiciary is not only appropriate, but necessary. The first of these books argues for more expansive federal court jurisdiction over human rights litigation and the second explores the extent to which the courts are implementing and enforcing human rights.

Professor Randall sets out to demonstrate that federal court jurisdiction is appropriate not only in the context of state and federal relations and within the constitutional framework of the executive, legislative, and judicial branches, but also in the hierarchy of the international legal system. With respect to the latter, the author builds upon Richard Falk's seminal work, *The Role of Domestic*

1. 630 F.2d 876 (2d Cir. 1980).

2. 726 F.2d 774 (D.C. Cir. 1984) (per curiam), cert. denied, 470 U.S. 1003 (1985).

*Courts in the International Legal Order.*³ Given the ambitious scope of this inquiry, Randall surprisingly limits his examination to enforcement of the most peremptory human rights violations (such as the prohibitions on torture, genocide, slavery, and piracy) and select criminal offenses (hijacking, taking of hostages, and offenses against internationally protected persons), which he characterizes as “terrorist” offenses. It is an unfortunate choice of terminology that obscures the common thread in the international law offenses he addresses—that each is relatively well defined and well accepted.

That criticism aside, the book is a comprehensive, straightforward, and very useful examination of human rights litigation in the domestic and international legal order. Randall’s clarity and uncluttered style is at its best in alleviating the needless obfuscation of federal court jurisdiction over human rights litigation on grounds of diversity, alienage, the Alien Tort Statute, and the existence of a federal question. The author effectively builds this discussion upon an historical examination of federal judicial authority from the Articles of Confederation to the drafting of the Constitution. Critical to Randall’s hypothesis is that the Constitution’s framers intended for federal courts to have clear primacy over state courts in adjudicating claims with international overtones and a forceful role vis-à-vis the executive and legislative branches in cases with international components. The analysis at this juncture would have benefitted from a less cursory exploration of state court jurisdiction under the transitory tort doctrine. Nevertheless, the centerpiece of his analysis is a thorough dissection of the Alien Tort Statute, which quite effectively refutes the opinions of Judges Bork and Robb in *Tel-Oren*. Having drawn a “road-map” for litigants pursuing nonstated offenders in federal court, the author then turns to suits against state offenders under the Foreign Sovereign Immunities Act, and discusses the hurdles of the political question doctrine, act-of-state doctrine, and forum non conveniens.

The culmination of the domestic law analysis is Randall’s proposed legislation for jurisdiction of human rights and terrorism offenses (both as limited by the author) over nonstate and state defendants. One certainly can debate whether such legislation is merely an academic exercise (because Congress is so unlikely to adopt such legislation) or quite the converse—the most likely avenue for expansionism given the reticence of an increasingly conservative judiciary. In any event, Randall’s proposals are intriguing and, oddly at times, more conservative in defining the scope of jurisdiction than the previous discussion merits. For example, Randall makes a forceful argument for restrained application of the act-of-state doctrine, yet the proposed statute precludes jurisdiction whenever the executive branch determines “United States foreign policy interests require application of the act-of-state doctrine, and a suggestion to that effect is filed with the court.” (p. 131)

3. RICHARD A. FALK, *THE ROLE OF THE DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* (Richard B. Lillich ed. 1964).

The second part of the book, domestic jurisdiction in the world legal order, is most interesting for its thesis that the Westphalian paradigm of an international legal system with its emphasis on nation-state actors has been replaced by a new world order matrix in which fundamental human rights norms will take priority over state sovereignty. The fast pace of recent events has outdistanced the author's arguments, while at the same time making his theory of an emerging human rights paradigm even more viable.

Accepting Randall's position that an aggressive judiciary serves the interests of domestic and international law, how well are the federal courts actually implementing and enforcing human rights principles? After reading *World Justice? U.S. Courts and International Human Rights*, one would have to answer, "Not nearly well enough." In this collection of essays, only one author, Professor John Rogers, takes the position that federal courts should be reticent in adjudicating human rights claims. Yet every other essay, whatever its topic, reveals critical deficiencies in judicial receptivity to human rights advocacy. For example, Professor Ralph Steinhardt attacks the impedimenta of the act-of-state and political question doctrines as being premised on the faulty notion that the United States Government speaks with "one voice" on foreign relations when in fact the Constitution was drafted to allow separate and distinct voices in each of the three branches of government on international issues (p. 24). Professor Daniel Bodansky suggests that there is strong international precedent for the exercise of universal jurisdiction by domestic courts yet to be utilized effectively in federal court. Perhaps the most serious indictment of the federal courts is that there is still a need for a human rights advocate such as Professor John Quigley to argue what should be self-evident: that extradition by abduction is illegal and federal courts should refuse extradition in such cases.

An essay by Professor Bert Lockwood serves as an interesting companion piece to Randall's work. Lockwood contends that the frontier of human rights litigation in this country is the enforcement of economic, social, and cultural rights. He optimistically predicts that constitutional guarantees may be utilized to incorporate many of these rights into domestic law. A related note of optimism is sounded in the concluding piece by Professor Anthony D'Amato:

Looking ahead, I hope that the new and exciting human rights cases that some American lawyers are initiating in United States courts will help educate our own government as to the proper translucency of our own country. . . . Courts throughout the world can be a forum in which people can assert the primacy of their human rights in all situations in which states are impeding the realization of those rights. (p. 171)

The editor of the book, Professor Mark Gibney, earlier suggests that the federal courts can and should play a vital role in national dialogue concerning foreign policy.

