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THE TRANSITION OF INTERNATIONAL LAW: REFLECTIONS ON TRENDS
PAST, PRESENT, AND FUTURE"

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THE LEGACY OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

*Professor Anne F. Bayefsky**

The Universal Declaration of Human Rights embodies three essential features: (1) it articulated shared, universal values; (2) it identified and strengthened the significance of the individual as a subject of international law, and (3) it declared and emphasized the responsibilities of states towards individuals. Furthermore, it set the agenda for the future towards further standard-setting.

The following fifty years of development of an international rights protection regime placed the emphasis on a two-part strategy: the proliferation and elaboration of standards, and the universal ratification of those standards.

The success of what might be called, the Universal Declaration's "platform of action", has been considerable. In particular: six major human rights treaties have been adopted; no state is left outside the system, that is, has failed to ratify any of these treaties¹; and the cultural relativism argument, (the argument that there are no shared, universal human rights), has largely been kept at bay².

At the same time, the Universal Declaration's platform of action, widespread, universal ratification of human rights treaties, has not been achieved without a cost. The costs have been in particular: serious reservations attached to many ratifications, and gross levels of non-compliance with the treaties' terms.

The shortfalls are so significant, that the system relies on non-compliance in order to carry on. As the Independent Expert reported to the UN Human Rights Commission in March 1998: "the present reporting system function[s].. only because of the large-scale delinquency of States which either d[o]...not report at all, or report...long after the due date. If many were to report, significant existing backlogs would be exacerbated,

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1. Although there are approximately 30 of the 185 UN member states which have ratified only one or two of the treaties.

2. While the 1993 Vienna Declaration on Human Rights, and the subsequent products of the Conference on Population and Development in Cairo, the World Summit for Social Development in Copenhagen, and the Beijing World Conference on Women, introduced and elaborated the role of 'national particularities' in defining human rights standards in general, the treaty provisions still stand.

and major reform would be needed even more urgently."³ Specifically, as of August 1998 there were 1100 overdue reports. Expunging the current backlog IF those reports were to be submitted, would take between 3.5 and 7.5 years. With respect to individual communications, the secretariat reported to the meeting of Chairpersons of the Treaty Bodies this past September, that the Human Rights Committee has a backlog of over 1,000 pieces of unattended correspondence, 10% of which will reveal, on their estimate, actual cases. Of the 92 states parties to the Optional Protocol of the Civil and Political Covenant, 36 states or 40% have never been subject to a single complaint. With respect to reservations, states such as the United States, the U.K. and France, have vigorously disputed the treaty bodies' role in pronouncing upon the compatibility of reservations with the object and purpose of the treaties, despite the fact that States parties refuse to take up the subject themselves. In other words, almost universal ratification was achieved because the costs associated with the accompanying obligations were so small.

Hence, the next 50 years of the international protection of human rights requires a new platform of action, founded still on those three early principles set by the Universal Declaration, universality, individual rights, state responsibility, but with a newly articulated agenda. The move must be towards implementation or enforcement. But what does that mean? Where are we headed? There are some clearly visible trends which provide two general answers.

Firstly, there is, and will continue to be, growing emphasis on individual empowerment. This means increasing rights to complain to an international remedial body, and ultimately likely amalgamation of such complaint processes into an international court of human rights, complete with hearings, legal aid and binding decision-making authority.

Evidence of this trend can be found in a number of developments:

- (A) the growth and elaboration of further optional complaint protocols to the human rights treaties. The Commission of the Status of Women is currently drafting an optional complaints procedure to the Women's Discrimination Convention. The Commission on Human Rights has before it a draft optional complaints protocol to the Economic Covenant. A working group of the Human Rights Commission is considering a draft optional protocol to the Torture Convention concerning on-site visits or monitoring.
- (B) increasing ratification and usage of existing optional protocol complaint schemes. 65% of states parties to the Civil and Political Covenant, for example, now accept the complaints procedure.

3. U.N. Commission on Human Rights, 1998, paras. 48-52.

- (C) elaboration of more sophisticated regional individual complaint processes. The European Court of Human Rights has now been substantially reformed into a standing tribunal as of November 1st of this year. A protocol establishing an African Court on Human and Peoples' Rights was adopted by the O.A.U. earlier this year and has 30 signatures to date, although not yet in force.⁴
- (D) the increase of international criminal judicial processes, specifically, the two ad-hoc international criminal tribunals and the International Criminal Court, and
- (E) expansion of international fora accepting individual complaints, such as working groups on specific rights. The Working Group on Arbitrary Detention in 1997 communicated 26 cases to 20 governments, and the Working Group on Enforced and Involuntary Disappearances in 1997 received 180 new cases. This was in addition to the total number of cases being kept under active consideration by the Working Group as of the end of 1997, 45,000 cases from 63 countries.

Secondly, the importance of state-written self-pronouncements on their human rights records⁵, seems destined to be overshadowed by the increasing emphasis on internationally-based, independent, investigatory mechanisms.

Evidence of this trend can be found in the following developments:

- (A) increasing numbers of international investigatory, or monitoring bodies or functions, such as country-specific rapporteurs, and thematic rapporteurs seeking country-specific information. At the 1998 Human Rights Commission there were over 30 rapporteurs and special representatives, a little less than half on thematic subjects, and a few more on country-specific situations.
- (B) visits by some treaty bodies to states parties and requests by the Chairpersons of the treaty bodies to hold regional meetings. This past September the Chairpersons of the Treaty Bodies concluded that it would be desirable to meet occasionally outside New York and Geneva, in UN regional offices. Additionally, within the past year the Economic Committee sent representatives to the Dominican Republic, and
- (C) increasing solicitation of information from within the UN of human rights information from outside the UN. The Child Committee, for example, works closely to solicit information from the national level with the NGO Group for the Convention. CEDAW also increased its solicitation of information from NGOs by inviting them for the first time in 1998 to provide information during pre-sessional working groups.

4. Fifteen ratifications are needed.

5. In the form of state reports to treaty bodies.

If individual empowerment, and independent, international monitoring and analysis, is the two-part strategy for the next fifty years, what are the requirements of such a system? What would it take to succeed? The answer appears to include the following four conditions: *Firstly, objectivity of the international body.* It will be crucial that specific states are not the continual objects of investigation, while others in similar or worse circumstances are ignored. There would need to be clearly articulated and transparent criteria for selecting states for investigation, or alternatively to routinely monitor all states without exception. *Secondly, genuine shared values or a universal normative structure.* The willingness of states to implement negative decisions will depend to a considerable extent on their internalization of the result, that is, fostering a belief that implementation is in their own best interest, or compatible with their self-image and identity. *Thirdly, democratic government and participation.* Individual empowerment at the international level would threaten non-democratic societies. *Fourthly,* a willingness of an international institution to bring some form of *negative consequences* to bear on those states which do not comply. No stick, no compliance - at least not in our lifetimes, although the nature of those consequences would need to be tailored to the circumstances.

The question then is, what is necessary for achieving those four conditions? In the past the guiding principle was to achieve universal ratification and then push compliance. There seems to have been little attention paid, however, on how to shift gears, or to define the methodology for increasing performance rates. Answers have tended to focus on pleas for more resources, more meeting time, more staff, more publications, *and* better information flow, improved web sites, more media coverage. But greater resources will not be forthcoming from states who are reluctant to see the system work, be they either human rights violators or those which perceive it to be significantly biased (for example, anti-Western). And information flow to victims in non-democratic states will continue to be impeded.

Enhanced implementation therefore requires a more complex, multi-pronged approach, which might include the following elements:

- (A) Exposing and confronting the absence of objectivity or neutrality. This means, for example, requiring transparency, and the uniform application of grounds for requesting special reports, or similar terms and conditions in the appointment of country-specific investigators.
- (B) Debunking rhetorical distortions of human rights principles and precepts. For example, unmasking "Co-operation" when used to mean - not the desirability of communication and dialogue, but the illegitimacy of identifying specific violators, or "non-selectivity" when used to mean - not objectivity, but again non-selection of violators.
- (C) Nurturing shared values or universality, and refuting relativism unashamedly. Claims that culture, values, morality are relative can be contradicted by the qualifications from which relativists shrink,

concentration camps and gas chambers and genocide and slavery and apartheid and torture and rape...

- (D) Pressing the information flow through UN officers already in the field with access to the relevant authorities and communities, such as those in UNICEF, UNDP, or UNHCR. UNICEF and to some extent UNDP, are already seeking to press their goals through treaty obligations and implementation of the Child and Women's Discrimination Convention, and the Economic Covenant respectively.
- (E) Increasing the positive results and benefits of democratization.
- (F) Targeting resource increases with end goals clearly in mind - in other words, those recipients able to support the strategy of enforcement, such as, - information catalysts, individual communication systems, field missions.
- (G) Taking seriously, developing and applying the rod, at the very least, in the context of economic benefits or incentives for improving compliance with human rights standards.

The next fifty years of the international protection of human rights can move forward, therefore, if it begins with the principles of the Declaration and then redefines the Platform of Action accompanying those principles to meet the challenges of our age, namely, objective and verifiable facts and fact-finding, together with individual empowerment.

FIFTY YEARS OF DISABILITY LAW: THE RELEVANCE OF THE UNIVERSAL DECLARATION

*Charles D. Siegal**

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I. INTRODUCTION: WHY TALK ABOUT DISABILITIES LAW IN CELEBRATION OF UNIVERSAL DECLARATION OF HUMAN RIGHTS?

This discussion is about the relevance of the Universal Declaration to disability rights law. There has been a good deal of discussion historically about the status of the Declaration. Is it law or not? But the real question for me is its impact on the lives of real people with real problems. About

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the time I was asked to participate in this panel, I had gotten involved in some disabilities rights cases. In areas like disability rights, the key is not broad statement in international documents; the key is what states do in practice and what is in local law.

The following points are significant: the Declaration is virtually silent on disability discrimination; from 1971 to the present, the United Nations has spent a lot of effort in the area; all that effort may not have brought much change; and, do not despair, good may yet come.

We tend to think of international bodies as treaty makers or norm creators. In fact, *vis-à-vis* disability rights, the United Nations tried that first and failed. Another spin on their role perceives them as information conduits, facilitating the sharing of experiences. The role it has now cut out for itself implicitly incorporates that understanding. So, if at the end of the story there is no overarching treaty, something useful may still have been accomplished.

II. THE BEGINNINGS

A. *What Constitutes Disabilities Law Today?*

The scope of disabilities rights that we would recognize today, especially in the United States, includes: complex issues related to the right to determine whether one will continue to live; issues related to public health, particularly AIDS; issues of incarceration and immigration, particularly relating to people with developmental disabilities; access to public and private facilities: office buildings, sports, stadium, hotels, and housing units built with government funds, including provisions for reasonable accommodations; access to public and private employment including provisions for reasonable accommodations to ensure that *otherwise qualified* individuals are not excluded because of a disability; access to education and targeted assistance in instruction; and access to proper medical care and rehabilitative services.

Contentious issues remain. Who has a *disability*, and what accommodations must be made? But there is consensus within a surprisingly broad swath of United States, Canadian, British and Australian society. This is hard, domestic law. A number of broad movements have precipitated it. Sometimes the thrust has been in a sense "internal" organic development based on longstanding problems. Sometimes there has been an external driver-AIDS or euthanasia. Have any been international?

B. *Fifty Years Ago - the Universal Declaration: Security in the Event of Disability*¹

Even in 1948, disabilities issues were not new. Following World War I and the huge increase of people who suffered disabilities in combat, a number of European states adopted programs to assist people with disabilities.² Most often the programs utilized quotas for the number of disabled employees entities had to hire.

In some states, government entities bore the burden; in others, private employers. Whatever the particular means, governments understood the centrality of giving people access to jobs. The quota approach to jobs endures in much of Western Europe. But there was a realization, even before the close of World War II, that the quotas were not effective. Often they were voluntary, an oxymoron. When there was some kind of enforcement, it was often circumvented.

Despite awareness of the issue, the document we are celebrating, in keeping with its time, is virtually silent on disability as such. Centrally, it sets forth the basic notions of equality. But it only specifically refers to "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth." It only mentions disability in Article 25:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control.

But disability is not recognized as a protected classification, like race, religion, gender. This silence is particularly striking, because one of the Americans most closely associated with the Declaration is Eleanor Roosevelt, who had twenty years of personal experience with a high-achieving person with a severe disability. But this silence is not unexpected. In much of the world frankly, most of the world in 1948 and today, people with disabilities were stigmatized and marginalized. Clearly, the time was not ripe, intellectually or politically. Its promise, to the extent it had any content, was completely paternalistic. It says nothing about employment, training or treatment and certainly nothing about access.

1. G.A. Res. 183, U.N. Doc. A/Res/217 A (iii), art.25 (1948).

2. Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws*, 18 COMP. LAB. L.J. 62 (1996); Eric Besner, *Employment Legislation for Disabled Individuals: What Can France Learn for the Americans with Disabilities Act?*, 16 COMP. LAB. L.J. 399, 401-02 (1995).

C. 1971 Declaration of the Rights of Mentally Retarded Persons³

One of the first overt efforts of the international community was the 1971 Declaration. Although broadly phrased, it is a substantial jump. Article 3 reads: "The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities." There is now an emphasis on integration, promising employment to the fullest extent of "his" capabilities.

D. 1975 Declaration on the Rights of Disabled Persons⁴

This is the first detailed attempt of the UN to articulate rights of people with disabilities generally. It is a major doctrinal step beyond the 1971 Declaration. Article 5 posits an entitlement "to the measures designed to enable them to become as self-reliant as possible." Articles 6 and 7:

Article 6. Disabled persons have the right to medical, psychological and functional treatment, including prosthetic and orthetic appliances, to medical and social rehabilitation, education, vocational training and rehabilitation, aid, counseling, placement services and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the processes of their social integration or reintegration.

Article 7. Disabled persons have the right to economic and social security and to a decent level of living. They have the right, according to their capabilities, to secure and retain employment or to engage in a useful, productive and remunerative occupation and to join trade unions.

In a sense, the 1975 Declaration added "disability" as a protected class. Still, note the silence on exactly how the entitlement will be realized. The Declaration provides no guidance. While this might not have been a criticism of the Universal Declaration in 1948, in a document targeted at disability rights in 1975, the guts at this date should have been *what* had to be done.

At the time, in most of the world, three models were used:⁵ (1) hope that altruism will guide private behavior we can ignore that one; (2)

3. G.A. Res. 2027, U.N. GAOR, 26th Sess., U.N. Doc. 20.7.1 (i)-(vi) (1971).

4. G.A. Res. 2433, U.N. GAOR, 30th Sess., 2433rd mtg., U.N. Doc. 20.7.1 (i)-(vi) (1975).

government assistance to individuals in, e.g. vocational training (United Kingdom), but also to employers to help them accommodate workers with disabilities; and (3) quota systems requiring employers to hire people. But other legal developments had far outpaced those models.

E. National Level

In contrast to the still-generic language of the 1975 Declaration, at the national level, in the United States at least, some progress, how significant depends on one's viewpoint, had occurred in fleshing out the legal structures needed to implement a program of rights for people with disabilities. In the United States significant legislation preceded the 1975 Declaration:

1. Architectural Barriers Act of 1968:⁶ Requires new federal buildings and those constructed with federal funds to be accessible;
2. Rehabilitation Act of 1973:⁷ Makes it illegal to discriminate on the basis of disability in any US government-funded program or activity; and the
3. Education of All Handicapped Children Act of 1975.⁸

Each of these represents a practical realization of a "rights" approach. The first two effectuate an equality-based right of all citizens to be treated on the individual merits. The third is in the nature of a call on social resources to maximize participation.

There was also some little movement elsewhere. For example, in the Federal Republic of Germany Severely Handicapped Persons Act of 1974,⁹ the statute set a quota of six percent disability for all public and private employers for employers of sixteen or more. The quota can range from four to ten percent. If the quota is not met, the employer is subject to a fine of 200 deutsche marks per month.

5. Lisa Waddington, *Legislating to Employ People with Disabilities: The European and American Way*, 1 MAASTRICHT J.EUR. & COMP.L. 367, 370-75 (1994).

6. 42 U.S.C. §§ 4151-4152 (1968).

7. 29 U.S.C. § 794.9 (1998).

8. 20 U.S.C. §§ 1400-1401 (1975) (now the Individuals with Disabilities Education Act).

9. Schwerbehindertergesetz [SchwbG], v. 30.4.1974 (BGBl. I S.1005); see I.L.O. Legis. Series, Ger. F.R.3 (1974) (English translation).

While this law is said to be one of more effective quota regimes, employment of people with disabilities in Germany actually decreased from 1982 to 1992. And, more crucially, quotas can leave people behind.¹⁰

To summarize, the string of declarations beginning in 1948 and continuing through 1975 probably had essentially zero effect *as law*. But that does not mean they had no impact. They may be viewed as first steps.

III. THE 1980'S: ACCELERATION OF ACTIVITY

In the next decade, the activity that began rather modestly in the 1970's picked up momentum. Still, there was a certain amount of casting about for the proper practical and theoretical approaches. (Even the terminology was still not fixed: "disabled persons" as opposed to the more politically correct "persons with disabilities.") What was going on here was not a law making process the right had been established, but an educational and policy-creating process; both spreading the word to places that had not addressed disabilities issues and experimenting (more accurately setting the stage for experimenting) with forms of solutions. Just listing the initiatives shows how the intensity and focus changed:

A. 1981: United Nations International Year of Disabled Persons.¹¹ This set out to define the rights of people with disabilities, to increase public awareness and encourage the formation of advocacy organizations. This was a time of organizing: *e.g.*, Disabled Peoples International, begun in Singapore in 1981, now has observer status with the ECOSOC, ILO, WHO, *et seq.*;

B. 1983: World Programme of Action Concerning Disabled Persons,¹²

C. 1983: ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention;¹³

D. 1983-1992: United Nations Decade of Disabled Persons. The United Nations began a significant effort directed to a range

10. During this pre-80's period, and into the mid-90's for that matter, the European Union was largely silent. One writer has characterized the Community Charter of Fundamental Social Rights as "more of a statement of social policy than a body of anti-discrimination provisions affecting employment." Donald Dowling, *Worker Rights in the Post-1992 European Communities: What "Social Europe" Means to United States-Based Multinational Employers*, 11 NW. J. INT'L L. & BUS. 564, 613 (1991).