This optimism, however laudable, is tempered by the essay of Professor Howard Tolley, Jr., the only political scientist other than Gibney of the authors represented. Tolley's essay is a fascinating and disturbing report card for the federal judiciary in human rights litigation. Twenty-two cases were selected in

which district and appellate court judges made conflicting rulings on comparable issues in alien tort cases and refugee rights cases. Tolley concludes from the comparisons:

Republican appointees came out three to one against the human rights claimants, while Democratic appointees favored refugee petitioners in two-thirds of the cases decided. President Reagan appointed ten judges voting in the cumulative total of 22 cases, and nine rejected the human rights petitioners. All three women and all three black judges in the sample voted for the refugee petitioners. Gender and race were not related to voting in alien tort claims litigation, as the seven [sic] women and black judges divided almost evenly between plaintiffs and defendants. (p. 138)

Faced with such statistics, Tolley suggests that the most likely avenue for successful litigation is utilization of international law to construe domestic law rather than a "premature, overambitious effort to realize monist ideals." (p. 142)

Advocacy necessitates optimism. For the human rights advocate, there is much in the so-called "new world order" to engender optimism, yet the ethnocentric fragmentation of the nation-state is also cause for concern. Both chains of development suggest an increasing need and better defined framework for judicial activism by United States courts in human rights enforcement. This task, however, does not appear to be one that the current federal judiciary will welcome, if any broad conclusions are to be drawn from Tolley's study. However correct Randall might be that there is an international human rights paradigm, it is his artful manipulation of domestic law to serve human rights objectives that holds the most promise for successful human rights litigation in the foreseeable future.

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Competition Policy and Merger Control in the Single European Market

By Sir Leon Brittan. Cambridge, England: Grotius Publications Limited (P.O. Box 115, Cambridge CB3 9BP, England), 1991, pp. xi, 56, \$30.00.

This compact volume provides a thoughtful but very readable overview of two key issues in European antitrust enforcement—extraterritorial jurisdiction and merger control. Its author, Sir Leon Brittan, is vice president of the European Commission and the energetic head of the Community's antitrust enforcement

program. The book is based on Sir Leon's Hersch Lauterpacht Memorial Lectures given in 1990, but is updated to reflect developments through January 1991. The book is in two parts, the first dealing with jurisdiction and the second with mergers. Both antitrust specialists and generalists in the international field will be pleased by the clear thinking and broad perspective that the book brings to these important topics.

I use the term "extraterritorial jurisdiction" as a shorthand phrase familiar to American lawyers, although Community law tries hard to avoid that label. Sir Leon demonstrates skills as both a lawyer and a politician in his discussion of this difficult subject. He argues forcefully for the Commission's right and need to address anticompetitive constraints on Community markets, regardless of the nationality of the actors or the locus of the conduct. While articles 85 and 86 both require events "within the common market" and while "[t]he fundamental scope of Community competition law is therefore territorial" (p. 5), competition policies are too important to be constrained by rigid jurisdictional rules. "If . . . an agreement has or is liable to have an effect on prices, supplies or output in the Community, the Commission must have regard to its duty to create and preserve a system of undistorted competition." (*Id.*)

If this sounds like the "effects" doctrine,¹ essentially it is. The Commission has in fact endorsed that approach to jurisdiction in explicit terms.² But the European Court of Justice has not gone so far, at least not as a matter of terminology.

Sir Leon reviews the history of the recent *Wood Pulp* decision,³ where the Commission invoked the effects doctrine to claim jurisdiction over non-EC importers of products that had allegedly engaged in price coordination. The European Court, however, declined to adopt the Commission's jurisdictional theory. Finding sufficient "implementation" of agreements within the Community, the Court upheld jurisdiction but used language more consistent with traditional territorial principles.

Sir Leon seems comfortable with the result. He suggests that the concepts of "implementation" and that of "effects" in most commercial circumstances may not be much different. (p. 13) Clearly, *Wood Pulp* indicates that sales within the Community at prices determined by collusion are sufficient for jurisdiction. (*Id.*) More difficult cases, however, arise where there is an agreement not to act in the EC (for example, to boycott) or, under article 86, where a dominant firm refuses to sell into a Community market. (p. 14) While declining to speculate on how such cases may someday be decided by the Court of Justice, Sir Leon strongly signals the Commission's view that jurisdiction should attach where the effects in Europe are sufficiently strong and direct.

1. See *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

2. E.g., *FOURTEENTH REPORT ON COMPETITION POLICY* 59 (1985).

3. Cases 89/85, etc., *Åhlström v. Commission*, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901.

This aggressive stance on jurisdictional issues raises the problem of potential conflicts of jurisdiction, certainly in the political if not in the legal sense. "It is axiomatic that in antitrust matters the policy of one state may be to defend what it is the policy of another state to attack."⁴ Sir Leon's discussion of this subject anticipates an agreement, which has since been negotiated and signed, between the Commission and the United States on cooperation in antitrust enforcement.⁵ As Sir Leon predicted (pp. 20-21), the agreement provides for exchanges of information, notification, and consultation on enforcement actions, a commitment to consider the modification or adaptation of enforcement actions to take the other party's interests into account, and a generalized agreement to avoid enforcement conflicts.

Two areas of greater difficulty are not covered by the agreement, again as Sir Leon has predicted. Those areas are intergovernmental cooperation relating to private enforcement actions and arbitration or some similar dispute-resolution mechanism in the event cooperative discussions are unsuccessful. Obviously, the new agreement does not diminish the problems presented by conflicting enforcement jurisdiction.

Sir Leon's chapter on the Community's new merger control regulation⁶ is particularly satisfying. It is an excellent introduction to a complex regulatory program that will be increasingly important to American business in the years to come.⁷ Sir Leon succinctly describes the unusual history of merger regulation under Community law and gives a helpful summary of the principal political and legal considerations that shaped negotiation of the new regulation. Its complex provisions themselves are nicely summarized and explained, and a supplemental discussion (pp. 47-56) addresses some of the more technical interpretative questions.

An important theme addressed in the merger chapter is the interplay of competition and industrial policy. Sir Leon's preference for the first is never in doubt; he describes the second as the "old-fashioned [process] where politicians and bureaucrats sat in their offices playing with industrial structures much as children do with their Lego sets." (p. 32) He argues convincingly that the merger regulation should focus strictly on competition issues, notwithstanding its reference to "the development of technical and economic progress" as a relevant criteria of legality.⁸ He vows that this language, which is borrowed from the exemption provisions of article 85(3), will not be read as justifying trade-offs between

4. *In re Westinghouse Elec. Corp. Uranium Contract Litigation*, [1978] A.C. 547, 617 (H.L. 1977) (Lord Wilberforce) (quoted at p. 15).

5. Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws (Sept. 23, 1991).

6. EEC Reg. No. 4064/89, O.J. (L 257) 13 (Sept. 21, 1990).

7. This is for two reasons, at least: the continued globalization of world economies and the anticipated lowering of coverage thresholds in the regulation, thus broadening its application to a larger class of mergers, acquisitions, and joint ventures.

8. EEC Reg. No. 4064/89, *supra* note 6, art. 2(1)(b).

competition and other economic objectives: "In a competitive market, mergers may or may not give rise to technical and economic progress. In an uncompetitive market, even if they do, they will not be allowed." (p. 35)⁹

In sum, Sir Leon has provided a brief but thoughtful overview of two important topics in European antitrust enforcement. Whether read as an introduction to those subjects or as a means to better understand the thinking of Europe's principal antitrust official, this is a helpful and satisfying volume.

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Effective Lobbying in the European Community

By James N. Gardner. Deventer, The Netherlands, and Cambridge, Massachusetts: Kluwer Law and Taxation Publishers, 1991, pp. xix, 162, \$45.00.

The European Community's 1985 decision to embark on a program to complete by the end of 1992 the economic integration it had set out to achieve at the time of its founding set in motion a process of renewal and change within the EC that has permeated all aspects of its activities. Lethargy and gloom have given way to activity and enthusiasm, with the result that the early 1990s find the EC well down the path toward creation of a genuine single market. At the same time, the EC is moving in the direction of political and institutional change, dictated by progress toward the single market and upheaval in central and eastern Europe.

One result of the EC's 1992 program has been a sharp increase in the intensity and, particularly, in the importance of legislative activity in the Community. The decisions taken by the EC to make the single market a reality will obviously directly affect the operations of firms and individuals engaged in business activities in the EC, irrespective of their nationality. For that reason, and to a far greater extent than in the past, it will be crucial for all who are engaged in the Community, presently or potentially, to know what legislative developments are taking place and, above all, to seek to influence the contents of EC legislation.

9. Actual experience under the regulation will provide the final test. The Commission's first decision under the regulation to block a transaction came in October 1991, prohibiting Boeing's sale of De Havilland, the Canadian manufacturer of turboprop commuter aircraft, to France's Aérospatiale SNI and Italy's Alenia e Selenia SpA. Aérospatiale-Alenia/de Havilland, 34 O.J. (L 334) 42 (1991). The Commission's action was met with political protests, particularly by the French Government, and with calls for revision of the regulation to ensure its compatibility with a strong European industrial base. Sir Leon has defended the decision in the press, although in doing so he himself has invoked industrial-policy arguments rather than those based solely on competition grounds. *E.g.*, 1 EC COMPETITION L. REP., Oct. 28, 1991, at 2.

Hence, the timeliness of James Gardner's *Effective Lobbying in the European Community*. And fortunately, it is not only timely; it is comprehensive, perceptive and eminently readable. Mr. Gardner is not an EC insider. However, his experiences as a lobbyist, a former state legislator, and journalist have clearly been put to good use. The climate for lobbying is not uniformly friendly; an undercurrent of suspicion and concern counterbalances the receptivity to "knowledgeable, fact-based advocacy" (p. xviii) in the EC institutions. Thus, the lobbyist in the EC has all the more reason to tread carefully.

Mr. Gardner's book provides anyone interested in lobbying in the EC with the essentials about the institutions, the decision-making process, the participants in EC lobbying, and—most important—the "how to" and "how not to" of effective lobbying in the Community. The book is clearly and sensibly organized, providing a logical progression from relevant background information to a description of the lobbying process and on to advice on lobbying activities and strategies.

Mr. Gardner begins with a brief account of efforts at European integration, followed by a description of the Community's institutions, the present political environment, the EC's legislative process, and the lobbying "players." Having laid this necessary foundation, the book turns its focus on lobbying: first on "style," or how to lobby effectively; then on the institutions—the role of key elements, where, when, and how to lobby; and finally on sections in which Mr. Gardner lists what he terms "underutilized" and "unused" lobbying tools, offers advice on the selection of a lobbyist in Brussels, and describes publications that can be useful in keeping abreast of developments in the EC.

In the final chapter, Mr. Gardner summarizes the message he has elaborated on throughout his book. He does so in the form of "six megathemes of Euro-lobbying" that are right on target: keep it low-key, keep it short and substantive, keep it long-term, get in early, use the bottoms-up approach, and remain vigilant. To these he adds three exhortations: "catch the wave, don't fight it" (meaning that it is virtually impossible to attack an EC proposal head-on, whereas "reshaping" it is usually possible), "speak the languages and know the cultures," and, lastly, "think European."

Beyond these key points, Mr. Gardner's text contains numerous insights into EC procedures and possible lobbying strategies. He accurately points out that a Council working group often considers and alters a Commission proposal with "scant regard" (p. 100) for action by the Parliament (pp. 33, 100, 101) and that "an overriding goal of the Parliament is to amass greater power and influence in the EC legislative process" (p. 98), both key considerations in carrying out lobbying activity. The book contains an accurate assessment of the strengths and weaknesses of European trade associations (pp. 50–51) and sound advice on seeking a broad constituency (p. 74) and creative alliances (p. 104).

As is to be expected in a book written by a person not steeped in the ways of the Community, some inaccuracies have crept into the text, primarily relating to the European Parliament. Although several committees' sessions are closed to

the public (pp. xix, 64, 90), the majority, including most of the target committees for lobbying, are open, and some that are nominally closed will permit outsiders to attend upon request. Similarly, although the pressure may be "all but irresistible" to consolidate Parliament's operations in Brussels (p. 80), the French Government stands resolutely in the way. In addition, Mr. Gardner might have explained more clearly the significance of Parliament's amendment procedures (p. 91), the prevalence and importance of bloc voting by political groups (p. 90), and hence, the need to cultivate political group staffs (p. 96).