11. See generally GA Res., U.N. GAOR.

12. G.A. Res., U.N. GAOR, 37th Sess., Supp. No. 51 (1982).

13. International Labour Organization, *C159 Vocational Rehabilitation and Employment (Disabled Persons) Convention*, 1983, (last visited on Apr. 3, 1999) <<http://ilolex.ilo.ch:1567/scripts/convde.pl?query=c159+query1=159+submit=Display>> .

of projects involving disabilities. It culminated in several significant documents in the area;

E. 1984: Special Rapporteur for Human Rights and Disability;

F. 1987: United Nations rejected proposed Convention on the Elimination of All Forms of Discrimination Against Disabled Persons;¹⁴

G. 1989: Convention on the Rights of the Child;¹⁵

H. 1989: Tallinn Guidelines for Action on Human Resources Development in the Field of Disability¹⁶ were set into place as well; and

I. 1991: General Assembly adopted the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care.¹⁷

This for the first time, albeit in a limited context, tried to put into law programs needed to achieve equality. Article 23 reads in pertinent part:

[m]entally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community....effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

Despite all this activity at the United Nations level, so far as I can tell few states were actually doing anything about disabilities, other than the United States. More important, states did not seem to believe they were under a legal obligation to do anything. Certainly, the defeat of the Convention in 1987 stresses the non-binding nature of the various

14. See generally THERESIA DEGENER, *Disabled Persons and Human Rights: The Legal Framework*, in HUMAN RIGHTS AND DISABLED PERSONS 12 (Theresa Degener & Yolana Koster-Dreese eds., 1995).

15. See generally 1989 CONVENTION ON THE RIGHTS OF THE CHILD.

16. See generally G.A. Res. 38/28.

17. See generally U.N. Doc. A/44/755 (1989).

declarations. Most of Europe still used quotas.¹⁸ Often these were riddled with loopholes, calling into question their sincerity.

In 1981, The Council of Europe adopted a resolution on the employment of people with disabilities.¹⁹ Focusing on quotas, but also on integration, recommended specific action, but could order nothing. This does not mean states were not serious, but their pursuit of this kind of justice remained sporadic.

In 1986, a Council of Europe Recommendation²⁰ articulated a number of ideas previously seen in the Rehabilitation Act and later incorporated into the Americans with Disabilities Act, but was downgraded from a directive to a recommendation.²¹ A later conclusion, based on the 1986 Recommendation, recognized the lack of progress in moving people with disabilities into the workforce.²²

A state might have statutes that nominally fulfilled international norms, but may not have enforced the law. In 1988, Israel had enacted a statute modeled on the former EAHC Act,²³ but a study in 1992 found that no body of law had developed around it.²⁴

The 1985, Canadian Human Rights Act²⁵ covers discrimination based on disability, but does not require, for example, accommodations. This permits courts to develop remedies.

In many states, people with disabilities, especially developmental disabilities, are denied basic rights, for example, the right to vote, marry, or to have children.

We should not be too sanctimonious in the United States; however. At this point, most protections extended only to federal programs.

18. E.g., Law No. 87-517 J.O., July 12, 1987, at 7822; D.S.L. 1987, 282. This is supplemented by criminal penalties Law No. 90-602, J.O., No. 162, July 12, 1990, at 8272, D.S.L.1990, 321.

19. Resolution of March 11, 1981, 1981 O.J. (C 77) 21. 27 (referring to 1981 Year of Disabled Persons).

20. Council Recommendation of 24 July 1986 on the Employment of Disabled People in the Community, 1986 O.J. (L 225) 43.

21. See generally Josh Bernstein, *The Enforcement of European Directives on Employment of the Disabled*, 30 TEX. INT'L L.J. 603 (1995).

22. Conclusions of the Council of June 12, 1989 on the Employment of Disabled People in the Community, 1989 O.J. (C 173) 1.

23. Special Education Law of 1988, [1988] S.H. 1256, at 114.

24. Stanley S. Herr, *Human Rights and Mental Disability: Perspectives in Israel*, 26 ISRAEL L. REV. 142, 154-60 (1992).

25. CANADIAN HUMAN RIGHTS ACT, R.S.C. ch. H-6 (1985) (Can.)

However, some states had gone farther²⁶ and substantial programs to aid people with identified disabilities existed.²⁷

IV. THE 1990'S: INCREASING ATTENTION TO EFFECTIVENESS

In the 1990's, rights began to take on a more concrete aspect. A number of countries put programs into place that gave meaning to the bare rights mentioned in prior documents.²⁸ They are as follows: United States-1990 ADA;²⁹ Australia-Disability Discrimination Act 1992;³⁰ New Zealand-Human Rights Act of 1993;³¹ United Kingdom-Disability Discrimination Act of 1995;³² Canada-Employment Equity Act 1995;³³ Israel-Equal Rights of Persons With Disabilities Law.

A. *United Nations: Expanding Understanding*

1. 1993: Standard Rules on the Equalization of Opportunities for Persons with Disabilities³⁴

The 1987 midway report on the Decade on Disabilities showed that very few states had adopted policies or programs. Therefore, it focused its activity. Partly in recognition of the difficulty of achieving consensus on a legal regime and on the importance of national solutions, partly because existing human rights documents guaranteed the rights of those with disabilities, in 1993 the Economic and Social Council passed a resolution adopting standard rules to equalize opportunity for people with disabilities. The twenty-two rules concerning disabled persons consist of four chapters of preconditions for equal participation, target areas for equal participation, implementation measures, and the monitoring mechanism and cover all aspects of the life of a disabled person. They are quite progressive and lay out in broad scope what action states should take to establish legal regimes for people with disabilities.

Note the progression from 1948 protection of people with disabilities to 1993 finding ways to ensure participation in society. It is fair to inquire

26. *E.g.*, California Civil Code § 54.1 (disabilities included in basic anti-discrimination statute).

27. *E.g.*, Developmental Disabilities Act of 1984, 42 U.S.C. § 6001.

28. A source for the status of the human rights situation in countries other than the United States is the web site of The Department of State, *Country Reports on Human Rights Practices for 1996*, (last visited Apr. 2, 1999) <<http://www.usis.usemb.se/human/human96/>>.

29. 42 U.S.C. §§ 12101-12121 (1990).

30. Act No. 135, 1992, as amended.

31. Human Rights Act of 1993.

32. Disability Discrimination Act, 1995 Ch. 50 (Eng.).

33. Employment Equity Act, 42-43-44 Elizabeth II, 1994-95, Ch. 44.

34. G.A. Res. 48/96, A/RES/211 (III) (1993).

into the synergy, if any between international efforts and domestic laws/movements. Here, one of the central functions of the international body was the preparation, from 1995 to 1996, of a Global Survey on Government Action on Disability Policy.³⁵ Although only 83 states (of 185) responded, a number of NGO's were queried and responded, so there is information on 126 countries.

Frankly, the report is disheartening. Of the eighty-three responding states, only thirty-nine had enacted new disability legislation since the 1992 Report, which the reporter found surprising, since he assumed no doubt correctly that most states did not have legislation as advanced as the Report.³⁶ And only a few states had rights-based legislation, as opposed to welfare based legislation.³⁷

And, the problem was not limited to states. In 1997, Special Rapporteur wrote regarding the situation with governments and the United Nations: "The panel noted with some alarm the tendency to disregard the specific needs of individuals with disabilities within Governments, the United Nations and professional groups. This signifies the continued low priority status assigned to the individuals with disabilities on the ladder of progress."³⁸

While United Nations organizations like UNESCO, the WHO and the ILO had disabilities programs, the development agencies did not include a disability component.

The factors militating against action are obvious-the lack of resource leads, even among the many states that have updated their laws. While much of the world languishes in poverty, this is hardly surprising. But, often fixes are not very expensive. Moreover, attitudes impede progress in a large number of states. About ten to twelve percent of the states responding reported that they do not guaranty basic civil rights-marriage, the right to vote, the right to health care to people with disabilities, especially mental disabilities.

As you might expect, the news is mixed. Some part of the progress that has occurred is certainly attributable to United Nations initiatives; some is certainly due to a generalized appreciation of these issues and economic conditions in developed states that permit them to address the issues. What may be as much a driver as any legal obligation is the asking of questions by a United Nations body-it concentrates the mind, so to speak.

The United Nations has also pursued more defined projects like:

35. See generally BENGT LINDQVIST, GOVERNMENT ACTION ON DISABILITY POLICY, A GLOBAL SURVEY (1997).

36. *Id.* at 16.

37. *Id.* at 11.

38. See generally U.N. Doc. A/52/56, at 16 (Dec. 23, 1996).

1. Education 1994 - UNESCO World Conference on Special Needs Education at Salamanca, Spain more than 90 countries were represented. The Conference adopted the Salamanca Statement and Framework for Action, which builds on and develops the guidelines in Rule 6 of the Standard Rules.
2. HIV/AIDS 1997 - International Guidelines on HIV/AIDS and Human Rights, U.N.C.H.R. Res. 1997/33, U.N. Doc. E/CN.4/1997/150 (1997).

B. Domestic Developments

In the EU, few states have adopted any kind of rights-based legislation, although this is changing. A few states have put anti-discrimination language in the constitutions; one has a statute that extends such protections. The EU has, however, devoted a substantial amount of resources to disabilities issues.

1. Legislative Framework³⁹

All countries promote the employment of people with disabilities through financial incentives for employers. These include compensation for reduced productivity; reimbursement of the costs of adapting the workplace; and bonus payments.

Most promote employment through legal requirements such as quota systems. Germany⁴⁰ and Portugal⁴¹ include an anti-discrimination clause in their Constitution.⁴²

39. Pdraig Flynn, *Pathways to Integration and Disabled Persons*, SEMINAR IN LUXEMBOURG (Sept. 26, 1997).

40. F.R.G. CONST. art. 3(3). "No one may be disadvantaged or favored because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions. *No one may be disadvantaged because of his handicap.*" (Emphasis added).

41. PORT. CONST. art. 71.

1. Citizens who are physically or mentally disabled shall enjoy all the rights and be subject to all the duties contained in this Constitution, except to the extent that their disability renders them unfit to exercise or perform them.

2. The State shall implement a national policy for the prevention of disability, and for the treatment, rehabilitation and integration of disabled persons, shall educate the community to be aware of its duties of respect for them and solidarity with them, and shall ensure that they enjoy their rights to the full extent subject to the rights and duties of their parents or guardians.

3. The State shall provide assistance to associations of disabled persons.

42. As does South Africa. S.AFR. CONST. art. 3: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, conscience, belief, culture, language and birth." (Emphasis added).

Others have framework legislation providing a basis for the integration of disabled people through vocational rehabilitation, vocational training and work placement. Spain has a general human rights statute regarding people with disabilities.

2. EU Programs

There has been a good deal of talk, a good deal of study and programs, but little that is legally enforceable.

The Single European Act is generally silent on disability. Under the Maastricht Treaty, the EU lacks the ability to enact legislation binding on all members in this area, but has sponsored two action programs, Helios I and II, in the area.⁴³ Helios II produced a set of guidelines of good practice, designed to promote policy development.

The European Union From 1994 to 1999 dedicated about 1.3B ECU to projects for people with disabilities. About 0.5B EU was spent on the Horizon program from 1994 to 1998 to develop innovative employment programs for people with disabilities.⁴⁴

Council Resolution of 20 December 1996 on Equality of Opportunity for People with Disabilities⁴⁵ uses the right words, but is purely hortatory.

V. CONCLUSION

Fifty years ago, the Universal Declaration mentioned those with disabilities briefly; it was strictly paternalistic. And candidly nothing much came of it directly. Broad, anti-disability discrimination norms still don't exist as such at the international level, in the strict sense that there is no claim available.

But that does not mean there has been no progress; indeed, it might not even be particularly important. Or that the Declaration has not had some influence. What it may have accomplished was to help establish a background set of expectations that the international community recognizes certain rights, and it is important to work out ways those rights can be realized and cannot be abridged on an irrelevant or invidious basis.

Norms do exist as positive law in some states, a growing number. The Declaration was certainly a precursor of the 1975 Declaration and the

43. Council Decision 88/231 of 18 April 1988 Establishing a Second Community Action Program for Disabled People (Helios), 1988 O.J. (L 104) 38; Council Decision 88/231 of 25 February 1993 Establishing a Third Community Action Program to Assist Disabled People (Helios II), 1993 O.J. (L 56) 30.

44. European Union, *Employment-HORIZON, Better Employment opportunities for people with disabilities*, (last visited Apr. 2, 1999) <http://europa.eu.int/comm/dg05/esf/en/public/sr_hor/sr_hor.htm> .

45. European Union, *Communication of the Commission on Equality of Opportunity for People with Disabilities, A New European Community Disability Strategy*, (last visited Apr. 2, 1999) <<http://europa.eu.int/comm/dg05/soc-prot/disable/com406/indexen.htm>> .

language in the Children's Convention. It was part of the program that evolved into the Standard Rules. If the best the United Nations can do at the moment is the Standard Rules, they at least communicate *best practices*. And this may be what the structure inaugurated by the Declaration does best: communicate notions of rights and practical ways of advancing them among the states of the world. Maybe the best one can expect is not *super-legislation*, but a *super-internet*.

THE IMPORTANCE OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS IN THE PAST AND FUTURE OF THE UNITED NATION'S HUMAN RIGHTS EFFORTS

*Elsa Stamatopoulou**

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I. INTRODUCTION

After fifty years since the adoption of the Universal Declaration of Human Rights [hereinafter UDHR] it is legitimate to ask whether the UDHR is at the root of all the positive international action in the last five decades. At the root of these developments were, of course, the suffering and the struggles of people. But, the UDHR was a breakthrough and a revolution in international relations and has remained a continuing source of inspiration since 1948. It is a living document in United Nations practice, by now part of international customary law. The United Nations has, through its history, held countries responsible under the high standards of the UDHR, whether they were United Nations member states or not. International human rights standards drafted subsequently had to keep in line with and always draw inspiration from the UDHR. And, yes, in a certain sense we believe that from the UDHR sprang the *by now expanded* net of human rights mechanisms for the promotion and protection of human

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rights, including the institution of the United Nations' High Commissioner for Human Rights.

II. EVALUATION: A HUMBLING PROCESS

The Fiftieth Anniversary of the UDHR we commemorate this year is a unique opportunity for us to evaluate what has been achieved for human rights at the international, regional, national, and local level. The High Commissioner for Human Rights, Mrs. Mary Robinson, has cautioned us to be modest in this evaluation, as, in her words, the results of action on human rights are often quite underwhelming.

Throughout these fifty years, the development of human rights protection mechanisms at the United Nations has been inextricably linked with the organization's efforts to promote human rights. The two approaches have been mutually reinforcing and have created strong human rights constituencies. This process itself has gradually *de facto* depoliticized and enhanced the international mechanisms in the area of human rights.

Today, I will divide my comments into five parts and give the historical perspective of the past half-century. I will first speak about the human rights treaties and treaty-based mechanisms and their significance in the protection and promotion of human rights. I will then refer to the extra-conventional system of protection of human rights. Thirdly, I will refer to the contribution of the World Conference on Human Rights in 1993, which deals with the protection and promotion of human rights. Fourthly, I will speak of the United Nations human rights field presence and their contribution, as well as the recent efforts to integrate human rights in the areas of peace and security, humanitarian issues, and development. Finally, I will outline some of the main challenges ahead in protecting and promoting human rights.

III. TREATY-BASED SYSTEM OF PROTECTION AND PROMOTION OF HUMAN RIGHTS

After the adoption of the Universal Declaration of Human Rights, the United Nations faced the challenge of preparing binding international human rights instruments. One day before the adoption of the Universal Declaration, on December 9, 1948, the General Assembly had already adopted the first binding United Nations Human Rights treaty, the Convention Against Genocide, whose fiftieth anniversary we commemorate this year. The ascending Cold War ideological rift between civil and political rights, on the one hand, and economic, social and cultural rights on the other, had found a happy solution in the inclusion of both families of rights in one unified document, the UDHR; partly thanks to the overwhelming momentum after the tragedies of World War II, and partly thanks to the leadership of Eleanor Roosevelt and others. Yet, this dichotomy was not avoided when it became obvious during the subsequent

two decades that the polarized world around the table was not ready to allow the same fusion when preparing a binding legal instrument. Thus in 1966, the United Nations adopted the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its Optional Protocol. The year before, the United Nations had adopted the Convention on the Elimination of All Forms of Racial Discrimination. These three treaties established the first three human rights monitoring mechanisms in the form of *treaty bodies*, as this type of mechanism is now called, thus correcting what the anti-genocide Convention clearly lacked.

The first treaty bodies were later joined by others and to date there have been three subsequent human rights treaties: The Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Degrading Treatment or Punishment and the Convention on the Rights of the Child.

The Human Rights Committee, the treaty body under the Covenant on Civil and Political Rights, the Committee Against Racial Discrimination (CERD) and the Committee Against Torture (CAT) also examine individual complaints that are submitted, respectively, under the Optional Protocol to the Covenant, Optional Article 14 of the Anti-Racism Convention and Article 22 of the Anti-Torture Convention. Under the above-mentioned treaties, the treaty bodies are expected to make general comments as well, a task which during the Cold War era precluded any formal value judgments or conclusions by the treaty bodies regarding the performance of specific governments after the examination of their reports. The general comments thus consisted of authoritative interpretations by the treaty bodies of the articles of the human rights treaties. This however, changed in the early 1990's as the treaty bodies, one after the other, in addition to adopting interpretative statements to the articles of the conventions, also started the practice of adopting conclusions and recommendations after examining the specific country reports. This, and the increasing acceptance of the role of NGO's as information providers to the treaty bodies, has resulted in an objective system of treaty monitoring. The system has been further strengthened by the adoption of some innovative working methods, including the request for extraordinary or supplementary reports from governments, if circumstances so require, and especially by the linkage between technical assistance and the areas of weakness identified in each country by the treaty bodies. The latter approach, initiated by the Committee on the Rights of the Child, is a fundamental step in the operationalization of human rights. Not only is the United Nation's Programme of Technical Cooperation in the Field of Human Rights expected to respond to areas identified by the treaty bodies, but also other parts of the United Nations are gradually expected to do so.

IV. EXTRA-CONVENTIONAL SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

The original words in Article 1 of the United Nation's Charter setting as one of the United Nation's aims the promotion of human rights, were restrictively interpreted for two and a half decades by the Commission on Human Rights. *Promotion* was definitely seen as softer by comparison to *protection* and, in a polarized ideological environment, the United Nation's Commission on Human Rights had no power to establish any monitoring mechanisms that were protective of human rights.