In addition, three minor complaints should be registered. First, in his "final thoughts" chapter Mr. Gardner seeks to describe the stakes for the United States, Japan, and Eastern Europe. The stakes for the United States, presumably Mr. Gardner's target audience, are enormous, and his comments might better have been placed in the introduction. However, the sections on Japan and Eastern Europe do not do justice to the complexity of the issues and, in any event, they do not really fit with the rest of the text. Secondly, a succinct description of the competence of the various committees of the European Parliament would be more useful than reproducing the lengthy official text of their responsibilities (Appendix C). Finally, it is most unfortunate that the book contains an astonishing number of typographical and other editing errors.

However, there are no major errors or omissions. To the contrary, Mr. Gardner has provided a useful manual of information and advice, particularly to the uninitiated, and it is well worth reading. Indeed, he has amply succeeded in the objective he set for himself of "shorten[ing] the learning curve" (p. xvii) for those wishing to lobby more effectively in the EC.

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Transferring Hazardous Technologies and Substances: The International Legal Challenge

Edited by Günther Handl and Robert E. Lutz. London/Dordrecht/Boston: Graham & Trotman/Martinus Nijhoff, 1989, pp. ix, 275, Dfl. 175.00, U.S. \$92.50, U.K. £59.50.

Günther Handl and Robert Lutz have done a wonderful job in collecting and editing ten essays written by a distinguished group of contributors about one of the most difficult issues in international environmental law: the regulation (or

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not) of trade in hazardous technologies and substances. Inspired by a panel at the April 1985 Annual Meeting of the American Society of International Law devoted to international legal implications of the Bhopal disaster, the book ranges much further. What seems to me to be the volume's best definition of its subject matter was provided in chapter 8 by Harold Koh:

Although . . . questions have most recently arisen with respect to celebrated disasters at hazardous industrial facilities, such as Bhopal and Seveso, the same questions could also be posed with regard to any number of recent *causes célèbres* involving the import (usually by developing nations) of consumer products, infant formulas, pharmaceuticals and medical devices, hazardous waste, chemicals and pesticides, and nuclear materials and reactors. (p. 171)

For an order for reading the book, my own preference would be to begin with chapter 2, "The Transboundary Trade in Hazardous Technologies and Substances from a Policy Perspective" written by the work's editors. Here Handl and Lutz provide, in a general way, the legal and political themes that weave the other more specific essays together. Some readers, of course, will prefer to begin more factually with the excellent introduction to recent major accidents supplied by Ved P. Nanda and Bruce C. Bailey in chapter 1, "Nature and Scope of the Problem."

After reading the chapters by Handl and Lutz and Nanda and Bailey, the reader might turn to chapter 9, "Expediting the Provision of Compensation to Accident Victims," by Stephen C. McCaffrey and chapter 10, "International Legal Remedies," by Daniel Barstow Magraw. These chapters are effective in painting the picture of the book's central problem: the inadequacy of law's present response to real life environmental disasters. Understanding how badly modern international, municipal, and private law cope with the transfer of hazardous technology and substances is a necessary predicate for appreciating the value of a better response from the international community.

The other six chapters—"Prior Notification and Consultation" by Lothar Gündling, "International Technology Transfer and Environmental Impact Assessment" by David A. Wirth, "Internationalization of Hazard Management in Recipient Countries: Accident Preparedness and Response" by Günther Handl, "Codes of Conduct and Other International Instruments" by Robert E. Lutz and George D. Aron, "The Responsibility of Exporting States" by Michael Bothe, and "The Responsibility of the Importer State" by Harold Hongju Koh—offer the reader a wealth of factual detail and sophisticated legal and policy analysis. They emphasize the need for a more effective legislative, executive, and judicial process at the international level. So long as real decision-making concerning international environmental problems is vested at the level of the nation states, whatever may be generated as treaty or international code is likely to be hortatory only, guidelines faithfully followed by remarkably few governments and private actors.

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International Judicial Assistance

By Bruno Ristau (vols. 1 & 2, Civil and Commercial, 1984) and Michael Abbell & Bruno A. Ristau (vols. 3-6, Criminal, 1990). Washington, D.C.: International Law Institute, looseleaf, supplemented. Vols. 1 & 2, \$220.00; vols. 3-6, \$440.00; complete set of 6 volumes, \$595.00.

The general or even specialized practitioner faces serious difficulties as the world shrinks and the practice of law frequently transcends international boundaries. In the civil and commercial arena, issues of discovery and service of documents abroad, others relating to judicial assistance from foreign courts, available to American courts or individual litigants, and assistance available from American courts for foreign governments and individual litigants, can be mind-boggling. In an age where transnational litigation (that is, domestic litigation that touches upon one or more foreign jurisdictions) is rapidly increasing, counsel could be guilty of malpractice if counsel takes action abroad that proves ineffective and that causes substantial expense. Counsel must be sure what to do and what not to do to remain properly within the law of the foreign state. Failure to meet this standard may not only produce the repercussions of malpractice; it may even produce criminal liability in the foreign country. American lawyers all too often overlook the fact that foreign law may well have a bearing on acts and procedures taken abroad. Aside from the fact that some procedural acts performed on behalf of American litigants abroad may violate the foreign state's criminal laws, sometimes acts performed solely in accordance with American procedural rules may be without legal effect as a matter of foreign law. Hence, volumes 1 and 2, authored by Bruno Ristau, are essential, as they provide understanding insight necessary to avoid the pitfalls and to ensure efficient, ethical, and safe transnational practice in the civil and commercial arena. Michael Abbell does the same for the practitioner of criminal law in volumes 3-6. I am not an expert on civil or commercial litigation, and those chapters were reviewed eminently, in 1986, by David Otis Fuller, Jr.,¹ so I will not dwell thereon.

A couple of points are worth making, however. Bruno Ristau, the author of volumes 1 and 2 (civil and commercial judicial assistance), in the early 1960s was put in charge of the Department of Justice's foreign litigation. He organized an office in the Department that assumed the responsibility for executing judicial assistance requests from foreign tribunals. Since then, in his government and private career, he has been in the forefront of transnational and international litigation in civil and commercial matters. Volumes 1 and 2 were published by the International Law Institute in 1984.²

1. David Otis Fuller, Jr., Book Review, 18 N.Y.U. J. INT'L L. & POL'Y 753 (1986) (reviewing BRUNO RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL) (1984)).