The breakthrough came in the late 1960's when the situation in southern Africa allowed the Commission to gather a majority view for the creation of the Ad Hoc Working Group on Southern Africa, a group in charge of monitoring the situation in that part of the world. At the same time, the Commission was able to gather adequate political will to establish a procedure for considering, on a confidential basis, gross and systematic violations of human rights in specific countries based on information received from victims, NGO's and others. This procedure became known as "1503 procedure" from the number of the resolution of the Economic and Social Council which established it.

From that time on, the non-governmental actors received official standing at the Commission on Human Rights in that they became recognized information providers about human rights violations. It was quite significant for the United Nations that, virtually during the same period in the late 1960's, the Economic and Social Council officially adopted a procedure that was valid not only in the human rights area, but in the whole economic and social area, of granting consultative status to non-governmental organizations. This procedure, which has been significantly expanded since the global United Nation's conferences of the 1990's, has allowed the significant input of civil society in the development of international human rights norms and mechanisms.

I would also argue that the very recognition of such consultative status for NGO's was obviously a result of the rising strength and significance of the non-governmental part of society and of powerful movements against colonialism, and for democracy and human rights.

These first mechanisms of human rights monitoring and protection were soon followed by the Working Group on Chile in 1974, after the coup against Allende, and, in the late 1970's, by the Working Group on Enforced or Involuntary Disappearances. The 1980's and 1990's were characterized by the establishment of a series of protection mechanisms, both country-specific and thematic. There are, in 1998, seventeen thematic mandates: enforced or involuntary disappearances; arbitrary detention; summary or arbitrary executions; independence of judges and lawyers; torture and cruel, inhuman or degrading treatment or punishment; internally displaced persons; religious intolerance; use of mercenaries as a means of impeding the right to self-determination; freedom of opinion and

expression; racism, racial discrimination and xenophobia; sale of children, child prostitution and child pornography; violence against women; effects of toxic and dangerous products on the enjoyment of human rights; protection of children affected by armed conflict; impact of external debt on human rights; the right to education; the right to development; and fifteen country-specific mandates.

Thousands of complaints are processed by the United Nations under these procedures every year. The methods of work of the Commission's Special Rapporteurs/Representatives and Working Groups consist in collecting and analysing information received by individuals, non-governmental organizations, church groups, opposition groups, and others, conducting country visits, sending urgent action appeals to governments on individual cases, and presenting public reports annually to the Commission on Human Rights and, in many cases, to the General Assembly, with specific conclusions and recommendations.

This methodology of the United Nation's extra-conventional human rights procedures allows for a considerable depoliticization of human rights mechanisms. Thus it is not necessary for the Commission on Human Rights to adopt a specific resolution on a country for this country to appear in the reports of the thematic mechanisms of the Commission, on the basis of information received from NGO's and others.

V. THE CONTRIBUTION OF THE WORLD CONFERENCE ON HUMAN RIGHTS

I will highlight nine main consensus proclamations at the World Conference on Human Rights in 1993 as having added in a significant way to the international protection and promotion mechanisms of human rights:

(1) The universality of human rights: human rights are a legitimate concern of the international community; all human rights must be respected including civil, cultural, economic, political, social; human rights are interrelated and interdependent (forty-five years after the adoption of the UDHR the world came to again view human rights holistically); all states, irrespective of their regional, cultural or political particularities, must respect internationally recognized human rights; call for the universal ratification of human rights treaties;

(2) The right to development is part of fundamental human rights and the High Commissioner for Human Rights, established at the end of 1993 at the admonition of the World Conference, is to promote the right to development, along with the other human rights;

(3) Women's rights are human rights and must be fully integrated in the work of the human rights protection procedures; violence

against women, whether in the public or private sphere, is a human rights issue and states must eliminate cultural or religious practices which violate the human rights of women;

(4) Human rights are linked with peace and thus should be integrated *as appropriate* in United Nations peacekeeping operations;

(5) Development, democracy and human rights are inextricably linked;

(6) Human rights institutions must be strengthened and the United Nations should provide comprehensive assistance in this respect. Human rights education is crucial and the United Nations should proclaim a Decade for Human Rights Education (the General Assembly did so in 1993);

(7) The General Assembly was called upon to consider the establishment of a High Commissioner for Human Rights and did so in 1993, thus adding to the system of protection and promotion of human rights;

(8) The international community was called upon to expedite the establishment of an International Criminal Court; and

(9) The United Nations should substantively increase its resources for human rights.

VI. HUMAN RIGHTS FIELD PRESENCE AND THE INTEGRATION OF HUMAN RIGHTS IN ALL RELEVANT AREAS OF INTERNATIONAL WORK

The peace and human rights areas of the Organization have had an uneasy relation over the decades, with members of the Security Council generally skeptical to formally recognize a role for the Council to intervene and protect human rights. This however, has not been absolute and in the last few years the Council was able to recognize such a role. South Africa's Apartheid and the protection of the Kurds in Iraq are two examples.

Since the 1993 World Conference on Human Rights and with the establishment of the post of High Commissioner for Human Rights in 1994, the operationalisation of human rights in the field has taken on a new meaning. The rapidly growing number of human rights field presences (including operations and offices), from zero in 1991 to twenty-two in 1998 speaks for itself. It is a clear indication that states are encouraging each other to refrain from committing human rights violations and that, if violations persist, the international community is ready to reach out and

witness, through the eyes of independent monitors, any situation which would endanger internationally accepted standards of human rights.

Such field presences which are established with the agreement of the country concerned, represent yet another way of ensuring compliance with international human rights standards by governments. There are several types of human rights field operations, offices and presences. Field operations may have technical cooperation components which provide assistance in revising national legislations, establishing national human rights institutions or training of police, judges and prosecutors, and/or monitoring components, by which human rights monitors observe the situation of human rights in the country. Frequently, the presence involves international human rights monitors, whether they report directly to the High Commissioner for Human Rights or to a special rapporteur mandated by the Commission on Human Rights to study the situation in the country concerned.

Human rights field presences have had a positive effect in the 1990's, including in the prevention of conflict.

The provision of technical assistance in the field of human rights has been another concrete way in which to operationalise human rights. The Office of the High Commissioner has been increasing its activities at a national level, providing assistance in training law enforcement officials, revising national legislation or reforming the justice system, with a view to creating strong national structures which both support and monitor the actions of this state.

In addition to human rights field activities carried out by the Office of the High Commissioner for Human Rights directly, as a result of the Secretary-General's reform proposal for the mainstreaming of human rights throughout the system, many other United Nations bodies and agencies also "do human rights." In effect, the integration of human rights in all relevant aspects of the work of the United Nations system has become one of the main tasks of the High Commissioner and her Office. It is encouraging to note that, for example, memoranda of understanding have been signed with the United Nations Development Programme (UNDP) and the United Nations Population Fund (UNFPA), in order to concretely pave the way for human rights in development and population activities. A growing trend in the field of United Nations activities in promoting development is the move towards a *rights-based approach*, currently pioneered by UNICEF.

Another prime example of operationalising human rights is the inclusion of human rights components within the United Nations' peacekeeping mission. These missions have increasingly complex and multidimensional characters, which may include civil affairs, humanitarian, political, as well as human rights components.

Gender and human rights are now the two cross-cutting themes in the four Executive Committees established by the Secretary-General which have been functioning since April 1997: the Executive Committee on Peace

and Security, the Executive Committee of the United Nations Development Group, the Executive Committee on Humanitarian Affairs and the Executive Committee on Economic and Social Affairs.

The right to development is a high priority of the High Commissioner and recently the EC-UNDG decided to establish a Working Group on the Right to Development in order mainly to incorporate this right in the UN Development Assistance Framework (UNDAF).

VII. SOME OF THE MAIN CHALLENGES IN THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

I will outline six major challenges:

(1) The implementation of international human rights norms starting from the UDHR remains the paramount core challenge.

(2) The full integration of economic and social rights in the UN's human rights mechanisms and in all countries' approach to human rights.

(3) The full integration of the human rights of women in the international human rights mechanisms of protection and promotion.

(4) The integration of human rights in the peace and security areas of the United Nations, as well as regionally and nationally, remains a major challenge.

(5) The extremely urgent challenge of making private economic actors accountable for the violation of human rights needs to be addressed in the present climate of globalization of the economy. Today, we can't speak about human rights without addressing globalization, the weakening of the state, and the accountability of non-State actors.

(6) Finally, I believe that in the same way that human rights movements around the world worked for the development of international human rights mechanisms that now stand on their own, irrespective of the surrounding ideological trends, civil society must continue being mobilized for the defense of human rights. Without solid constituencies, even strong institutions fall in disarray and wither away. Human rights education, in the broadest sense of the term, must systematically penetrate each society, whether at school, in the community, in the family, in professional settings or otherwise. The creation of a human rights culture in which everybody participates, beyond divisive

ideologies, is the ultimate guarantor of human rights and of the vision of the UDHR.

THE NEGLECTED PILLAR: THE "TEACHING TOLERANCE" PROVISION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

*Stephanie Farrior**

As we celebrate the fiftieth anniversary of the Universal Declaration of Human Rights¹ this year, I would like to take particular note of the first of the core human rights treaties developed since adoption of the Universal Declaration, the International Convention on the Elimination of All Forms of Racial Discrimination.² Adopted in 1965 by unanimous vote of the United Nations General Assembly, the Convention was followed in 1966 by adoption of the two Covenants: the Covenant on Economic, Social and Cultural Rights,³ and the Covenant on Civil and Political Rights.⁴ As other writers have pointed out, the Race Convention soon became the most widely ratified of the core human rights treaties. It was only in 1993 that it was passed in number of ratifications by the Convention on the Rights of the Child.⁵

One reason the Racial Discrimination Convention had such widespread support is that many states viewed it as being primarily a statement against apartheid; others saw it as targeting both apartheid and colonialism. But they did not view it as being applicable, or even needing application, within

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1. Universal Convention of Human Rights, Dec. 10, 1948, G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948).

2. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, G.A. Res. 2106A (XX), U.N. GAOR, 660, U.N.T.S. 195, *entered into force* Jan. 4, 1969.

3. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No.16, U.N. Doc. A/6316, 999 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

4. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Dec. 16, 1966, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

5. Convention on the Rights of The Child, U.N. Doc. A/RES/44/49, 28 I.L.M. 1448 (1989), *entered into force* Sept. 2, 1990. As of this writing, the Child Convention has been ratified by every state in the world except Somalia, which has no functioning government, and the United States.

their own territory. The Committee on the Elimination of Racial Discrimination has seen to it to disabuse states of that notion when reviewing their periodic reports,⁶ and the change of government in South Africa has forced some states to finally acknowledge that racial discrimination is a problem of global dimensions.

The Convention addresses discrimination on the basis of "race, color, descent or national or ethnic origin."⁷ Discrimination on these grounds is what lies at the foundation of many other human rights violations. This is amply evident, for example, in the report that Amnesty International issued in October at its launch of a year-long, world-wide campaign on human rights violations in the United States.⁸ It is significant that not only conscious but also unconscious discrimination falls within the purview of the Convention, whose definition of "discrimination" includes measures that have the "purpose or effect" of nullifying or impairing the full enjoyment of human rights.

Despite the pervasiveness of racial discrimination in the United States and elsewhere in the world, the textbooks used to teach international human rights law in the United States pay scant attention to the Race Convention. Often, the only mention of the Convention is in a list of existing human rights treaties. This inattention is why I organized this panel: to help bring attention to an important treaty and its untapped potential.⁹

6. See, e.g., CERD, General Recommendation II (Fifth session, 1972), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 1 at 60 (1994).

7. International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1.

8. See Amnesty International, UNITED STATES OF AMERICA: RIGHTS FOR ALL (1998). For the Amnesty International press release launching the campaign against human rights violations in the United States, see <http://www.amnesty.org.uk/news/press/releases/6_october_1998-0.shtml>.

9. The other speakers on the panel were: Prof. Lisa Crooms of Howard Law School, speaking on the intersection of race and gender; Prof. Crooms' important work in this area is contributing to the integration of a gendered perspective into the work of all human rights treaty bodies; see, e.g., Lisa Crooms, *Indivisible Rights and Intersectional Identities: What Do Women's Rights Have to Do With the Race Convention?*, 40 HOW. L.J. 619 (1997); Douglas Scott, Esq., Director, International Human Rights Law Group Project on "Racial Discrimination: International Obligations and Domestic Strategies," speaking on the Law Groups' project of introducing the Convention to activists in the United States; for more information on the Initiative, contact the Law Group at (202) 822-4600; and Neil Popovic, Esq., of Heller Ehrman White & McAuliffe, and Director, U.N. Program, Earthjustice Fund, addressing how to use the Race Convention to combat environmental racism, a subject on which he has written extensively; see, e.g., *pursuing Environmental Justice With International Human Rights and State Constitutions*, 15 STAN. ENVTL L.J. 338 (1996); *Environmental Racism in the United States and the Convention on the Elimination of Racial Discrimination*, 14 NETHERLANDS QTLY HUM. RIGHTS 277 (1996).

My own remarks focus on one provision of the Race Convention, Article 7, which requires that states take certain steps to combat “the prejudices which lead to racial discrimination.”¹⁰ This is just one of a series of measures set forth in the Convention that are designed to eliminate racial discrimination on the basis of race, color, descent or national or ethnic origin. The Convention specifies that temporary special measures taken to ensure the equal enjoyment of rights, called “affirmative action” in the United States, do not constitute prohibited “discrimination” within the meaning of the Convention (Article 1(4)). The treaty directs governments not only to abolish discriminatory laws and refrain from engaging in discriminatory acts, but also to encourage mass movements to eliminate racial barriers and “discourage anything which tends to strengthen racial division” (Article 2). In addition, states are to take measures in the social, economic, cultural and other fields to ensure adequate development of racial groups in order to guarantee full and equal enjoyment of rights (Article 2(2)).

In a provision recognizing the power of hate propaganda to foster prejudice, states must prohibit hate speech and outlaw organizations that promote racial hatred (Article 4).¹¹ In addition, states must guarantee the right to equal treatment before the law, to security of the person from violence whether at the hand of the state or a private individual, and to equality in such areas as voting, employment, housing schooling and the like (Article 5). Article 6 guarantees effective remedies against and compensation for acts of racial discrimination that violate the Convention. Finally, under Article 7, states are to combat prejudices that lead to racial discrimination, in particular, by adopting measures in the fields of “teaching, education, culture and information.”

We see, therefore, that the drafters of the Convention recognized that laws alone will not suffice in reducing discrimination. It is not that

10. Article 7 provides in full:

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination, and to promoting understanding, tolerance and friendship among nations and racial or ethnical (sic) groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Discrimination, and this Convention.

11. The hate speech provision, Article 4, has received perhaps the most attention among commentators. See, e.g., MICHAEL BANTON, *INTERNATIONAL ACTION AGAINST RACIAL DISCRIMINATION* 202-209 (1996), (pointing out the view that Article 4 is “the key article of the Convention”); Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 *BERKELEY J. INT’L L.* 1, 48-62 (1996); Thomas David Jones, *Article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination and the First Amendment*, 23 *HOW. L.J.* 429 (1980).

legislation plays an unimportant role. As Dr. Martin Luther King, Jr. remarked: "It may be true that morality cannot be legislated, but behavior can be regulated. The law may not change the heart, but it can restrain the heartless."¹² Racial discrimination will not be reduced in the long run, unless "we change the heart." This is what led to the inclusion of Article 7 of the Race Convention, which requires states to take measures to combat prejudices that lead to racial discrimination, as well as measures to promote racial tolerance and understanding.

During the United Nations General Assembly debate in 1963 on the draft Convention, the United Kingdom delegate, Lady Gaitskill, expressed it well when she said she doubted whether legislation alone was a sufficient response to the problem of racial discrimination: "Using legislation by itself was like cutting down a noxious weed above the ground and leaving the roots intact."¹³

Given the importance of destroying the root causes of racism, it is particularly disheartening that Article 7 has been virtually ignored by commentators and states alike. One of the scholars involved in drafting the Convention has no section on Article 7 in his publication giving an article-by-article elaboration on the Race Convention.¹⁴ Natan Lerner's book on the Convention barely mentions Article 7.¹⁵ A book recently published by a member of the Committee on the Elimination of Racial Discrimination, Michael Banton, states the following in the section entitled "The Structure of the Convention": "In Article 1 the term 'racial discrimination' is defined Articles 2-6 list what states parties must do in order to eliminate racial discrimination."¹⁶ In short, he does not seem to consider Article 7 to include any state obligations.

12. Martin Luther King, Jr., *An Address Before the National Press Club, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 99, 100 (James Melvin Washington, ed., 1986).

13. MICHAEL BANTON, *INTERNATIONAL ACTION AGAINST RACIAL DISCRIMINATION* 59 (1996).

14. Egon Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L.Q. 996 (1966). In addition, Theodor Meron's important article, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 A.J.I.L. 283, 297 (1985), makes but a single reference to Article 7 as mentioning "various educational measures." He then points out that CERD "has emphasized, correctly, that '[f]ar from being concerned solely with combating acts of racial discrimination after they have been perpetrated, the national policies of the State parties must also provide for preventive programmes, which seek to remove the sources from which those acts might spring - be they subjective prejudices or objective socio-economic conditions.'" *Id.*, citing 33 U.N. GAOR Supp. (No. 18) at 109, UN Doc. A/33/18 (1978).

15. NATAN LERNER, *THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* (2d ed. 1980).

16. MICHAEL BANTON, *INTERNATIONAL ACTION AGAINST RACIAL DISCRIMINATION* (1996).

A welcome exception to the lack of interest in Article 7 appears in the Hague Academy lectures of George Tenekides, former CERD member. Portions of his lectures on "United Nations Action against Racial Discrimination" are devoted to states parties' obligations under Article 7 of the Convention.¹⁷

The Committee on the Elimination of Racial Discrimination has referred to Articles 4 and 7 as the pillars on which the Convention rests.¹⁸ In doing so, the Committee noted that the Convention aims at "prevention rather than cure" by means of education, "particularly in Article 7, through teaching, information, education and acculturation, to combat prejudices which lead to racial discrimination and to promote understanding, tolerance and friendship among nations and racial or ethnic groups."¹⁹

Given the reservation to the substance of Article 4 entered by the United States when it acceded to the Convention,²⁰ the obligations under Article 7 are all the more important in achieving the goals of the Convention in the United States. Just what are a state's obligation under Article 7, and what led the drafters to include them?