2. 1 & 2 BRUNO RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL) (1984).

Volumes 1 and 2 gather the relevant treaty provisions, conventions, and domestic legislation bearing on international judicial assistance in civil matters. The volumes are in a binder format, so that they may be updated continually. They also discuss the machineries established under the relevant conventions and give guidance for the preparation of judicial assistance requests where the conventions apply. Some of the foreign so-called "blocking legislation," which restricts access by American litigants or authorities to witnesses, documents, or information located abroad, are reproduced. Guidance is provided on the preparation of judicial assistance requests to countries with which the United States has treaty arrangements and for those with which there are none. While Mr. Ristau notes that the treatise is not a treatise of foreign law, which it is not, it provides the practitioner with the wherewithal to deal with virtually any problem that may arise in transnational litigation.³

Volumes 1 and 2 also address the current practices of United States courts regarding foreign requests for assistance. This is important, because American practitioners are called upon with increasing frequency to render services in connection with requests for judicial assistance emanating from foreign tribunals.

My area of interest is international criminal law and procedure, so that is where I will focus. I have indicated at length elsewhere, that in the criminal law and procedure arena the problems have become widespread, significant, and even dangerous, for the basic business person, banker, and their attorneys.⁴ Extradition, for example, has become a matter of increasing concern for executives of companies and banks with transnational business interests, as several recent trends in criminal law have emerged. First, governments both in the United States and abroad have increasingly criminalized financial misconduct and directed significant enforcement resources toward its prosecution. Second, a number of commercial or tort disputes involving foreign nationals or foreign companies have been treated as criminal matters by their countries, apparently, at least to some degree, in order to obtain more favorable resolution of related civil litigation.⁵ Third, extradition law, itself, has recently evolved in such a way as to create the real possibility that an American business person or banker could be extradited abroad to face criminal charges, for what he or she might consider to be ordinary business conduct.⁶

3. Note also that Michael Abell has written a chapter in another work on how to find and work with foreign counsel. Michael Abell, *Locating, Retaining, and Working with Criminal Defense Counsel Abroad*, in *INTERNATIONAL TRADE: AVOIDING CRIMINAL RISKS* ch. 21 (Hannay ed. 1991) [hereinafter *INTERNATIONAL TRADE*].

4. Christopher L. Blakesley, *International Extradition for Business Crimes*, in *INTERNATIONAL TRADE*, *supra* note 3, ch. 17, from which portions of the two following paragraphs were adapted.

5. See, e.g., Victor E. Schwartz, *The Bhopal Tragedy: Interface and Conflict Between Criminal and Tort Law Abroad*, in *INTERNATIONAL TRADE*, *supra* note 3, ch. 12. Note, however, that the Indian Supreme Court recently reversed the part of the settlement agreement that related to the promise not to seek criminal sanctions against the president and other officials.

6. Blakesley, *supra* note 4, at 17-2.

For example, many countries have sought to draw their business communities, either willingly or unwillingly, into the "war" on drugs and on organized crime. Within the past five years, the United States Congress has promulgated several antidrug laws⁷ and amended the Bank Secrecy Act⁸ to require detailed reporting and even criminal referrals by financial institutions in order to attack money-laundering. The effect of these new statutes is to criminalize a significantly greater range of activity than heretofore had been the case. Foreign financial institutions and their officials, accountants, and lawyers thus may find themselves in trouble in the United States, perhaps even extraditable, merely by operating in a traditional manner to safeguard client confidentiality. United States business people, in turn, face possible extradition to a foreign country because other nations⁹ have begun to adopt similar requirements.¹⁰ The United States Government is now entering into extradition treaties in which extraditable offenses are not listed, and thereby limited, but are determined by virtue of the punishability for a minimum amount of time by the parties.¹¹

Thus, more conduct is being condemned as criminal and more types of criminal conduct are being made extraditable or punishable via transfer of proceedings treaties. Also, so-called defenses or exceptions to extradition, such as the "double criminality" principle and the rule of specialty are being restricted or effectively eliminated.¹² With the atmosphere generated by the war on drugs and other crimes and the increased attention to financial crimes at home and abroad, there is no doubt that an ounce of prevention at the business stage (based on proper advice of counsel) is worth a great deal more than a pound of defense at the extradition or prosecution stage. Counsel's or other officials' failure to ask probing questions, failure to record proper information or to transmit it to the government, or failure to verify answers received when they or their clients are entering into transactions can lead to criminal charges and extradition proceedings.¹³ Thus, volumes 3-6 of *International Judicial Assistance*, especially Part

7. See, e.g., Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1351-1367, 100 Stat. 3207, 3218-38 (codified variously throughout 12 U.S.C., 18 U.S.C., and 31 U.S.C.); the Money Laundering Control Act; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified variously throughout 12 U.S.C., 18 U.S.C., and 31 U.S.C.); both cited and discussed in detail in Bruce Zagaris, *Dollar Diplomacy: International Enforcement of Money Movement and Related Matters—A United States Perspective*, 22 GEO. WASH. J. INT'L L. & ECON. 465 (1989).

8. The Currency & Foreign Transactions Reporting Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970) [hereinafter Bank Secrecy Act] (codified variously, and recently significantly amended, in 12 U.S.C. §§ 1730d, 1829b, 1951-1959, 31 U.S.C. §§ 321, 5311-5324, and throughout 15 U.S.C.); discussed in Zagaris, *supra* note 7, nn.16-89, 163-68, and accompanying text; and in Charles Thelen Plambeck, *Confidentiality and Disclosure: The Money Laundering Control Act of 1986 and Banking Secrecy*, 22 INT'L LAW. 69 (1986).

9. See, e.g., John Clitheroe, *Investigation and Prosecution of Business Crime in the United Kingdom: The Changing Climate*, in INTERNATIONAL TRADE, *supra* note 3, ch. 4.

10. See generally Blakesley, *supra* note 4.

11. See generally CHRISTOPHER L. BLAKESLEY, *TERRORISM, DRUGS, INTERNATIONAL LAW AND THE PROTECTION OF HUMAN LIBERTY* ch. 4 (1992); Blakesley, *supra* note 4.

12. BLAKESLEY, *supra* note 11, ch. 4; Blakesley, *supra* note 4, at 17-21 to 17-30.

13. Blakesley, *supra* note 4, at 17-3 to 17-4.

XIII, on International Extradition, are invaluable for counsel to any business with any extent of transnational operation.

In addition, the comprehensive coverage of international judicial assistance in criminal matters is essential for any prosecutor, judge, other governmental official, or defense attorney, who must face issues relating to the five types of international judicial assistance in criminal matters: obtaining evidence, extradition, transfer of sentenced persons, or other forms of judicial assistance, such as transfer of proceedings or transfer of supervision of paroled or otherwise released offenders. These are all analyzed comprehensively, efficiently, and coherently by Michael Abbell, who provides the conceptual and mechanical wherewithal for a practitioner to resolve most transnational criminal law and procedure problems.

Mr. Abbell was the Director of the Office of International Affairs, Criminal Division, of the United States Department of Justice, from 1979-1982. In that capacity he negotiated and supervised the negotiation of several international treaties of extradition, transfer of sentenced individuals, judicial assistance, and various matters of international mutual assistance in criminal matters. He also drafted domestic legislation in these areas and testified often before Congress on matters related thereto. He now practices privately in these same areas and is one of the foremost practitioners in the field, participating in colloquia and serving as counsel in many major cases. He is chair of several American Bar Association Section subcommittees on these subjects and is chair of the Committee on International Law, Extradition and Representation Abroad of the National Association of Criminal Defense Lawyers. He has also written extensively in the legal periodical literature and has produced several chapters in books in the arena of international criminal law.

Volume 3 includes a very efficient overview of judicial (or mutual) assistance in criminal matters and then focuses on obtaining evidence in criminal investigations and proceedings. Chapter 1 provides the history of judicial assistance in a manner that gives the reader a foundation to understand the evolution and the concepts at work. An academic might have wished to have more philosophical, conceptual, and historical detail, but that would perhaps not be necessary or desirable for the audience to which the work is addressed.

A general overview of international mutual assistance from the police level, where the assistance is not actually "judicial," at least from the Anglo-American viewpoint, to the prosecutorial and judicial levels is also provided. While police-level mutual assistance does not require any form of "judicial" assistance, many forms of assistance at the prosecutorial level—such as obtaining the testimony of witnesses, securing the production of documents, and obtaining a search and seizure—either always or frequently require the assistance of the courts of the requested country. Assistance at the judicial level in criminal proceedings is provided primarily pursuant to letters rogatory by which a court in one country asks the assistance of a court in another country at the request of

a prosecutor, grand jury, investigating magistrate or judge, or defendant. These are all considered in turn. The analysis is comprehensive and incisive. The appendices include the statutes, rules, and treaties relating to mutual assistance in criminal matters; a sample multilateral treaty; a sample bilateral mutual assistance agreement; the European Convention on Mutual Assistance in Criminal Matters; a sample narcotics assistance agreement; a list of nations with which the United States has similar agreements; and the United States Attorneys' Materials on Mutual Assistance in Criminal Matters, which is most instructive and helpful.

Chapter 2 covers the laws affecting obtaining evidence from abroad by cooperative methods for use in the United States. Provisions in the United States Constitution, including the confrontation clause, the compulsory process clause, and the search and seizure clause are analyzed. Also analyzed are federal statutes covering, among other things, the transmittal of letters rogatory issued by U.S. courts, admission of foreign business records pursuant to commission or certification of custodian, depositions before U.S. consular officers, suspension of statutes of limitation or prescriptive periods to permit evidence to be obtained, service in the United States of pleadings and documents filed in foreign countries opposing U.S. evidence requests, and transfer of witnesses in custody in a foreign country to the United States. The Federal Rules of Procedure and Evidence relevant to foreign depositions are considered. State and foreign laws relevant to obtaining evidence from abroad are also analyzed.

With regard to obtaining evidence from abroad when no mutual assistance treaty exists, chapter 3 covers assistance at the police level, the deposition on commission, and letters rogatory. It also focuses on some case-specific agreements, such as narcotics agreements, tax treaties, and mutual assistance provisions in extradition treaties and multilateral conventions.

Chapter 4 covers the use of mutual assistance treaties in criminal matters to obtain evidence from abroad for use in the United States. This chapter shows how mutual assistance treaties interact with other forms of assistance in the criminal arena. It analyzes the types of assistance, including, among other things, locating persons, service of documents, production and authentication of government documents, obtaining testimony in a foreign country, search and seizure, transfer of a person in custody, obtaining testimony in the United States, transfer of an in-custody witness to the United States to testify, and the immobilization and forfeiture of criminally obtained assets. It also covers the rights of the requested and the requesting country, rights of the accused or the target of the investigation, including suppression or exclusion of evidence for violation of the treaty, and the use of the treaty to obtain evidence. Finally, the responsibility, procedure, and function of governmental authorities in judicial assistance are covered.

Chapter 5 considers the use of coercive methods to obtain evidence from abroad for use in the United States, including the production of the defendant, witnesses, and evidence, among other things. Chapter 6 covers the laws affecting

U.S. assistance to foreign authorities and defendants seeking evidence from the United States, pursuant to the United States Constitution and federal and state statutes. Chapter 7 covers that topic when there is no treaty of mutual assistance in criminal matters, while chapter 8 covers the use of mutual assistance treaties in criminal matters to obtain evidence from the United States.

Volume 4 covers extradition, the international rendition of fugitives sought for trial on an extraditable offense or sought for punishment after already having been convicted.¹⁴ This volume is comprehensive and incisive. Extradition is available only when formal charges have been brought by the requesting government or an actual conviction has been rendered for an extraditable offense. It is not appropriate to obtain custody of a person whose presence is desired as a witness or to enforce a civil judgment.¹⁵ These latter needs for mutual or judicial assistance are covered in chapters 1, 2, and 3. All aspects of international extradition are covered in detail: its history, U.S. statutes covering extradition, applicable treaties, all of the basic extradition treaty provisions, and the problem areas of extradition, such as the political offense exception, dual criminality, provisional arrest, probable cause, the rule of specialty, among others, are analyzed in depth and in detail. The operation in practice of extradition from the United States is analyzed in chapter 3. This chapter covers all the defenses and procedures needed in prosecuting or defending the extradition request. Chapters 4 and 5 do the same for extradition to the United States from abroad.