The roots of Article 7 can be traced to Article 26 of the Universal Declaration of Human Rights, which proclaims the right to education. "Education," the Universal Declaration states, "shall be directed to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups"²¹ An identical clause appears in the

17. George Tenekides, *L'Action des Nations Unies Contre la Discrimination Raciale*, in 168 *Recueil de Cours*, Collected Courses of the Hague Academy of International Law 350-57 and 465-66 (1980) (the latter with a section entitled "Mieux vaut prévenir que guérir").

18. See CERD, *Positive Measures Designed to Eradicate all Incitement to, or Acts of, Racial Discrimination, Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4*, U.N. Doc. CERD/2 (1985).

19. *Id.* The Committee also noted the potential educative effect of Article 4 when it added: "But it is also recognized that penal legislation is educative as well as punitive." *Id.*

20. The United States ratified the Convention in 1994, with several reservations including the following:

The Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

140 Cong. Rec. S7634-02 (daily ed. June 24, 1994).

21. An earlier proposal had taken the opposition approach: "Education shall be directed to contain the spirit of intolerance and hatred against other nations and against racial and religious groups everywhere." See Pentti Arajärvi, *Article 26*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY* 408 (Asbjørn Eide et al eds., 1992) [hereinafter UDHR]. This approach was changed to take the positive approach, specifying what education was to

UNESCO Convention Against Discrimination in Education, at Article 5(1).²² Similarly, the Convention on the Rights of the Child provides that

[T]he education of the child shall be directed to . . . the development of respect for human rights and fundamental freedoms, . . . [and] the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.²³

State are not only to ensure access to education, but also “as appropriate, [to] include instruction in minority languages at least at primary, and possibly at secondary levels.”²⁴ This is in part to help preserve minority cultures as well as to promote understanding and tolerance of diverse cultures in the society.²⁵

Article 7 is not directed solely at the education children receive. The Convention specifies four fields in which states parties are to adopt measures to combat prejudice and promote understanding “teaching, education, culture and information.” Guidelines on implementation that explore each of these areas have been developed by CERD in collaboration with UNESCO.²⁶

State reporting on implementation of Article 7 has tended to focus on the education of school children.²⁷ Given this focus, CERD has

promote rather than combat. The elimination of racial discrimination is nonetheless understood to be a goal of Article 26 of the UDHR.

22. Convention Against Discrimination in Education, Mar. 23, 1976, 429 U.N.T.S. 93, entered into force May 22, 1962.

23. Convention on the Rights of the Child, *supra* note 5, art. 29(1).

24. *Joint working paper on article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination*, U.N. Doc. E/CN.4/Sub.2/1998/4, at 41, para. 172 (10 June 1998) [hereinafter *Joint working paper*].

25. See, e.g., *id.* at 25-26, paras. 90-92 (noting “the right of national and ethnic minorities to education in their mother tongues”).

26. U.N. Doc. CERD/C/70/Rev.3 (23 July 1993). See also *Implementation of Article 7 of the Convention*, U.N. Doc. CERD/C/69 (2 June 1980) (presenting survey of legal literature on and states parties’ implementation of Article 7); *Draft Guidelines Proposed by UNESCO*, U.N. Doc. CERD/C/69/Add.1 (9 April 1981) (detailed guidelines for states parties to use in reporting on measures taken under Article 7), adopted by CERD in 1982. U.N. Doc. CERD/C/SR.570 (16 March 1982) at 201. CERD has issued a General Recommendation on the implementation of Article 7, but rather than specifying the types of steps states should take, it simply implores states to report on measures they have taken. CERD, *General Recommendations V* (15th sess. 1977), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/Gen/1/Rev.1 at 62 (1994).

27. See *Joint working paper*, *supra* note 24, at 15, paras. 42-48; “Most of the information is confined to school teaching and rarely includes other categories such as law

emphasized the importance of the education of teachers with Article 7 in mind, so that they might be prepared to meet their proper role in educating against prejudice. CERD clearly recognized the important role teachers play in shaping opinions when it referred to the need to educate "teachers and other opinion leaders."²⁸

As for the content of education, CERD has asked states to make more concerted efforts to promote intercultural and multicultural education.²⁹ Teaching of young people outside the classroom setting is also important. One area in which this has come up is in the review of states' periodic reports, when the Committee has asked states parties whether they have made any effort to re-educate young adults imprisoned for committing racist acts, and whether these peoples' behavior is monitored after release.³⁰

Despite the emphasis on education of young people, states should also be required to fulfil their obligations under the "teaching" and "education" segments of Article 7 through the education of others who hold power over individuals in society, so that they do not exercise that power in a discriminatory manner: police, judges, prosecutors, administrators and enforcers of regulations, and the like. CERD's General Recommendation on the training of law enforcement officials in the protection of human rights reflects this aspect of Article 7.³¹ "[I]n the implementation of article 7," CERD notes, states parties are "to review and improve the training of law enforcement officials so that the standards of the Convention as well as the Code of Conduct for Law Enforcement Officials (1979) are fully implemented." States are also urged to include information on implementation of this recommendation in their periodic reports.

The third area listed in Article 7 in which states are to act to promote tolerance and combat prejudice is in the field of culture. The inclusion of this category demonstrates an understanding of the impact on attitudes of such activities as theater performances, shows, concerts, cultural events, sports competitions, films and the like. In its guidelines on

enforcement officials, magistrates, prosecutors, public figures, institutions, out-of-school activities, etc." *Id.* para. 46.

28. *Id.* at 12, para. 32 (referring to seminars "for education and training experts. . . aimed at the development of educational materials and training courses for teachers and other opinion leaders on eliminating prejudice and fostering tolerance").

29. *Id.* at 15. In addition, CERD has indicated its support for the UN General Assembly resolution inviting UNESCO "to expedite the preparation of teaching materials and teaching aids to promote teaching, training, and educational activities on racism and racial discrimination, with particular emphasis on activities at the primary and secondary levels of education." *Id.* at 10, para. 22.

30. *See, e.g.*, U.N. Doc. A/48/18 (1993) (reviewing periodic report of Germany).

31. CERD, General Recommendation XIII on the training of law enforcement officials in the protection of human rights (Forty-second session, 1993), in *Compilation of General Comments and General Recommendation Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 67 (1994).

implementation, CERD has indicated that states should report on "the role of institutions or associations working to develop national culture and traditions to combat racial prejudices" and to promote intra-national and inter-cultural understanding and tolerance.³² To improve what it has noted are rather paltry efforts to implement this section of Article 7, CERD has called for "strategies involving different channels of culture and information," including "the direct and active involvement of ministries for education, social affairs, health care [and] justice."³³

The fourth field in which states are to take measures to combat prejudice and promote understanding is in the field of information, which has been interpreted to be the media. CERD has urged states to "encourage. . . the mass media to take into account in their wide-ranging activities the provisions of article 7, including educational action and other programmes against racism, racial discrimination, xenophobia, anti-Semitism and intolerance."³⁴ Among other things, CERD would have states parties encourage the involvement of journalists from minority groups and communities in the mass media. In a recent report, CERD quoted a United Nations' Programme of Action targeting racism and xenophobia in which the General Assembly recommended

that Member States encourage the participation of journalists and human rights advocates from minority groups and communities in the mass media. Radio and television programmes should increase the number of broadcasts produced by and in cooperation with racial and cultural minority groups. Multicultural activities of the media should also be encouraged where they can contribute to the suppression of racism and xenophobia.³⁵

The United States would meet its obligation under the "information" section of Article 7 through programs such as those of the Federal Communications Commission (FCC) that would provide minority set-asides for broadcast license ownership. In implementing this and other affirmative action programs, the FCC determined that by increasing ownership among minorities, it would be promoting viewpoint diversity.³⁶ However, each of

32. U.N. Doc. CERD/C/70/Rev.3 (23 July 1993) at 7.

33. *Id.* at 42, para. 176.

34. *Joint working paper, supra* note 24, at 42, para. 177.

35. *Id.* at 13, para. 33.

36. In one such program, the FCC would take race and gender (as well as other factors, such as potential licensee's character, and involvement in management of the station) into account when deciding to whom to grant a broadcast license. Leonard M. Baynes, *An Investigation of the Alleged "White Man's Burden" in the Implementation of an Affirmative Action Program in Telecommunications Ownership*, RUTGERS L.J. (1999). In implementing these affirmative action programs, the FCC observed:

its affirmative action programs has been repealed, overturned, or held in abeyance, in large part because the Supreme Court heightened the standard of review necessary to determine these programs' constitutionality.³⁷

As stated earlier, the United States entered a reservation to the substance of Article 4, the "hate speech" provision, when it acceded to the Race Convention. One of the main arguments put forward in the United States for opposing the regulation of hate speech is that the response should not be penalization of "bad" speech but instead, should be "more speech" in the so-called marketplace of ideas. Without access to that marketplace, however, one cannot counter with more speech.³⁸ To fulfil its obligations under the Convention, the United States has a particular obligation to ensure access to that marketplace through measures adopted under Article 7 so that speech targeting racial prejudice is available in the media.

I would like to end with a brief recommendation to the government of the United States. Having ratified the Race Convention, the United States should be sure not to ignore its obligations under Article 7, but instead should implement it by developing, as recommended by CERD, "an action-oriented national plan" on education "with an emphasis on racial discrimination and the provisions of Article 7."³⁹ The national plan should require the adoption of curricula in the classroom that educate against racial prejudice; make similar education part of the training of teachers "and other opinion leaders," and include among those opinion leaders the media, given the powerful role the media play in shaping perspectives and hence opinions in today's society. The United States should also be sure to include in its first report to CERD those measures it has taken to implement its obligations under Article 7, as well as those measures it plans to take. Given the United States reservations to Article 4 on hate speech, a failure to implement the other pillar of the Convention, Article 7, could render United States ratification of the treaty nearly meaningless.

Full minority participation in the ownership and management of broadcast facilities results in more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum. And of course, we have long been committed to the concept of diversity of control because "diversification ... is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities.

Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C. 2d 979 (1978), cited in Baynes, *id.*

37. See *Metro Broadcasting v. FCC*, 497 U.S. 564, 565; *Adarand v. Peña*, 515 U.S. 200 (1995).

38. For further analysis of this concept, see Baynes, *supra* note 36.

39. *Joint working paper*, *supra* note 24, at 41, para. 171.

LAW OF THE SEA DISPUTE SETTLEMENT: PAST, PRESENT, AND FUTURE

*John E. Noyes**

For some, the vision of international courts able to issue binding rules of decision and clarify the meaning of rules of international law has had great pull. For example, Hersch Lauterpacht urged that the International Court of Justice (hereinafter ICJ) be given wide powers, and argued that international courts and tribunals should treat even problems involving the vital interests of states as justiciable.¹ With respect to the law of the sea in particular, some have proposed that an international court exercise broad jurisdiction. In Arvid Pardo's 1971 draft treaty, which proposed an intergovernmental institution to govern ocean spaces, an International Maritime Court was to play a central role.² This Court was to have jurisdiction over individuals and corporations, as well as states, "with respect to matters . . . in International Ocean Space."³

Although no general Ocean Space institution emerged from the Third United Nations Conference on the Law of the Sea (hereinafter UNCLOS III), the 1982 United Nations Convention on the Law of the Sea⁴ does contain innovative provisions concerning dispute settlement. Even while denying the need for an intergovernmental organization with broad powers, some states at UNCLOS III favored a strong third-party system of dispute

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1. See, e.g., Hersch Lauterpacht, *Some Observations on the Prohibition of Non Liqueur, and the Completeness of Law*, in 2 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCHE LAUTERPACHT 213 (E. Lauterpacht ed., 1975). For a summary of Lauterpacht's views, see MANFRED LACHS, *THE TEACHER IN INTERNATIONAL LAW* 113-15 (2d rev. ed. 1987).

2. Draft ocean space treaty: Working paper submitted by Malta, U.N. Doc. A/AC.138/53 (1971), reprinted in *Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction*, U.N. GAOR, 26th year, Supp. No. 21, at 105-93, U.N. Doc. A/8421 (1971), and in STAFF OF SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, *REPORT ON THE UNITED NATIONS SEABED COMMITTEE, THE OUTER CONTINENTAL SHELF AND MARINE MINERAL DEVELOPMENT* 168 (Comm. Print 1971) [hereinafter *Draft Ocean Space Treaty*]. See Louis B. Sohn, *Managing the Law of the Sea: Ambassador Pardo's Forgotten Second Idea*, 36 COLUM. J. TRANSNAT'L L. 285, 291-92 (1997).

3. Draft Open Space Treaty, *supra* note 2, art. 161.

4. *Opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), 21 I.L.M. 1261 (1982) [hereinafter *Law of the Sea Convention*].

settlement as a means to help reinforce Convention norms.⁵ States favoring a strong dispute settlement system, states expressing skepticism about submitting disputes to third-party fora, and states seeking to have particular issues exempted from compulsory third-party dispute settlement engaged in complicated negotiations.⁶ A compromise, under which many disputes may be subject to compulsory binding arbitration or adjudication, emerged from UNCLOS III. My remarks first briefly outline this compromise dispute settlement system, and then analyze some of the factors bearing on the current and future uses of the Convention's third-party mechanisms.

The dispute settlement provisions of the Law of the Sea Convention are found in the text of the Convention itself, rather than in an optional protocol.⁷ The Convention calls first for informal efforts at resolving disputes. Should these fail, States Parties have a choice among four third-party dispute settlement mechanisms—arbitration, special arbitration, the ICJ, and a new International Tribunal for the Law of the Sea (hereinafter ITLOS)—to handle many disputes.⁸ If the parties to a dispute do not choose the same forum, or if they fail to make any selection, an arbitral tribunal usually has residual compulsory jurisdiction.⁹ The ITLOS, rather than an arbitral tribunal, has residual compulsory jurisdiction to order the prompt release of vessels and their crews under Article 292¹⁰ or to order provisional measures,¹¹ though in the latter case only until an arbitral tribunal (or some other forum acceptable to the parties) can be constituted. Although States Parties cannot make reservations to the Convention to avoid its dispute settlement provisions, Articles 297 and 298 do contain limitations on and optional exceptions to the requirement of binding third-party adjudication or arbitration. These limitations and exceptions affect several categories of sensitive disputes, involving, for example, military

5. The United States, for example, favored a strong dispute settlement system. See Louis B. Sohn, *U.S. Policy Toward the Settlement of Law of the Sea Disputes*, 17 VA. J. INT'L L. 9 (1976).

6. For the negotiating history of the dispute settlement provisions of the Law of the Sea Convention, see A.O. ADEDE, *THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A DRAFTING HISTORY AND COMMENTARY* (1987); 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY (Shabtai Rosenne & Louis B. Sohn eds., 1989) [hereinafter 5 COMMENTARY].

7. Law of the Sea Convention, *supra* note 4, arts. 74(2), 83(2), 151(8), 159(10), 162(2)(u)-(v), 165(2)(i)-(j), 186-191, 264, 279-99, 302; Annex III, arts. 18(1)(b), 21(2); Annex V; Annex VI; Annex VII; Annex VIII; Annex IX, art. 7. See also *infra* note 13. Cf. Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, Apr. 29 1958, 450 U.N.T.S. 169 (ratified by 37 states).

8. Law of the Sea Convention, *supra* note 4, art. 287. Special arbitration before panels of experts is available in cases involving fisheries, protection of the marine environment, marine scientific research, and navigation. See also *id.* art. 282.

9. See *id.* art. 287(3), (5).

10. See *id.* art. 292(1).

11. See *id.* art. 290(5).

activities, maritime boundaries, and aspects of coastal state jurisdiction in the exclusive economic zone (hereinafter EEZ) concerning living resources and marine scientific research.¹² Separate provisions apply to the settlement of disputes relating to mining activities in the sea bed beyond national jurisdiction, with respect to which a Sea-Bed Disputes Chamber of the Law of the Sea Tribunal is to play the primary role.¹³

The Law of the Sea Convention, along with its compulsory third-party dispute settlement provisions, entered into force in November 1994. The Law of the Sea Tribunal elected its twenty-one judges in 1996, and in 1997 handed down its first decision, in an Article 292 prompt release case.¹⁴ Earlier this year the Tribunal issued an order concerning a provisional measure,¹⁵ and it is currently seized with a related case in which the applicant state has raised issues of freedom of navigation, hot pursuit, and the scope of a coastal state's power to enforce its customs regulations.¹⁶

During the four years since the Convention has entered into force, states have not brought many new law of the sea cases to international courts or arbitral tribunals. Before the Convention entered into force, the ICJ and arbitral tribunals had decided several law of the sea cases, many of them brought via special agreement.¹ The baseline, as it were, of judicial and arbitral activity relating to the law of the sea has for many years been "some cases," even absent a widely adopted treaty establishing a system of compulsory jurisdiction. I do not mean that the Convention's third-party dispute settlement system has had no effect. I doubt, for example, that the first case decided by the Law of the Sea Tribunal would have been submitted to an international court without that system. But the number of

12. Some of the disputes falling within these limitations and exceptions are subject to a system of compulsory conciliation. See *id.* arts. 297(2)(b) & (3)(b), 298(1)(a), Annex V, arts. 11-14.

13. See *id.* arts. 186-91. The Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 Dec. 1982, July 28, 1994, U.N. Doc. A/RES/48/263, 33 I.L.M. 1309 (1994), which modifies some of the technical and institutional features of the Convention's regime for mining the deep sea bed that developed states had found problematic, and which is to be interpreted and applied together with Part XI as a single instrument, contains a few provisions on dispute settlement. See *id.* Annex, §§ 3.12, 6.1(f)-(g), 6.4, 8.1(f), 8(2). None of these provisions affects the basic structure of dispute settlement under Part XI.

14. See *The "M/V Saiga" (Saint Vincent and the Grenadines v. Guinea)*, <http://www.un.org/Depts/los/judg_1.htm> (1997).

15. *The "M/V Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea) (Request for Provisional Measures)*, <<http://www.un.org/Depts/los/ord1103.htm>> (1998).

16. The pending case, the Article 292 decision, and the provisional order all arose from the same incident. See ITLOS/Press 17, Oct. 19, 1998; ITLOS/Press 13, Feb. 28, 1998.