The entirety of volume 5 is devoted to the appendices to volume 4, on extradition. The appendices are invaluable. They include all U.S. statutes regulating extradition from the United States; the statutes and Executive Order regulating extradition to the United States; the very helpful United States Attorneys' Manual Materials on Procedures for Requesting International Extradition; the Department of State Form Surrender Warrant; the Department of State Certification Form for Foreign Extradition Documents; the Department of State Form Authorization for a United States Agent to receive an extraditee from abroad; and the European Convention on Extradition, its First and Second Additional Protocols, and a list of the parties to each. It should be noted that all extradition treaties to which the United States is a party are found in *Treaties in Force*, a United States Department of State publication.

Volume 6 covers international transfer of sentenced persons and other forms of international judicial assistance in criminal matters, such as the international transfer of proceedings in criminal matters and the international transfer of supervision of offenders sentenced to probation or released under supervision. With regard to the international transfer of sentenced persons, when an individual from one country is convicted and sentenced in another country, he or she may be transferred to his or her own country to serve out his or her sentence. The

14. See generally BLAKESLEY, *supra* note 11, ch. 4; Blakesley, *supra* note 4, at 17-4.

15. See *Terlinden v. Ames*, 14 U.S. 270, 298 (1902); Blakesley, *supra* note 4.

courts of the country of nationality are the ones ultimately responsible for ruling on the lawfulness of the enforcement of the transferred sentence if a transferred offender challenges either the legality of the transfer or the enforcement of the sentence. It has been suggested recently that U.S. governmental abductions from abroad have undermined the effectiveness of these potentially very important treaties.¹⁶

The international transfer of proceedings (part XV of volume 6) involves the transfer of actual criminal proceedings from the country in which the alleged criminal conduct occurred to the country of which the offender is a national. It is quite an interesting institution, into which one is provided a glimpse by volume 5.¹⁷ While the practical aspects from the point of view of the American practitioner are presented in part XV, chapter 1, more detail on this interesting phenomenon might be in order. For example, transfer of proceedings, called by various names abroad, including the vicarious administration of justice by Germany, is a growing phenomenon in Europe, being promoted vigorously by some nations, such as Germany. The current desire to find solidarity among nations attempting to combat international and transnational crime would suggest that we are ready for the vicarious administration of justice. *Aut dedere aut punire* (or *aut iudicare*) requires that if the United States refuses to extradite a person who has committed an offense against the law of a foreign (extradition requesting) nation, then the United States ought to prosecute that person if the conduct committed constituted a crime under U.S. law. This is the notion of the vicarious administration of justice,¹⁸ which provides that, when a nation refuses to extradite an individual, that nation shall prosecute that individual, as long as the conduct involved serious, punishable (otherwise extraditable) behavior in the place in which it occurred.¹⁹ Perhaps the notion

16. Abraham Abramovsky, *Transfer of Penal Sanctions Treaties: An Endangered Species?*, 24 VAND. J. TRANSNAT'L L. 449 (1991).

17. Mr. Abbell notes that this form of international judicial assistance, like the transfer of supervision, are currently "of little importance to the United States, although they may be of some potential use to it in the future." (vol. 3, p. 5) It is true that most U.S. policy makers are opposed to them at the current time, but as they take hold in Europe, more interest might be engendered. For more detail, see Christopher L. Blakesley & Otto Lagodny, *Finding Harmony Amidst Disagreement Over Extradition, Jurisdiction, the Role of Human Rights, and Issues of Extraterritoriality Under International Criminal Law*, 24 VAND. J. TRANSNAT'L L. 1, 36-44 (1991), from which the following relevant paragraphs are adapted.

18. Jürgen Meyer, *The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction*, 31 HARV. INT'L L.J. 108 (1990). See generally HANS-HEINRICH JESCHECK, *LEHRBUCH DES STRAFRECHTS* 143-64 (4th ed. 1988); D. OEHLER, *INTERNATIONALES STRAFRECHT* 413-15 (2d ed. 1983); Albin Eser, *Abschnitt Das Strafgesetz*, in A. SCHÖNKE & H. SCHRÖDER, *STRAFGESETZBUCH KOMMENTAR* 56-85, §§ 3-7 (Lenckner, Eser, Cramer & Stree eds., 23d ed. 1988); Albin Eser, *Die Entwicklung des internationalen Strafrechts im Lichte des Werkes von Hans-Heinrich Jescheck*, in 2 *FESTSCHRIFT FÜR HANS-HEINRICH JESCHECK* 1353-77 (1985); Hans-Heinrich Jescheck, *Gegenstand und neueste Entwicklung des internationalen Strafrechts*, in *FESTSCHRIFT FÜR REINHART MAURACH* 579 (1972).

19. Meyer, *supra* note 18, at 115.

ought to apply when the conduct occurred in a manner or place that would provide the nation prosecuting it jurisdiction to do so.

Vicarious administration of justice is quite common in Europe and even has been adopted in several extradition treaties,²⁰ although many U.S. commentators and government representatives have difficulty accepting jurisdiction being based solely on the basis of a refusal to extradite. True, the United States has always taken *aut dedere aut punire* less seriously than has Europe.²¹ Nevertheless, perhaps jurisdiction on this theory could be based on the refusal to extradite and an applicable theory of jurisdiction under U.S. law. This might be a somewhat limited version of continental vicarious administration of justice, but, with the recent significant expansion of U.S. prescriptive jurisdiction,²² we may find that there really is not much functional difference.