17. The ICJ and its predecessor, the Permanent Court of International Justice, have handed down some 40 decisions that directly involve the law of the sea. See Jonathan I. Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L L. 69, 70 n.13 (1996); Mark W. Janis, *The Law of the Sea Tribunal, in INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY* 245, 247-48 (Mark W. Janis ed., 1992).

law of the sea cases is far less than, for example, the number of international trade disputes submitted to WTO panels, which have rendered over 100 binding interstate decisions since 1994.¹⁸

What factors explain this relative lack of interstate law of the sea cases? First, many sensitive disputes have been exempted from the compulsory dispute settlement requirement under Articles 297 and 298. In such disputes, a state seeking a public third-party forum in which to air its grievances may well find none available. Second, unlike the GATT/WTO or the European human rights systems, the law of the sea has seen no experimentation with widely accepted multilateral treaty-based dispute settlement mechanisms.¹⁹ Although states have found recourse to third-party procedures useful in particular law of the sea disputes, they have not had the opportunity to try out a compulsory dispute settlement mechanism established in a widely accepted convention, or perhaps to try out different mechanisms for different types of disputes. There has been no time, following a period of use of a dispute settlement system, to discuss possible reforms and perhaps to reach consensus on the need for incremental moves toward a more formal system.

A third possible reason for the lack of many new interstate cases could relate to concerns that no one international court has exclusive authority to

18. For an overview of activity by the WTO Dispute Settlement Body, see WTO, Overview of the state-of-play of WTO disputes, <<http://www.wto.org/wto/dispute/bulletin.htm>>. For discussion of the binding nature of WTO panel decisions, see John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstanding on the Nature of Legal Obligation*, 90 AM. J. INT'L L. 60 (1997).

19. Before January 1, 1995, GATT panel decisions could be blocked by the disadvantaged state. The WTO's Dispute Settlement Understanding, Agreement Establishing the World Trade Organization, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, in General Agreements on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, 33 I.L.M. 1125, 1216 (1994), removes that blocking option, establishes a firm timetable for cases, and creates a new appellate procedure. The significant WTO caseload has led some to argue in favor of an even more formal court with independent judges, rather than panelists selected by the parties, to decide trade disputes. See, e.g., *Presentation Summary and Comments*, 32 INT'L LAW. 883, 891 (1998) (comments of John Kingery); Alan Wm. Wolff, *Reflections on WTO Dispute Settlement*, 32 INT'L LAW. 951, 955 (1998).

Another example of an active, evolving international third-party dispute settlement system is the one created by the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. In the early years of this system, the European Commission on Human Rights screened out most cases as inadmissible, and some states refused to accept two optional Convention clauses involving (1) a right of individual petition to the Commission and (2) acceptance of the jurisdiction of the European Court of Human Rights. The system evolved, however, with all member states eventually accepting the optional clauses and the Court's caseload continually increasing. On Nov. 1, 1998, Protocol No. 11 to the Convention entered into force; this Protocol eliminates the Commission, restructures the Court to accommodate its significant caseload, and allows individuals to bring cases directly to the Court. See generally MARK JANIS ET AL., *EUROPEAN HUMAN RIGHTS LAW* (1995).

interpret the Law of the Sea Convention. If a state wants a definitive interpretation of some Convention rule, might it be discouraged from bringing a case to one forum because it recognizes the risk that different tribunals may interpret the rule in other cases, and the concomitant risk that inconsistent jurisprudence could develop? In my opinion, the concern that the variety of fora available to hear law of the sea disputes could damage the development of consistent jurisprudence—a point some have raised as a systemic criticism of the Convention²⁰—is probably overblown.²¹ It also seems more likely that, on balance, the availability of multiple fora will increase the chances that states could find a forum with a composition and procedure they like. Any state that has a dispute with another state must determine that pursuing a claim in some forum will not unacceptably upset friendly relations or disrupt negotiations on other, unrelated matters. If a variety of fora are available, however, the probability increases that at least one acceptable forum will be found, either for filing a claim unilaterally or for pursuing a ruling that, at the time the case is brought, all the parties to the dispute desire.

The extent to which the number of interstate cases involving law of the sea disputes will increase remains unclear. Certainly, as in the past, many cases will continue to be brought to a court or tribunal by special agreement.²² It may well be, however, that the Convention's dispute settlement provisions will have their main impact not in terms of new case law, but behind the scenes. For example, these provisions may deter some states from making outrageous unilateral claims that could be legally challenged before a third party, and may influence the conduct of interstate negotiations.

Although my focus thus far has been on the application of the Law of the Sea Convention's dispute settlement provisions to states, the Convention does not limit the jurisdiction of the various courts and tribunals to interstate disputes (although the Statute of the International Court of Justice provides that "[o]nly states may be parties in cases before the Court"²³). The fact that the Convention's dispute settlement mechanisms are in some situations open to

20. For discussion of some of the criticism, see Jonathan I. Charney, *Third Party Dispute Settlement and International Law*, 36 COLUM. J. TRANSNAT'L L. 65, 76-89 (1997).

21. Although different tribunals may in theory develop different legal interpretations of rules of law of the sea, one tribunal may gain a virtual monopoly over some types of cases. For example, the ITLOS, with its residuary compulsory jurisdiction under Article 292, should attract virtually all prompt releases cases. Furthermore, one should not necessarily assume that different tribunals will interpret an international law rule differently. The judges on one court or tribunal may well rely on decisions of another tribunal (although international courts and tribunals may place more reliance on their own prior decisions and on ICJ decisions than on decisions of other tribunals). See *id.* at 72-73.

22. See, e.g., INTERNATIONAL COURT OF JUSTICE PRESS COMMUNIQUÉ 98/35, Nov. 2, 1998 (Indonesia and Malaysia bring to the ICJ, by special agreement, a dispute concerning sovereignty over two islands in the Celebes Sea).

23. Statute of the International Court of Justice, art. 34(1), June 26, 1945, 59 Stat. 1031, T.S. No. 993.

non-state entities may lead to increased use of third-party fora. It is true the Convention provides no general individual right of access to courts or tribunals for wide categories of disputes. Such a right of access is a feature of some of the busiest international courts and tribunals. This lack of assured individual access is not surprising, given the historical period in which the Law of the Sea Convention was negotiated, and given the fact that the international law of the sea has not traditionally been conceptualized in terms of human rights.²⁴ But the Convention does provide several options for non-state entities to be parties to cases. Some of these options apply to disputes related to sea-bed mining contracts and other disputes arising under Part XI.²⁵ In addition, states may authorize individuals to pursue prompt release applications under Article 292.²⁶ Furthermore, because the Convention's dispute settlement provisions apply generally to "States Parties," and because the definition of "States Parties" encompasses some non-state entities, such entities may be parties in a wide range of cases.²⁷ Finally, the Statute of the Law of the Sea Tribunal could be read to allow the ITLOS to exercise jurisdiction over cases submitted pursuant to an "agreement" to which non-state entities are parties.²⁸ If the Statute were to be construed in this manner, port states and ship owners could, for example, enter into agreements to refer to the Tribunal disputes about the application of

24. That the international law of the sea has not traditionally been viewed primarily in terms of individual human rights does not mean that the Law of the Sea Convention ignores such rights. Indeed, as Professor Oxman has demonstrated, numerous Convention provisions recognize and protect civil and economic rights. See Bernard H. Oxman, *Human Rights and the United Nations Convention on the Law of the Sea*, 36 COLUM. J. TRANSNAT'L L. 399 (1997). Furthermore, courts or tribunals with jurisdiction under the Law of the Sea Convention are directed to apply not only the Convention, but "other rules of international law not incompatible with" it. Law of the Sea Convention, *supra* note 4, art. 293. These "other rules" could, in appropriate cases, include generally accepted human rights norms.

25. See Law of the Sea Convention, *supra* note 4, arts. 187(c)-(f), 190.

26. See *id.* art. 292(2) (suggesting States Parties may authorize private parties to make applications on behalf of States Parties in Article 292 prompt release proceedings); Bernard H. Oxman, *Observations on Vessel Release under the United Nations Convention on the Law of the Sea*, 11 INT'L. J. MARINE & COASTAL L. 201 (1997).

27. The definition of "States Parties" covers, for example, the European Union. See Law of the Sea Convention, *supra* note 4, arts. 1(2)(2), 305(1).

28. According to the Statute of the ITLOS, the Tribunal may exercise jurisdiction, *inter alia*, over "all matters specifically provided for in any ... agreement which confers jurisdiction on the Tribunal," *id.* Annex VI, art. 21, and entities other than States Parties have access to the Tribunal "in any case submitted pursuant to" any such agreement. *Id.* Annex VI, art. 20. As an annex to the Convention, the Statute of the ITLOS is considered an integral part of the Convention. See *id.* art. 318. However, the general jurisdictional provision of the Convention, Article 288, refers to jurisdiction pursuant to "international agreements," *i.e.*, treaties, rather than "agreements," and the Tribunal has not yet indicated that it will accept jurisdiction over non-seabed-mining disputes submitted pursuant to agreements to which natural or juridical persons are parties. See generally 5 COMMENTARY, *supra* note 6, ¶¶ A.VI.112-128.

standards of the International Maritime Organization or about Memoranda of Understanding on Port State Control.²⁹

How many cases the various fora referred to in the Law of the Sea Convention actually hear will depend in large part on how they conduct their business. For example, the ITLOS can, if it chooses, do much to build a track record that deserves respect and attracts business. The question of what the Tribunal should do to achieve these goals is not one that should be answered in the abstract. The functions it performs in, say, a maritime delimitation case will be far different from its functions in a sea-bed mining dispute involving a challenge to regulations of the Sea-Bed Authority. But let me suggest briefly a few factors that may be relevant to the acceptance of the Tribunal. The Tribunal already has set itself up as a body that can act quickly. It handed down its first decision only three weeks after the application was filed. This efficiency may help it to attract cases and to compete effectively with other available fora. The Tribunal also has established several chambers, including a Chamber on Fisheries Matters, a Chamber on the Marine Environment, and a Chamber of Summary Procedure, that are available at the request of parties to a dispute.³⁰ Parties thus may choose fora able to act more quickly than the full Tribunal, or fora whose members have a particular subject-matter expertise.

Sometimes the Tribunal's natural desire to attract business may conflict with the goal of rendering decisions that will be widely respected. For example, in its first decision, the Tribunal ordered a coastal state to release a detained foreign flag vessel and its crew on the posting of a reasonable bond. The Tribunal set a low burden—an "arguable or sufficiently plausible" standard—that the applicant flag state had to satisfy with respect to one essential allegation in order for the Tribunal to rule in its favor.³¹ This standard may help to attract some submissions from states whose flag vessels have been detained by a coastal state. But, the standard arguably does violence to the balance the Convention strikes concerning the scope of permissible third-party oversight of coastal state activities in their EEZs, making it too easy to subject coastal state detentions of foreign flag vessels to international judicial review.³² In general, the Tribunal is most likely to gain support among its various audiences—international institutions, private parties, states, and national courts—called on to implement prompt release orders or other rulings if it does

29. *E.g.*, Memorandum of Understanding on Port State Control in the Caribbean Region, Feb. 9, 1996, 36 I.L.M. 231 (1996).

30. *See* Law of the Sea Convention, *supra* note 4, Annex VI, art. 15; International Tribunal for the Law of the Sea, Rules of the Tribunal, arts. 28-31, ITLOS/8, Oct. 28, 1997, <http://www.un.org/Depts/los/rules_e.htm>; Oceans and the Law of the Sea: Law of the Sea, *Report of the Secretary-General*, 52d Sess., Agenda Item 39, ¶ 37, U.N. Doc. A/52/487 (1997).

31. *See* The "M/V Saiga" (Saint Vincent and the Grenadines v. Guinea), ¶ 51, <http://www.un.org/Depts/los/judg_1.htm> (1997).

32. I develop this theme in John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L.J. (forthcoming 1998).

not assert bold and innovative interpretations of the Convention, and if it exerts its authority only incrementally.³³

The scope of application of the third-party dispute settlement provisions of the Law of the Sea Convention will be broadened if they are incorporated by reference in other treaties. The 1995 Straddling Stocks Agreement already uses this technique.³⁴ Disputes concerning the interpretation or application of that Agreement can be pursued through the dispute settlement mechanisms of the Law of the Sea Convention. Thus, when that Agreement enters into force, each party to it and the United States is already a party—will be subject to the third-party dispute settlement mechanisms of the Law of the Sea Convention. This is true even for states (such as the United States) that have not accepted the 1982 Convention. Future bilateral and regional treaties also could authorize recourse to the dispute settlement mechanisms of the 1982 Law of the Sea Convention. Alternatively, of course, a treaty may simply confer jurisdiction on one particular tribunal, such as the Law of the Sea Tribunal.³⁵

In sum, the third-party dispute settlement provisions of the Law of the Sea Convention may lead to a gradual increase in judicial and arbitral activity, and thus to some important new contributions to the international law of the sea. The International Tribunal for the Law of the Sea, in particular, could see an increase in business if it acts with impartiality and demonstrates its ability to render well-reasoned decisions quickly and efficiently. Development of such a record could persuade states and other entities to use the Tribunal even when the Convention itself does not give the Tribunal residuary compulsory jurisdiction. States may refer disputes to the Tribunal via special agreements or compromissory clauses in treaties, and some non-state entities might also regard the Tribunal as their preferred dispute settlement forum.

33. See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997); Mark W. Janis, *The European Court of Human Rights*, in INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 105, 108-14 (Mark W. Janis ed., 1992).

34. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature* Dec. 4, 1995, arts. 7(4)-(6), 27-32, A/CONF.167/37, 34 I.L.M. 1542 (1995) (not yet in force).

35. E.g., Draft Agreement on Free Transit Through the Territory of Croatia to and From the Port of Ploce and Through the Territory of Bosnia and Herzegovina at Neum, Sept. 8, 1998, art. 9(2), Croat.-Bosn. & Herz. This Draft Agreement names the International Tribunal for the Law of the Sea as the body to nominate a member of a decision-making Commission, a nonjudicial matter over which the Tribunal arguably has jurisdiction under its Statute. See Law of the Sea Convention, *supra* note 4, Annex VI, art. 21. See also *id.* art. 282.

ANTI-PIRACY LAW IN THE YEAR OF THE OCEAN: PROBLEMS AND OPPORTUNITY

*Samuel Pyeatt Menefee**

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The 20th century has provided an unparalleled occasion for the explosion of maritime violence. Piracy continues to be with us and contemporary masters, shippers and crew need also keep a “weather eye” for political extremists and ecoterrorists, smuggling violence and anonymous mines, telephoned threats and other abuses using new cutting-edge technology. Truly, the forces of maritime crime have never had it so good.

This is an appropriate, if perhaps unexpected, coda to a centennium which featured pirate expert Philip Gosse’s optimistic assertion that “[t]he end of piracy, after centuries, was brought about by public feeling, backed up by the steam-engine and telegraph.”² Gosse’s report of the crime’s

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1. DR. SAMUEL PYEATT MENEFEЕ, TRENDS IN MARITIME VIOLENCE 5 (1996) [Special Report from Jane’s Intelligence Review and Jane’s Sentinel].

2. Philip Gosse, *Pirates and Piracy*, 17 ENCYCLOPEDIA BRITANNICA 951, 952 (1964).

demise was, alas, premature; 1997 saw 247 attacks³ recorded by the I.C.C. International Maritime Bureau's Piracy Reporting Centre, while 1998, the "Year of the Ocean," has suffered 126 incidents through September 30th.⁴ As the landfall of a new millenium approaches, it seems particularly appropriate to take soundings and sightings on the continuing problem of piracy. While this survey is abbreviated in nature, it is hoped that it will point the way to more positive responses to maritime crimes.

I. PROBLEMS IN DEFINING PIRACY

Definitional problems date back at least as far as the American Civil War, when the Union deemed operations undertaken by Confederate naval sympathizers to be "piratical" in nature.⁵ The 20th century has seen similar controversies over German U-Boat attacks in World War I,⁶ Soviet Bloc charges concerning Republic of China naval activities in the China Seas region,⁷ and competing characterizations of incidents such as the seizure of the *Santa Maria*,⁸ the *Mayaguez*,⁹ and the *Achille Lauro*.¹⁰ In

3. I.C.C. INTERNATIONAL MARITIME BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS: ANNUAL REPORT: 1ST JANUARY-31ST DECEMBER 1997, at 2 (while the figure given in the report is 229, this number was augmented by accounts received in the following year). See also I.C.C. INTERNATIONAL MARITIME BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS: REPORT PERIOD 1 JANUARY-30 SEPTEMBER 1998, at 3 (Oct. 1998).

4. I.C.C. INTERNATIONAL MARITIME BUREAU (Oct. 1998), *supra* note 3, at 2.

5. See Samuel Pyeatt Menefee, *Piracy, Terrorism, and the Insurgent Passenger: A Historical and Legal Perspective*, MARITIME TERRORISM AND INTERNATIONAL LAW 43, at 47-54 (Natalino Ronzitti ed., 1990).

6. See MENELEE, *supra* note 1, at 6; C.J. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 404-05 (5th ed. 1962); *The German-American Submarine Controversy*, THE ROUND TABLE 493-534 (June 1916).

7. See SAMUEL PYEATT MENELEE, CONTEMPORARY PIRACY AND INTERNATIONAL LAW 9-13 (1995); MENELEE, *supra* note 1, at 56.

8. See Menefee, *supra* note 5, at 56-58. See also Samuel P. Menefee, *Terrorism at Sea: The Historical Development of an International Legal Response*, VIOLENCE AT SEA: A REVIEW OF TERRORISM, ACTS OF WAR AND PIRACY, AND COUNTERMEASURES TO PREVENT TERRORISM 191, at 198-201 (Eric F. Ellen ed., 1987). Books discussing this takeover include HENRIQUE GALVÃO, *SANTA MARIA: MY CRUSADE FOR PORTUGAL* (1961); HENRY A. ZEIGER, *THE SEIZING OF THE SANTA MARIA* (1961). BETH DAY, *PASSAGE PERILOUS* (1962); WARREN ROGERS, JR., *THE FLOATING REVOLUTION* (1962).

9. See MENELEE, *supra* note 1, at 63-64. This incident is treated in depth in ROY ROWAN, *THE FOUR DAYS OF THE MAYAGUEZ* (1975).

10. See generally Menefee, *supra* note 5, at 58-61. See also *supra* note 5, for the other articles in MARITIME TERRORISM, *supra* note 5; George Constantinople, *Toward a Definition of Piracy. The Achille Lauro Incident*, 26 VA. J. INT'L L. 723 (1985) [note]; J.P. Pacrazio, *L'affaire de l'Achille Lauro et le droit international*, 31 ANN. FRANCAISE DE DROIT INT'L 221 (1985); Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269 (1988); Christopher Joyner, *Suppression*

addition to these spats over possible "political piracies," the effects of decolonization and the multiplication of non-western legal viewpoints have resulted in attempts to recharacterize many activities historically designated as piracy,¹¹ along with a general reluctance to apply what is viewed as a pejorative term to contemporary marine attacks. Examples of the latter include the refusal of several Nigerian academics to define robberies in their national waters as piracy (instead having recourse to the international definition of the crime found in the Convention on the High Seas and the Convention on the Law of the Sea),¹² and the campaign by Indonesian and Malaysian officials to characterize many local attacks as "armed robberies" or "robbery at sea."¹³ Finally, there are questions over emerging criminal behavior. Are maritime terrorist activities piracy?¹⁴ Is ecoterrorism, when it occurs in a marine context?¹⁵

There has been much debate over the language of Article 101 (a) of the Convention on the Law of the Sea (largely embodying the terminology of Article 15 of the Convention on the High Seas). Three major areas of argument have been (1) the requirement of "private ends,"¹⁶ (2) what has been termed the "one-ship, two-ship dilemma,"¹⁷ and (3) jurisdictional considerations.¹⁸ The "private ends" requirement appears to exclude attacks by maritime terrorists and arguably, environmental extremists, from being piracies, because of their "public nature."¹⁹ Some, however, have

of Terrorism on the High Seas: The 1988 IMO Convention on the Safety of Maritime Navigation, 19 ISRAEL Y.B. HUM. RTS. 343 (1989); C. DE RISIO, L'ODISSEA SEGRETA DELL'ACHILLE LAURO (1985); F. GERARDI, ACHILLE LAURO—OPERAZIONE SALVEZZA (1986); GERARDO DE ROSA, TERRORISMO FORZA 10 (1987); ANTONIO CASSESE, TERRORISM, POLITICS AND LAW: THE ACHILLE LAURO AFFAIR (1989).

11. See SULTAN MUHAMMAD AL-QASIMI, *THE MYTH OF ARAB PIRACY IN THE GULF* (1986).

12. See generally R.A. AKINDELE AND M.A. VOGT, EDS., *SMUGGLING AND COASTAL PIRACY IN NIGERIA: PROCEEDINGS ON A WORKSHOP* (1983).

13. See IMO DOC MSC 63/17/2/Add 1, Annex 1; MENEFEE, *supra* note 7, at 57.

14. See generally Menefee, *supra* note 5; Halberstam, *supra* note 10.

15. See Samuel Pyeatt Menefee, *The Case of the Castle John, or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of International Law*, 24 CAL. W. INT'L L. REV. 1-16 (1993).

16. See Samuel Pyeatt Menefee, *The New "Jamaica Discipline": Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea*, 6 CONN. J. INT'L L. 127, at 142-44 (1990).

17. See Menefee, *supra* note 16, at 144.

18. *Id.* at 145-47.

19. See P.W. Birnie, *Piracy Past, Present and Future*, in, PIRACY AT SEA 131, 140 (Eric Ellen ed. 1989); Samuel Pyeatt Menefee, *Scourges of the Sea: Piracy and Violent Maritime Crime*, 1 MAR. POL'Y REP. 13, at 15 (1989); Constantinople, *supra* note 10, at 744, 749.

opined that public and non-private ends are not necessarily synonymous;²⁰ that many terrorist attacks veer into the area of common crime,²¹; and that actions undertaken by environmentalists may be considered private in nature. Greenpeace, for example, when engaged in anti-dumping protests, was found guilty of piracy under international law by the decision of a Belgian court.²² According to Article 101(a) of the Convention on the Law of the Sea, piratical acts must be directed "(i) on the high seas against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State"²³ The generally accepted reading is that this excludes crew seizures or passenger takeovers of vessels *per ipse*, from the concept of piracy, as only a single ship would be involved in such cases.²⁴ A counter-argument, however, is possible; Article 101(a)(ii) states that the crime be against "a ship, aircraft, persons or property" (there is no mention of "another") if the location is "outside the jurisdiction of any State." The high seas is unarguably such a place. Therefore, the requirement of the presence of two vessels for a piracy to occur is unnecessary.²⁵ A fourth, and largely undiscussed, problem relates to the first part of the definition, holding that piracy may only consist of "illegal

20. See Menefee, *supra* note 5, at 60; 2 D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 970 (1989); S.P. Menefee, *The Achille Lauro and Similar Incidents as Piracy: Two Arguments*, in PIRACY AT SEA, *supra* note 19, at 179-80; Menefee, *supra* note 16, at 143.

21. The . . . problem occurs if a "political act" falls outside the definition's requirements of "private ends." But an act . . . is hardly deemed "political," simply because the proprietor so-characterizes it. Nor is it logical that a person once labeled an "insurgent" could never commit actions "for private ends." As Chief Justice Cockburn notes in *In re Tivnan*: "it is not because persons assume the character of belligerents that they can protect themselves from the consequences of an act really piratical." Similarly, an act may have *both* a political and a private nature. What appears to be needed, therefore, is a balancing test, in which actions are *strictly* weighed against political objectives. This was the rationale used to deny the political nature of the robbery in the *Philo Parsons*. At the same time, if a political organization repudiates insurgents, as did the Confederacy in the *Gerrity* and *Chesapeake* cases, and the P.L.O. in the *Achille Lauro*, that too should have a bearing as to whether "private ends" should be deemed to exist. Finally, whenever a "third party attack" occurs, one should be able to realistically question the motives of its perpetrators. Nor should the fulcrum of the decision be the mind of the terrorist; it should be the mind of the judge weighing the facts.

Menefee, *supra* note 5, at 60.

22. See Menefee, *supra* note 15, at 1-16; MENEFEE *supra* note 1, at 26.

23. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, Montego Bay, Dec. 10, 1982 [hereinafter CLOS], art. 101(a).

24. See Menefee, *supra* note 5, at 60.

25. *Id.*

acts of violence or detention, or any act of depredation."²⁶ A multiple number of actions involving physical force or [keeping under] restraint or custody is thus necessary, suggesting the need for a *pattern* of abuse rather than an isolated incident, for piracy to have occurred.²⁷ A *single* act of plunder or robbery, however, would be enough to invoke the definition. While sneak theft is arguably outside this coverage, any taking of property by violence or intimidation directly from a person or in his immediate presence would presumably be included. No pattern of practice is thus required.²⁸

One result of these controversies has been the soft-peddling of the definition of piracy in favor of an act-specific approach, as in the 1988 IMO Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the related Protocol dealing with fixed platforms.²⁹ This is similar to the agreements reached against aerial hijacking, which avoided clashing definitions of what constitutes terrorism.³⁰ While the IMO Convention was a result of the *Achille Lauro* attack, its coverage is broad enough to include piracy as well as maritime terrorist incidents.³¹

On a national level, defining the crime of piracy is even more convoluted. While scholars remain split as to whether the 1958 and 1982 Convention codified the law on the subject, or whether other crimes

26. CLOS, *supra* note 23, art. 101(a) (emphasis added). An additional consideration is "whether 'illegal acts' are to be determined under *national* or *international* law. The former could produce discrepancies in enforcement, while the latter might restrict the statute's coverage." Menefee, *supra* note 15, at 4.

27. *The Oxford English Dictionary* defines "violence," *inter alia*, as "1. The exercise of physical force so as to inflict injury on, or cause damage to, persons or property; actions or conduct characterized by this; treatment or usage tending to cause bodily injury or forcibly interfering with personal freedom." 12 THE OXFORD ENGLISH DICTIONARY: BEING A CORRECTED RE-ISSUE WITH AN INTRODUCTION, SUPPLEMENT, AND BIBLIOGRAPHY OF A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES FOUNDED MAINLY ON THE MATERIALS COLLECTED BY THE PHILOLOGICAL SOCIETY 221 (1933) [hereinafter THE OXFORD ENGLISH DICTIONARY]. "Detention" includes "1. Keeping in custody or confinement; arrest" and "4. A keeping from going on or proceeding; hindrance to progress; compulsory delay." 3 THE OXFORD ENGLISH DICTIONARY 266 (1933).

28. Depredation is "[t]he action of making a prey of; plundering, pillaging, ravaging," including "spoilation and robbery." 4 THE OXFORD ENGLISH DICTIONARY 219 (1933).

29. See CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION, Rome, March 10, 1988; PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF FIXED PLATFORMS LOCATED ON THE CONTINENTAL SHELF, ROME, March 10, 1988; MENELEE, *supra* note 7, at 46-47; Tullio Treves, *The Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, in MARITIME TERROISM, *supra* note 5, 69, at 70, 71.

30. See Treves, *supra* note 29, at 70, 71; MENELEE, *supra* note 7, at 46.

31. See MENELEE, *supra* note 7, at 47.

continue to constitute piracy under customary international law,³² there is no doubt that municipal definitions of the crime cast a wider net, and are therefore, less homogenous in nature. Here, it is not a question of differing interpretations, but rather one of differing definitions. To further compound the problem, many piracy laws including those of the United States were not drafted contemporaneously, but represent a patchwork of responses to problems, which arose over time.³³ They therefore lack comprehensive coverage as well as a consistent approach to the crime.³⁴

II. PROBLEMS IN ESTABLISHING JURISDICTION OVER THE CRIME OF PIRACY

Although less obvious, an equally severe problem for piracy law has been jurisdiction. A comparison of the 1988 Convention on the High Seas with its 1982 successor reveals the almost complete retention of wording from the former convention, probably due to a desire not to reopen yet another argument from the ILC and UNCLOS I debates.³⁵ Ironically, this does not mean that there have been no major changes; Indeed, the result of the 1982 Convention has clearly been to move the majority of maritime crimes under national jurisdiction. This was accomplished through the recognition of wider territorial seas, inclusion of the concept of archipelagic waters, and establishment of exclusive economic zones (EEZ's).³⁶ In the case of EEZ's, according to Article 58(2), the piracy provisions "and other pertinent parts of international law apply . . . in so far as they are not incompatible with . . . [Part V]."³⁷ However, according to 58(3):

32. See Menefee, *supra* note 5, at 61 ("It is no more reasonable to argue that piracy is exclusively defined by the Convention than it would be to claim that those nations who are not party to the *Convention* do not therefore recognize piracy *jure gentium*. State practice is the key here. While it is true that one nation's characterization of insurgents as pirates has not always been recognized by others, it does not follow that it *may not* be so recognized, or that such a characterization is necessarily municipal rather than international in nature"); 2 O'CONNELL, *supra* note 20, at 970 ("Article 15 is one of the least successful essays in codification of the Law of the Sea, and the question is open whether it is comprehensive so as to preclude reliance upon customary international . . . law . . .").

33. See Samuel Pyeatt Menefee, "Yo Heave Ho!": *Updating America's Piracy Laws*, 21 CAL. W. INT'L L. REV. 151, 175 (1990); Working Party on Piracy, Maritime Law Association Committee on the International Law of the Sea, *Report of the Working Party on Piracy, Maritime Law Association Committee on the International Law of the Sea* [hereinafter Report of the Working Party] at 2 (Nov. 4, 1992).

34. See Menefee, *supra* note 33, at 160-61, 169, 175-76.

35. See MENEFE, *supra* note 1, at 7-8. For a more in-depth review of the work of UNCLOS III on this subject; see MENEFE, *supra* note 7, at 31-35.

36. See Menefee, *supra* note 16, at 146. See also Thomas A. Clingan, Jr. *The Law of Piracy*, PIRACY AT SEA, *supra* note 19, at 170; Birnie, *supra* note 19, at 141.

37. CLOS, *supra* note 23, art. 58 (2).

[i]n exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law insofar as they are not incompatible with this Part.³⁸

It has been estimated that the shift in the 1982 Convention throws upwards of 85-93% of all piracies into the jurisdiction of the coastal states.³⁹ To the degree that Article 58(3) controls, Coastal State laws or agreements with Coastal States take on a prime importance in the struggle against piracy. The growing recognition of this shift is reflected recent articles and speeches dealing with the problem of foreign naval intervention in Coastal State waters.⁴⁰

III. POLITICAL PROBLEMS INVOLVING PIRACY

On a pragmatic level, contemporary laws concerning piracy face a number of political hurdles. Here, problems are more difficult to demonstrate, because of their non-textual nature, but they are equally real. At least three major fallacies have disrupted attempts to adequately respond to the crime. The historical fallacy emphasizes earlier forms of piracy, suitably modified by film and fiction, over more recent developments. The marine criminal researcher is often put in a "Catch-22" situation "playing up" the skull-and-bones, Blackbeard, walking-the-plank aspect of the problem appears the only way to attract attention, but the media then inexplicably concentrates on this to the exclusion of anything else. By overemphasizing history, focus is lost, and the problem of contemporary piracy is by and large ignored.

Of equal impact is the NIMBY fallacy. This holds that piracy, while it *does* exist, couldn't occur anywhere around *here*. It is a problem associated with turgid rivers, mangrove cays, or exotic straits, rather than with

38. CLOS, *supra* note 23, art. 58 (3).

39. Birnie, *supra* note 19, at 141. See also S.P. Menefee, *Forward* [sic], INTERNATIONAL MARITIME BUREAU, A THIRD REPORT INTO THE INCIDENCE OF PIRACY AND ARMED ROBBERY FROM MERCHANT SHIPS [ii] (Oct. 1985).

40. See Barry Hart Dubner, *Human Rights and Environmental Disaster--Two Problems That Defy the "Norms" of the International Law of Sea Piracy*, 23 SYRACUSE J. INT'L L. 1 (1997); Samuel Pyeatt Menefee, *Possible Foreign Naval Intervention In Cases of Piracy in International and Coastal Waters* (speech delivered at Conference of the I.C.C.-International Maritime Bureau ["Third International Meeting on Piracy and Phantom Ships"] on June 1, 1998); Samuel Pyeatt Menefee, *Modification of the Law of the Sea Convention and Other International Strategies to Allow for the Use of Armed Forces Against Pirates* (speech delivered at Conference of the I.C.C.-International Maritime Bureau ["Third International Meeting on Piracy and Phantom Ships"], on June 2, 1998).

thriving ports or well-traveled trade routes. Nineteenth century Malay depredations or robberies in the China Sea are well known, but how many can boast equal familiarity with the activities of the Charlton Street Gang, a group of post-Civil War New York river pirates?⁴¹ The problem of modern piracy is similarly "passed" by western countries to their third-world counterparts, who themselves then seek to define the practice away. Both, in fact, are guilty of ignoring reality. States spend their time externalizing or debating the concept rather than concentrating on eradication of the underlying problem.

A third complication is the international fallacy, which holds that any solution to the crime of piracy must necessarily involve a multilateral response. This is not to say that international cooperation has no role to play, but rather, that by overemphasizing its effect, we put the cart before the horse. In the forty years since 1958, the only major case which has apparently been brought under the piracy provisions of the Convention on the High Seas or of the Convention on the Law of the Sea was the Belgian action against Greenpeace.⁴² (It is true that the United States tried to justify its response against the *Achille Lauro* hijackers through use of this language, but this argument did not meet with universal acceptance.)⁴³ The international crime of piracy has not featured prominently in discussions surrounding the new International Criminal Court,⁴⁴ the United Nations generally avoids the subject of piracy,⁴⁵ while the IMO has bent over backwards not to offend its member nations when discussing maritime crime.⁴⁶ Added to this has been the ceding of authority to Coastal States, though the operation of the 1982 Convention, over most of the region in which pirates operate. And yet people still expect an "international" response!

41. See CARL SIFAKIS, *THE ENCYCLOPEDIA OF AMERICAN CRIME* 139-40 (1982).

42. See M.S. WADY TANKER, M.S. SIRIUS N.V. MABECO, N.V. PARFIN v. 1 J. Castle 2 Ned. Stichting SIRIUS, E.A., 20 EUR. TRANS. L. 536 (June 12, 1985); CASTLE JOHN AND NEDERLANDSE STICHTING SIRIUS V. NV MARJLO AND NV PARFIN, 77 INT'L L.R. 537 (Dec. 19, 1986); Menefee, *supra* note 15.

43. See generally *supra* note 10.

44. Steve Garber, Lesle Sadat Wexler, John Washburn, Jelena Pejic, Jamison Selby Borek, *The International Criminal Court and The Aftermath of the Rome Diplomatic Conference*. Discussion Panel at the American Branch of the International Law Association International Law Weekend (Nov. 13, 1998).

45. "State piracy," in which States are accused of piratical acts, seems to be the major exception.

46. As indicated, for example, by the IMO's gingerly handling of piratical incidents reported from the South China Sea. See MENEFEЕ, *supra* note 7, at 57-60.

IV. ANTI-PIRACY LAW: THE OPPORTUNITY FOR STATE-CENTERED SOLUTIONS

Having considered the problems facing current anti-piracy law, what then are the solutions? First, it seems clear that municipal legislation is the true fulcrum for the problem, and that much of the weakness of anti-piracy responses may be traced to the lack of attention paid to domestic piracy law. In the case of the United States, for example, the last major provision was added in 1847, and the patchy nature of coverage makes serious revision overdue.⁴⁷ As the Notes to 18 U.S.C. § 81 states:

In the light of far-reaching developments in the field of international law and foreign relations, the law of piracy is deemed to require a fundamental reconsideration and complete restatement, perhaps resulting in drastic changes by way of modification and expansion It is recommended . . . that at some opportune time in the near future, the subject of piracy be entirely researched and the law bearing on it modified and restated in accordance with the needs of the times.⁴⁸

The Maritime Law Association of the United States has recently risen to this challenge, and has expressed its support for a draft code, which treats the problem of modern piracy in a comprehensive manner.⁴⁹ Hopefully, this is the beginning of a dialogue between international

47. See Menefee, *supra* note 33, at 158, 169, 175; *Report of the Working Party*, *supra* note 33, at 2.

48. 18 U.S.C. § 81 (1988) (Historical and Revision Notes).