I have written extensively elsewhere to show that U.S. law has been vigorously expanding extraterritorial jurisdiction.²³ The question is whether principles of jurisdiction extant in U.S. law today will accommodate extradition to a state having jurisdiction under its law, based on the nationality or active personality principle, the passive personality principle, the protective principle, or the universality theory. Certainly in the arena of terrorism and under circumstances where the passive personality principle converges with policies relating to the universality and protective principles, the notion of "vicarious administration of justice" may already have a viable analogue in U.S. law. If a person were not extraditable to Germany because of some prohibition in the extradition treaty, he or she could perhaps be prosecuted in the United States.

Although some U.S. officials do not accept the notion of jurisdiction being based on the refusal of extradition, they may accept prosecution for conduct in the United States or in circumstances under which some U.S. theory of jurisdiction would apply. This would be true even if the impetus for prosecution were the request for extradition by the foreign country, its refusal, due to a prohibition to extradite in the treaty or extradition law, and the request, therefore, to prosecute. With the expanded principles of jurisdiction in U.S. law, there is no reason for this not to work.

Rapprochement: The law relating to jurisdiction over extraterritorial crime and extradition in the United States, at least in the area of terror-violence, is not as incompatible with that in European countries, as many commentators have suggested. Reciprocity is important from the German law standpoint, but not important for that of the United States. The nationality principle (active personality) is not a primary basis of asserting jurisdiction under U.S. law, but it is not wholly anathema either. The conjunction of the expanding nationality, protective

20. Eser, *Common Goals and Different Ways in International Criminal Law: Reflections from a European Perspective*, 31 HARV. INT'L L.J. 117, 119 (1990).

21. See Ethan A. Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT'L L.J. 37, 69 (1990).

22. BLAKESLEY, *supra* note 11, ch. 3.

23. See, e.g., *id.*; Blakesley & Lagodny, *supra* note 17, at 36-44.

principle, and universal jurisdictional bases in U.S. law with the reality that the United States often does not require reciprocity in the manner demanded by German law, accommodates many of the difficulties presented by the European commentators.

With this rapprochement in mind, it may or may not be necessary to develop a new institution such as vicarious administration of justice. It is necessary, however, for scholars, judges, and practitioners in the United States to come to grips with the notion. It behooves their continental counterparts to do the same with the expanding American notions of jurisdiction over extraterritorial crime and with the sometimes countervailing importance of procedure as a repository for the protection of human rights. Vicarious administration of justice may be a notion of significant benefit. German criminal law apparently applies in some instances to offenses committed outside Germany by foreigners, as long as some theory of jurisdiction, including vicarious administration of justice, covers the conduct and as long as the conduct constitutes an offense under German law.²⁴ Apparently, the instances in which vicarious administration of justice will apply are those wherein extradition was not requested by the state in which the conduct occurred or was refused by Germany or was otherwise not feasible. It appears that principles similar to those of double criminality and the special use of double criminality are at work in the notion of vicarious administration of justice.

For prosecution and punishment to be allowed in Germany, the conduct must be punishable by the law of the place in which it occurred (unless no criminal law enforcement exists there at all).²⁵ Moreover, the conduct must be such that it would permit extradition under a treaty or relevant law of each state for the particular offense involved, but for the technical blockage. Apparently, this means that the offense must be grave enough and incur sufficient punishment in each state to make it extraditable. It must also not be an offense of a political nature.

Vicarious administration of justice is subsidiary to extradition; it will not apply unless there is some treaty or legally based bar to extradition. In addition, even though German law applies to the prosecution and punishment, the punishment may not exceed that provided by the law of the place in which the conduct occurred; the parameters of punishment are controlled by the state in which the offense occurred. This accommodates notions of legality and double criminality.

Vicarious administration of justice would resolve situations in which one state would not be able to extradite. It seems that the concept of vicarious administration of justice is already functioning to a significant degree. If a nation refuses to extradite a national, it has the obligation under international law, and probably under its own domestic law, to seek prosecution of that person and to impose appropriate punishment, if appropriate under domestic law and procedure. An interesting difference between vicarious administration of justice and what is

24. The following paragraphs on vicarious administration of justice rely on Meyer, *supra* note 18, at 115-16.

25. *Id.*

currently the functioning law in the United States is that the former recognizes limits to its application of its own criminal law. Prosecution requires accommodation of each state's interests and values, as well as international values relating to human rights. If extradition and the alternative vicarious administration of justice were allowed to incorporate these values directly, and to function in tandem, it would certainly work to diminish the size of the world in terms of protection of rights and cooperation in matters of criminal law. The principle of vicarious administration of justice may make denial of extradition more palatable to nations that request it.

Perhaps the underlying questions of law in this arena can be reduced to the problems of *dedere punire iudicare*, the basic national tools of international law enforcement, from the still valid distinction made by Grotius to paraphrase the two ways to deal with escaped offenders. There are, in principle, only two legal ways to resolve problems that arise in a manner that interrelates the substantive and procedural penal law of more than one nation. One is for a state to assert prescriptive jurisdiction, although the human behavior in question occurred outside the asserting state. One could call this the essence of *punire* or *iudicare*. Grotius noted that this was part of the (still existing) dichotomy of national power and authority to punish a wrongdoer for transnational conduct.

The second is where one nation assists others through mutual assistance in the largest sense. Abbell notes that the first three of these forms of international judicial assistance in criminal matters (obtaining evidence, extradition, and transfer of sentenced persons) are of rapidly increasing importance to the United States. The treatise focuses on these forms of judicial assistance from the perspective of the United States as the requestor and provider of such assistance. Part XII (volume 3) of the treatise discusses the laws, treaties, and practices relating to the manner in which the United States seeks investigative information and evidence from abroad for use in U.S. criminal investigations and proceedings, and the assistance the United States provides to foreign countries seeking such information and evidence from the United States. Part XIII (volumes 4 and 5) covers extradition to and from the United States, other means by which the United States secures the presence of persons in this country for purposes of prosecution or service of sentence, and the effect of extradition and other means of securing the presence of persons from abroad on subsequent prosecution in the United States. Volume 6 describes the United States statutory and treating provisions governing the transfer of sentenced persons.

This set of volumes on international judicial assistance is a gold mine of fact, process, and insight into the workings of international mutual and judicial assistance. It is essential for anyone venturing into those rough waters.

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