49. See Harry E. Gerhardt and Samuel Pyeatt Menefee, *Revising the United States Laws on Piracy* (speech delivered at Conference of the Mariners' Museum ["Modern Piracy: New Methods for an Old Trade"] on November 14, 1997); *Report of the Working Party*, *supra* note 33; Working Party on Piracy, Maritime Law Association Committee on the International Law of the Sea, *Second Report of the Working Party on Piracy*, *Maritime Law Association Committee on the International Law of the Sea* (May 6, 1993); letter from S.P. Menefee to Doug Bennett of 3 Aug. 1994 ["Third Report of the Working Party on Piracy of the Maritime Law Association's Committee and [sic; on] the International Law of the Sea"] (May 3, 1994); Working Party on Piracy, Maritime Law Association Committee on the International Law of the Sea, *Fourth Report of the Working Party on Piracy of the Maritime Law Association's Committee on the International Law of the Sea*; Working Party on Piracy, Maritime Law Association Committee on the International Law of the Sea, "Sixth [sic; Fifth] Report of the Working Party on Piracy"; *Sixth Report of the Working Party on Piracy*; Working Party on Piracy, Maritime Law Association Committee on the International Law of the Sea, *Seventh Report of the Working Party on Piracy Maritime Law Association Committee on the International Law of the Sea* (April 26, 1997); Working Party on Piracy, Maritime Law Association Committee on the International Law of the Sea, *Ninth Report of the Maritime Law Association Committee on the International Law of the Sea's Working Party on Piracy* [hereinafter Ninth Report of the Working Party] (April 22, 1998).

lawyers, admiralty proctors, and other affected parties, which will eventually result in the revision of our piracy statutes.

Perhaps more importantly, action is also taking place on the international level, although here again municipal law remains the focus. The Comité Maritime International (CMI) is sponsoring a Joint International Working Group on Uniformity of the Law of Piracy, chaired by CMI Vice President Frank Wiswall, which is considering ways in which municipal laws can be revised to emphasize shared values in the fight against piracy. Several IGO's and NGO's are involved with this work, and it is hoped that the final report, which is due out in the year 2001 at the start of the new millennium, will provide a 21st century basis for state-centered solutions of this problem.⁵⁰

50. See *Ninth Report of the Working Party*, *supra* note 49, at 1. At least one other State, Sri Lanka, is also currently revising its law on the subject. See PROPOSED LAW AND PROCEDURAL REFORMS TO CONTROL AND ERADICATE PIRACY: FINAL REPORT & DRAFT LEGISLATION.

1998 - INTERNATIONAL YEAR OF THE OCEANS THE STATUS OF THE LAW OF THE SEA CONVENTION

*Margaret L. Tomlinson**

Good morning. Today is Friday the 13th. I have often thought that the Law of the Sea Treaty was born under the sign of Friday the 13th, if there is such a thing. Actually the unlucky day we are facing at the moment happens to be this coming Monday, November 16, at which time we stand to lose our provisional membership in the institutions created under the 1994 Agreement which, in effect, amended the 1982 Law of the Sea Convention, and enabled the United States to sign it, and send it to the Senate for its advice and consent, where it languishes still.

According to the program, this panel is to discuss accomplishments since the 1982 Law of the Sea Convention. My fellow panelists are indeed expert in the evolution of various institutions which have emerged from that Convention, and in a number of interesting current issues in the development of ocean law such as piracy and terrorism, environmental agreements, and conflicts between jurisdictional claims and navigational freedoms such as those that have erupted in the South China Sea, the Taiwan Straits, and elsewhere.

All of these developments arise from, or build upon, the Law of the Sea Treaty which was the beginning, not the end, of a continuing effort to build a rule of law in the world's oceans in the face of multiple uses and conflicting claims. I thought my role might be to set the stage for others on the panel by running through a quick historical overview of the long and torturous history of the negotiation of the Law of the Sea Convention. I do this with some trepidation before such an audience of experts in international law. But I have found that, except among people who follow this issue closely, the mention of the 1982 Convention elicits responses like those of the blind man and the elephant. What you touch is what you see. And because there is so much misunderstanding of what in fact this treaty is about I would like to review the whole, even if in very broad outline.

First a few basic facts. The Law of the Sea Convention entered into force in November of 1994 with the requisite sixty ratifications and after heroic efforts by the United States and others to achieve changes in the part of the 1982 Convention dealing with seabed mining, which would enable the United States to sign the treaty. These changes were embodied in what

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is known as *the Agreement*, adopted at a special session of the United Nations General Assembly in July of 1994, at which time the United States signed the Agreement and the Convention. The Law of the Sea Convention has now been ratified by 127 states (there are several more in process which may by now be complete). These states included all members of the European community, except, I believe, Belgium, the Russian Federation, China, Japan, India, Indonesia, Argentina, Brazil, and so on around the world.

If some opponents of this treaty once believed that the United States should make selective bilateral or regional arrangements with like minded states, that option no longer exists. We are either a part of this now virtually universal treaty or we stand outside as an observer, as all of these related institutions and rules, which other members of this panel will talk about, begin to take shape.

While assessing these new institutions I think it is important to keep in mind that the treaty has not been ratified in the four years since it was sent to the Senate, and indeed there has not even been a hearing in the Foreign Relations Committee because of the opposition of its chairman, Senator Helms. This despite the fact that the United States, which arguably had the most at stake in the successful outcome of this negotiation, worked to that end on a bipartisan basis through three different administrations of both parties to achieve such an outcome; and still later, the Bush and Clinton administrations set forth and obtained changes which were essential to the United States' support and ratification of the treaty.

Does it matter? After all, some argue, we have gotten along so far without being a party to this Treaty. Well, yes, it does matter. Apart from all the specific problems that may arise from our status as an observer rather than a state party, what really matters most is the constriction of American leadership in a rapidly evolving construct of international law, and one which is here to stay, and one which continues to touch vital interests of the United States.

The overarching reason for American support for a universal treaty has been to preserve navigational freedoms in which we have a fundamental strategic interest, and to that end, to contain and rationalize claims of jurisdiction over offshore waters which, in the late sixties, were escalating rapidly. Those territorial claims threatened to overlap strategic waterways and straits around the world and, in effect, to subject navigation in the most important and often confined transit routes of the world's oceans to a regime of innocent passage at best. And while the American concern at the time was, and still is, to preserve naval and air mobility and flexibility - a strategic interest not shared by many other nations - it is interesting to me that as the global economy grows, more and more nations and more and more companies engaged in international trade are becoming aware that freedom of the seas and assured access to navigation routes is also vital to commercial shipping which carries a vast percentage of world trade.

In the 1970's the effort, under the aegis of the United Nations, to create a universal treaty, was not undertaken without trepidation as to our ability to protect our vital interests in such a diverse forum. And, in fact, in the late sixties the United States was engaged in some discussions with a few other countries with a view to further defining the 1958 and 1961 Geneva Conventions with respect to offshore claims. That effort to deal with specific issues came to an end when there was set forth in the United Nations General Assembly a vision of vast wealth from the mineral resources of the deep seabed which would provide a solution to the financial problems of developing countries if they were assured a share of this wealth. Hence the evolution of the so-called *package deal* in a treaty which would accommodate navigation and coastal resource interests would be negotiated in tandem with a regime protecting access for all to the hoped for riches of the *common heritage* of the deep oceans. Such a regime however, did have to deal fairly with certain economic requirements which in the end it failed to do, and thus, in 1982 the United States did not sign the treaty despite the remarkably successful achievement of all of our objectives with respect to navigation and coastal resource rights.

The issue of seabed mining has colored perceptions of this treaty ever since. But the reality is that the limitations on the extent of territorial sea to twelve miles, the protection of transit rights through and over and under international straits and other traditional waterways, and the accommodation of coastal state jurisdiction over economic resources in a 200 mile economic zone with preservation of traditional high seas freedoms of navigation, was an extraordinary accomplishment in retrospect, and one which was only possible because of vigorous American leadership. Had we not taken on such a leadership role despite some concerns about the nature of the forum, we would most surely have found ourselves now with a thousand points of darkness threatening to hinder navigation.

Today, with strategic doctrines which emphasize rapid response and deployment to areas of trouble in the world, those rights of transit, and the accompanying rights of overflight, remain a vital interest of the Department of Defense in the ratification of this treaty. The argument that we can and would maintain our rights by force if necessary, ignores the virtues of being on the side of universally accepted law when an issue arises. Not that there will not be disputes, but the acceptance of a framework of law has in most cases an inhibiting effect on flagrant violations of accepted norms. It is far easier to engage in efforts to assure compliance with accepted norms than it is to impose them by force. It is also cheaper.

Furthermore, as the use of the oceans continue to expand, as they have and will continue to do, it is not only the rules that are important but compliance with the rules, and therefore, access to dispute settlement procedures. These rules and procedures are already being designed. It is very likely - one might say even a certainty - that if we fail to take a leading role we will not like the results. There are a couple of current

object lessons in the Outer Continental Shelf Commission and the Law of the Sea Tribunal, both of which have come into being without official participation by the United States, and both of which deal with issues of concern to us.

Finally, in making the case for ratification it is necessary to deal with the unfortunate problem still presented by what was known as Part XI, or *the seabed mining section* of the treaty. I am reminded of the time, many years later, that I asked the principal United States negotiator of the 1958 Geneva Conventions why the issue of jurisdiction over resources of the continental shelf was left so vague. He said it was because we had no real idea of what might be possible there. Would that the Law of the Sea negotiators been as sensible, but this issue became an ideological mantra of the new international economic order of the 1970s, as a tradeoff for the navigation and coastal resource interests of developed countries. In the end the result was unacceptable to us. Too many people are still unaware that those provisions have been substantially and satisfactorily changed.

This came about in the late Eighties when it became evident that this Treaty was getting close to coming into force with the requisite sixty ratifications without the participation of any significant players, a result which would benefit no one. The then Secretary General initiated a new effort to see if and how the concerns of the United States and others could be accommodated so that the treaty could become the universal framework it was intended to be. First the Bush and then the succeeding Clinton administrations, once again a bipartisan decision, took a quiet but vigorous leadership role in negotiating *the Agreement*, officially known as "the 1994 Agreement Relating to Implementation of Part XI of the United Nations Convention on the Law of the Sea."

That Agreement specifically addressed, and resolved to the satisfaction of the American negotiators, the six specific objections that the Reagan administration had set forth in declining to sign the treaty in 1982, and provided a permanent seat and a de facto veto for the United States in the Council of the International Seabed Authority - a position we keep until Monday after which our status is problematic because of our failure to ratify the treaty within the four year framework that was established for participation on an interim basis by states which had signed but not yet ratified. Presumably this time frame can be extended by agreement of the states parties.

In essence, the Agreement substitutes for the original Part XI in every instance where its provisions are in conflict. And while one might wish that none of this structure be put in place until such time as seabed mining becomes a reality, a circumstance far more remote in time now than was anticipated in the 1970's, the fact is that it is a workable piece of a whole which is far more important. Unfortunately, the public and political perception of this treaty, to the extent there still is one, is that it is all some third world concoction about seabed mining.

It is, of course, a little embarrassing, as well it should be, that the United States having insisted upon, and obtained, every one of its specified *fixes* to Part XI has now failed even to conduct a hearing on the whole treaty. But embarrassment is bearable and hopefully temporary; and alas, not all that unusual a fate of treaties in the Senate. What is less bearable and far less defensible is a prospective failure of the United States to continue its leadership role in this truly global evolution of law of the oceans. When the cat's away is not an inappropriate analogy here.

This is an audience which, far more than most, understands that international law is not a fiction, and that the U.S. role in building it is one of great consequence both to our own country and to the strength of the international system we have done so much to create.

To use the current cliché, "we are the world's only remaining superpower." To the extent that our interests are threatened anywhere in the world we will take appropriate action to defend them. We do not know how that role will evolve in the next century. What we do know is that man's move into the oceans is continuing. What we also know now, because of the ratification of this treaty by all the other significant members of the international community, is that the Law of the Sea Convention will be the framework for the evolution of ocean law whether we are its leader or not.

Whatever may have been the merits of arguments in the past for bilateral negotiations, or some other alternative to a universal convention, those options no longer exist. It is difficult to conceive of any reason why the United States should not ratify this treaty, and do it now. As the members of this panel talk about new institutions and emerging problems, keep in mind that we may be a three hundred pound gorilla observing the proceedings, but an observer is what our status is. It is not one worthy of what we have at stake.

Thank you.

SO YOUR CLIENT WANTS TO ENGAGE IN DEEP SEABED MINING

*Houston Putnam Lowry**

An excited client calls their corporate attorney, claiming to have solved the technical problems associated with the mining of manganese nodules on the seabed beyond national boundaries, commonly called the "area."¹ What can clients do to protect their rights and how can they start commercial mining? As might be expected, the answer is not simple.

The Third United Nations Conference on the Law of the Sea was convened in late 1973.² The Conference continued until its final meeting on December 10, 1982 in Montego Bay, Jamaica. At that time, the final act was signed and the Convention (commonly called UNCLOS III) was opened for signature. Part XI of the Convention comprehensively regulated activities in the Area, including deep seabed mining.

One hundred seventeen states signed the Convention on the first day, although the United States did not sign the Convention until July 29, 1994. Fiji deposited its instrument of ratification on the same day the Convention opened for signature, becoming the first state bound by the Convention.

As time went on, it became increasingly clear that the developed states were not willing to agree to Part XI concerning the deep seabed portions of the Convention. Part XI was a proverbial *deal breaker* for developing nations, as it was then written. Eventually it became clear UNCLOS III would enter into force on November 16, 1994, one year after the deposit of the sixtieth instrument of ratification.³

Recognizing that developed countries were an important part to any successful Convention, and that the deep seabed issues must be resolved, the United Nations Secretary-General began negotiating modifications to Part XI. All of the developed states participated in drafting the amending agreement (Agreement), which was concluded on July 28, 1994.⁴ While no one claimed the modifications were perfect from the developing

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1. UNCLOS III, article 1(1).
2. United Nations Convention on the Law of the Sea opened for signature Dec. 10, 1982, U.N. Doc. A/Conf.62/122 (1982).
3. There are presently 128 state parties to UNCLOS III.
4. The Agreement Relation to the Implementation of Part XI of the United Nations Convention of the Law of the Sea of 10 December 1982, U.N. Doc. A/Res/48/263 (1994).

countries' view, they made UNCLOS III generally acceptable to developed countries.

The Agreement entered into force on July 28, 1996. Any ratification or accession to UNCLOS III after July 28, 1994 is also considered a ratification or accession to the Agreement. A state who ratifies or accedes to the Agreement is also deemed to have ratified or acceded to UNCLOS III.

The Agreement contained a provision relating to provisional membership.⁵ This provision has been liberally applied to encourage non-member states to participate in UNCLOS III. As of September 30, 1998, eleven states, including the United States of America, were provisional members of the International Seabed Authority.⁶ This provisional membership expires November 16, 1998, which has adverse consequences for the United States' economic interests.

The International Seabed Authority was formed under UNCLOS III to organize and control activities on the seabed and ocean floor, including the subsoil thereof, beyond the limits of national jurisdiction. The Authority began functioning on November 16, 1994 and there were 138 members as of September 30, 1998.⁷

The Authority has made significant progress in drafting a seabed mining code for polymetallic nodules.⁸ The draft mining code does not cover polymetallic sulfides⁹ and cobalt-bearing crusts.¹⁰ These resources will be covered by one or more future codes. The Seabed Authority is expected to finalize its draft regulations for mining polymetallic nodules in August, 1999.

Title to all minerals in the Area belongs to mankind as a whole.¹¹ Title to the minerals vests in the person who that recovers them from the Area, provided the provisions of the Convention are complied with.¹² This

5. Agreement section 12.

6. The International Seabed Authority has several organs, including the Assembly (which consists of all members and elects the Council), the Council (an executive body consisting of 36 members divided into various interest groups), Legal & Technical Commission (consisting of 15 members), the Secretariat (which also carries out the functions of the Enterprise temporarily), and an Economic Planning Commission (who functions shall be carried out by the Legal & Technical Commission temporarily).

7. Including 11 provisional members. (Bangladesh, Belarus, Belgium, Canada, Nepal, Poland, Qatar, Switzerland, Ukraine, United Arab Emirates and the United States of America).

8. Such polymetallic nodules have commercially viable amounts of copper, nickel, cobalt and manganese.

9. These polymetallic sulfides contain commercially viable amounts of gold, silver, copper and zinc.

10. Cobalt bearing crusts have a similar metal composition to polymetallic nodules, but contain more cobalt.

11. UNCLOS III article 137(2).

12. UNCLOS III, Annex III, article 1.

gives rise to some interesting title issues. What is the interaction of Uniform Commercial Code § 2-403 with the Law of the Sea Convention? The question will be hypothetical until science can distinguish the products of a deep sea manganese nodule from similar products from other sources. That question is beyond the scope of this article.

There are two different classes of work described in the current draft of the mining code: prospecting and exploration. Prospecting is the search for polymetallic nodules with no exclusive rights.¹³ A prospector may not recover polymetallic nodules for commercial use.¹⁴ Prospecting can be done in the same seabed area by different prospectors.¹⁵

In order to prospect, the prospector must notify the International Seabed Authority of its intent to prospect.¹⁶ The notification must be in writing and contain certain information.¹⁷ A form for the notification is provided in the mining code.

The Secretary General acknowledges the date when the prospecting notification is received. This date is a starting date for all actions that the Secretary General must take. Within thirty days after the Secretary General receives the notification, the Secretary General must notify the prospector if:¹⁸

- 1) the location is included in any approved plan of work;
- 2) the location is in a prohibited area;
- 3) the location is in a reserved area; and
- 4) the location is in another prospector's area.

Presumably, this information may cause a prospector to change plans (or possibly the Secretary-General to reject the notification). If so, it is important for the prospector to notify the International Seabed Authority of the change in plans.

Within forty-five (45) days, the Secretary General must review and act upon the notification. The details of the notification are entered on a registry. It appears the registry is at least partially confidential, though the details of the confidentiality are not clear. Commercially sensitive information (and there is no definition of the scope of what constitutes commercially sensitive information) will be kept confidential for ten years. If the prospector is still prospecting at the end of the ten year period, the

13. Mining Code Regulation 1(r).

14. *Id.* at 2(3).

15. *Id.* at 2(5).

16. *Id.* at 3(1).

17. *Id.* at 3(4).

18. Mining Code Regulation 4(2).

prospector may request an extension for up to an additional ten year period.¹⁹

The prospector must submit annual reports to the Secretary General.²⁰ Any information submitted to the Secretary General cannot be kept confidential for more than 20 years.

The next stage is exploration.²¹ An important difference between prospecting and exploration (other than the issue of exclusivity) is a state party to UNCLOS III must sponsor the entity doing the exploration.²² A state that sponsors an explorer is derivatively responsible for damage done by the explorer.²³ This means entities not from a state party to UNCLOS III (such as United States corporations) are ineligible to conduct exploration operations directly.

A certificate of sponsorship must come from both the state of incorporation *and* the state of effective control over the explorer.²⁴ There is no requirement in UNCLOS III or the Agreement that both of these states be parties to UNCLOS III; but that is exactly what the mining code requires. This creates some difficulty concerning the United States because the United States will lose its ability to sponsor explorers when its provisional membership to UNCLOS III expires on November 16, 1998.²⁵

This may force United States nationals interested in exploration of the Area to incorporate in an UNCLOS III country and create local subsidiary in that country to obtain the necessary level of sponsorship. A state cannot avoid its liability by resigning its sponsorship.²⁶ If an explorer loses its sponsorship, it has six months to obtain a new sponsor.²⁷

The Council evaluates an applicant's exploration application.²⁸ The Council must review the applicant's financial capabilities, technological capabilities and performance of previous contracts with the Authority. These requirements are designed to prevent wildcat companies from "flipping" lucrative exploration contracts to more established companies at a profit. To prove its financial capability, the applicant must include audited financial statements for the past three years,²⁹ possibly a *pro forma* balance sheet, a certification from a parent corporation and information about financing terms and sources.

19. *Id.* at 5(3).

20. *Id.* at 5.

21. *Id.* at 1(n).

22. *Id.* at 9(1).

23. UNCLOS III article 139.

24. Compare Mining Code Regulation 8(3)(a) with Mining Code Regulation 9(2).

25. The concept of provisional membership was created by Agreement Annex § 1(12).

26. Mining Code Regulation 25(4).

27. *Id.* at 26(3).

28. *Id.* at 10.

29. *Id.* at 5.

The explorer must pick an area large enough to allow two mining operations.³⁰ The two areas need not be contiguous and must be of equal estimated value.³¹ The area of work (which I assume is the area where the explorer will actually explore) cannot exceed 150,000 square kilometers.³²

If the Council approves the application, the explorer must provide additional detailed information³³, including a five-year plan. The exploration contract will continue for 15 years,³⁴ with the possibility of a five-year extension based upon performance.³⁵

An explorer's claim shrinks according the following schedule: 20% after the 3rd year; 10% after the 5th year; 20% after 8th years.

This means an explorer may not maintain exclusive control over more than 75,000 square kilometers after eight years.

The present draft of the Mining Code Regulations does not currently provide for exploitation.³⁶ Needless to say, it is in the United States' interest to influence the drafting of these regulations to protect our interests. For this reason, it is imperative for the United States to ratify its signature to UNCLOS III. The world will work under UNCLOS III, whether or not the United States is a party. Contrary to a century ago, the United States cannot proceed unilaterally. Therefore, our only choice is to become a party to UNCLOS III.

30. *Id.* at 13.

31. Mining Code Regulation 13.

32. *Id.* at 21(1).

33. *Id.* at 15.

34. *Id.* at 22(1).

35. *Id.* at 22(2).

36. Mining Code Regulation 1(m).

ADMINISTERED VERSUS NON-ADMINISTERED ARBITRATION

*Peter H. Kaskell**

CPR is a Not-For-Profit membership organization with a staff of modest size and panels of arbitrators and mediators second to none. We like to think we punch above our weight. Our hallmark is flexibility. We are rarely accused of being bureaucratic.

No doubt all members of this panel agree: the overriding element in determining whether an arbitration will be successful is the quality and experience of the tribunal, particularly the managerial skill of the chair and his or her determination to conduct an efficient process. CPR's panels consist of about 700 arbitrators and mediators selected with great care, including 80 abroad. All are experienced lawyers. We aim to select *The Best of the Bar*. Knowledgeable practitioners regard the quality of our panels as outstanding.

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The issue, as we see it, is not *Administered vs. Non-Administered*, of administration is appropriate for the particular case. We believe in unbundling arbitration services, in letting the players in each case choose and pay only for the services they really need from an a la carte menu, rather than offering only a fixed price menu, the same for all cases. We do believe firmly in maximizing party control of the process.

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2. Assist the parties in modifying the rules to suit their dispute;
3. Maintain a roster of high quality arbitrators;

* Mr. Kaskell is the Vice President of the CPR Institute for Dispute Resolution based in New York, New York. The Universal Resource Locator for the CPR Institute for Dispute Resolution is www.cpradr.org.

4. Assist parties in selecting well qualified arbitrators, and if necessary, appoint arbitrators, who do not have conflicts of interest and who will be available when needed;
5. Deal with conflict of interest challenges; and
6. Make fee arrangements.

B. *Once the tribunal is in place:*

1. Schedule hearings and send notices;
2. Provide hearing rooms;
3. Distribute documents;
4. Review awards for procedural comments;
5. Pay arbitrators and arrange for advance deposits;
6. Be available for expert advice to parties in the process;
7. Assist in moving the process forward if one party is recalcitrant; and
8. Through the stature of the organization, help gain acceptance for the award and, if necessary, for its enforcement.

CPR's international arbitrators rules were developed by a committee of leading American and European arbitrators

The rules require the expeditious conduct of the proceeding, empowering the arbitrator(s) to establish time limits for each phase of the proceeding (Rule 9.2), and to penalize a party engaging in dilatory tactics (Rule 16.3).

The tribunal may decide challenges to its jurisdiction (Rule 8). This should allow arbitrators to decide all issues, including arbitrability questions, without the necessity for court intervention.

The chairman of the tribunal is assigned responsibility for the organization of conferences and hearings and arrangements with respect to the functioning of the tribunal (Rule 9.1).

The tribunal is required to hold at least one pre-hearing conference to plan and schedule the proceeding (Rule 9.4). Such conference should result in a smooth scheduling of the case, and may aid possible settlement.

The tribunal is given great leeway in matters of procedure. CPR's rosters are on the web at www.cpradr.org. We encourage adversaries to agree on arbitrators without our help, however, we certainly stand ready to consult with parties as to their needs and to nominate candidates after screening them for conflicts and availability.

Thirteen foreign arbitrals or organizations also have agreed to nominate arbitrators under the CPR rules.

The question is, what services are needed once the tribunal has been selected? The answer is, it depends. It depends to a large extent on the experience and sophistication of the players and on the cooperation among them: the clients, the attorneys, and the arbitrators.

When the parties are two substantial companies, they are likely to be represented by advocates experienced in international arbitration and to select arbitrators of high quality. Such advocates are likely to have confidence in each other's integrity and to cooperate to assure a smooth process. In that situation, the need for services of an administrative nature will be much less than if one party is inexperienced or tries to welch on its commitment to arbitrate.

We do believe an international arbitration is best conducted under the aegis of a respected organization but one that is flexible and does not intrude unnecessarily. An award made by prestigious arbitrators under the aegis of a respected organization is more likely to be accepted, and if need be, enforced; however, an award will have the imprimatur of an organization if made by its arbitrators under its rules, regardless of what administrative services the organization provided.

We all know horror stories about international arbitrations that dragged on for years and cost huge sums. The main objective must be to conduct an efficient process at reasonable cost. Most of the practitioners with whom I speak believe the best approach usually will be a no-nonsense chair who will insist on efficiency with a minimum of administrative intervention.

We urge at the first preliminary conference of the tribunal with the advocates, they discuss openly what administrative services they are likely to need and arrange only for those services.

CPR does not charge a filing fee or the like. We receive no part of the arbitrator's fees. When we help select arbitrators we charge a modest fee for that service.

We believe the very flexible CPR approach is likely to result in a relatively speedy process and in significant cost savings.

If your pre-dispute contract clause calls for a less user-friendly process, the parties by agreement are free to opt for a different process once a dispute has arisen.

WOMEN AND THE INTERNATIONAL MONETARY FUND

*Jane Lee Saber**

Madam chair, distinguished guests, ladies and gentlemen:

It is my privilege to be here today, to discuss the progress that the world has made in ensuring the rectification of facts presented at Seneca, some 150 years ago. This 1848 Declaration of Sentiments spoke to improving the conditions of women in society. In the developed nations, we have done well at starting to achieve our goals. I stand here today, in fact, as a testament to the efforts of the women's rights movement. I am educated, and have a political voice. I am not subjected to any tyrannies, personal, political, or otherwise. I am allowed to seek my own way, follow the goals of profit, humanitarianism, academia, or any other goals that I value. Unfortunately, this is not the case for all women. Specifically, poor women in developing countries do not share my privileges. Because of circumstances, they often cannot get an education, or have political voices. And, they largely experience the excruciating inhumanities of personal and political disenfranchisement. Why, you might ask? Why do these women not share in the abundant fortunes of the world?

I propose to show that poverty is a major cause of the continuing and increasing disenfranchisement of developing country women. I will show how the application of neoclassical economics by international institutions, and specifically, the International Monetary Fund, increase the hardships of these women.

Before I begin my discussion of the International Monetary Fund (hereinafter IMF) its policies of structural adjustment using conditionality and the impact of this on women, I must caution you against blame-finding. Although it is true that the IMF and its policies tend to have a negative impact on the lives of poor women in developing countries, the IMF itself, is not to blame. Prior to the entrance of the IMF into a country, the roots of the feminization of poverty were already in place. My desire is that the IMF and similar organizations do not exacerbate the pre-existing poverty of women. The IMF must not, under any circumstances, through blindness or disinterest, consider poor women in developing countries as sacrificial lambs to the gods of economics. With that in mind, I will begin this analysis.

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I will start with a brief examination of the nature of the IMF, its organizational design, its resources base, and transactions. Second, I will examine the empirical results of the IMF programs of conditionality. Third, I will examine the impact of IMF programs on the poor, and specifically poor women. Finally, I will outline some changes that may serve to alleviate the position of poor women in developing countries.

The IMF is a specialized UN agency founded in 1944, in Bretton Woods, and was conceived as a way to prevent the economic turbulence that existed prior to, and during the Second World War.

The IMF has full judicial personality, and also has certain privileges and immunities, such as immunity from judicial process unless explicitly waived, immunity of property and assets, immunity from search, requisition, confiscation and expropriation, non-disclosure of archives, unrestrictable nature of assets, privilege of communication, and so on. These immunities do not allow for a real transparency of the IMF, which may cause some concerns, given the potential influence the IMF has on member countries, as I will further describe.

The IMF is divided into three main bodies; the Board of Governors', the Executive Board, and the Managing Director sections. My comments will be limited to the work of the Managing Director section, since the other bodies have effectively little explicit influence in terms of fund transactions.

The IMF funds its resources through contributions of its members called quotas. Voting power is proportionate to contribution levels, and the borrowing of money, which as known as "drawing" or making a draw, reduces voting power. This weighted voting tends to concentrate power in the hands of the developed nations who may tend to view the lending of money to developing countries in a slightly different perspective than the developing countries, themselves. There is often a different perspective, when one needs, as compared to being asked to fulfill a need.

When the need for IMF financing becomes evident, the drawing nation makes a request to the IMF. Upon such a request, the IMF sets out a proposal, engages in discussions with the requesting country, and issues a letter of intent, indicating that under prescribed conditions, the IMF will lend money to the country. This is know as a standby agreement. Monies from the IMF are disbursed in stages, and any noncompliance with the conditions of the agreement may be cause for cessation of funding. Ordinarily, members are allowed to draw up to 200% of their quotas.

In the event of a draw, conditions normally required by the IMF of the drawing country include re-valuation of currencies, as well as changes in fiscal and monetary policies. Conditions become increasingly austere, as the amount of money drawn increases. These conditions are based on the principals of neoclassical economics, which will not be described here. Nevertheless, according to this style of economics, these measures should overcome balance of payment problems, as well as not particularly deteriorate the general welfare. These conditions are usually agreed to

because, when a country approaches the IMF, typically all other forms of commercial credit have dried up, and the country is very close to bankruptcy. The IMF is the lender of last resort. As such, this institution does prevent economic chaos. However, the IMF does not address the disproportionate costs that its adjustment programs have on the poor, and in particular, poor women, as I will further discuss.

Although a full analysis of empirical results is not possible here, even these numerical, economic indices of success are controversial after conditionality is in place. Devaluations often do not work, and just make goods more expensive and fiscal and monetary policy changes tend to stagnate the economies, due to less money available to be spent. I will not go into any details about this, due to time constraints, but, generally, in terms of the actual economies themselves, the figures that you see before you tend to suggest that even economic indices are not particularly improved by IMF conditions. It may be that, whatever improvements are achieved by structural adjustment are outweighed by the human cost of such programs.

Conditionality also impacts the sovereignty and political stability of nations. When the drawing member government agrees to accept the IMF's requirements, that country is largely giving up its rights to economic sovereignty, even by the simple fact that the payback periods extend well beyond the terms of most political structures. If monies need to be paid back over time, citizens of the nation will be forced to abide by the economic wills of potentially removed governments, and the IMF staff. Given that the drawing nation has no choice but to borrow from the IMF, it must basically agree to whatever conditions are set before it. This loss of economic sovereignty takes away the political voice of the people.

And finally, in the short term, cases such as in the Dominican Republic in 1984, Zambia in 1986, Nigeria in 1988, and others, incidents of riots, strikes, repression of dissidents, coup attempts, and other forms of social protest increase dramatically as a result of IMF austerity measures. Clearly, many of the people are unhappy with such measures.

And as well they should be. Doubtless we all would be unhappy if we experienced contraction in per capita incomes, rising unemployment, rising urban poverty, reduced per capita spending on health, education, and food subsidies, rising malnutrition, and a reduced probability of survival for the poor. We, too, would try to take steps to reduce these impacts.

But things are even worse for poor women of the 'drawing' countries. I will now briefly describe their experience. First, we must remember that, in developing countries, women are the poorest of the poor. Statistics show that women currently comprise the majority of the world's poor. Among the estimated 1.2 billion people living in extreme poverty within undeveloped countries, 59% are female. These women disproportionately bear the costs associated with IMF conditionality because of systemic biases that exist both, in notions of progress and development, as set out by

neoclassical economics, and also in their own cultures. These results occur for various reasons.

First, when conditionality occurs, generally, there are fewer jobs available, and certainly more so in the government sector. The employment that is available typically will have reduced or lowered wages, because devaluations, and changes in monetary and fiscal policies tend to reduce the profitability of businesses. In these cases, often low-level staff are often categorized as redundant, and laid off. Sometimes they are replaced with less highly trained workers, who are willing to work for a correspondingly lower wage. As a result, there is lower disposable income levels, and recessions may result. This is particularly damaging for women, as often they are at the bottom of the employment hierarchy and are likely to be bumped out of their jobs. They are the last hired and first fired, especially in low paid, menial work, where, in recessions, the male labor force tends to supplant them. And part of the reason for this situation is the lower levels of education that women typically have.

Even before conditionality, women tend to be less educated than men. This is because many cultures educate males rather than females, both because the male's job prospects are typically better, and because of the notion that the man will be a primary breadwinner. The male primary breadwinner hypothesis is somewhat of a myth in its exclusivity, in as much as about one third of developing country households are headed by females. Nevertheless, when conditionality is imposed, typically education budgets are further decreased, and any expenditures on females, both from the government, and from their families in the case of fees, books, and productivity lost while at school, is virtually stopped. Just about any chance at education is lost. The effects of this can be easily seen: since women comprise up to two thirds of the illiterate in developing countries. This, of course, makes it difficult for them to open their own bank accounts, or have commerce transactions involving writing, such as in the case of cheques. It also limits women's' abilities to read about the rights and treatment that they are entitled to expect, as members of the human population. And lower education may also impact the way in which they are able to care for the health of their families.

Women, according to statistics, generally control the levels of health in the family. But even here, women are at a disadvantage. For example, the attendance of male children at health care facilities is much higher than for female children; in some cases, up to 66% higher. Mortality rates of female children are high, as are maternal mortality rates. Women in developing countries are often malnourished and anemic. As a result, pregnancies will sometimes be life threatening.

Malnourishment and anemia are also borne disproportionately by women. Culturally, it is not unusual for food benefits to be unequally distributed amongst males and females. Practices in this area range from feeding males first, to saving the choicest food for the males. The reason for this there is a perception that male labor is more critical to the family

survival. This is somewhat of a myth, given that many women head households, and that they are largely responsible for the health of the family. Nevertheless, given these pre-existing cultural practices, when conditionality is applied, food resources decrease, causing a disproportionate decrease in women's nutrition. And if that decrease is not satisfactory to the males, and frustrations increase, higher levels of violence may also be an impact of the adjustment. This is because of the deterioration of the relative or absolute economic situations of families.

This deterioration is due to all of the devaluations, making things relatively more expensive, lower government spending, causing increased personal expenditures, and higher taxes. Any access to programs of assistance for the poor, which women were usually excluded from, but received benefit through the family males, usually get cut in IMF austerity programs. And once this deterioration occurs, statistics show that it is women who must find extra time, in terms of foraging for fuel and food, to make up for this deficit.

These effects represent a blindness to inequities; the blindness of invisibility for women. These women, as a result, face decreasing incomes, decreased sustenance, increasing workloads, more violence, and a bleak desolation of existence. This is unacceptable. I will now describe what changes can be made to begin to alleviate these problems.

One of the most important, but perhaps slowest steps that must be taken in order to achieve a lessening of the burden of adjustment on all the poor will be the redefinition of development. Notions of structural, distributive fairness must be included into contemporary economic theories. Growth, as stated by the United Nations, should include adequate employment creation, meeting the basic human needs of all segments of the population, a reduction in inequalities of wealth, and the provision of a better quality of life. Perhaps economists should look to a basic needs model, where the survival of individuals is valued in a more apparent way. Value of people should not be measured by the price of their labor on the market. We need a new paradigm of development, and, in particular, a new model of economic science. This change would align with the already existing recognition of basic human rights of all people.

This change could coincide with a redefinition of how developing countries actually develop. Rather than an emphasis on price competitiveness in currently existing products and markets, efforts should be made to find new products, with higher global demand in new markets. This will not be an easy task, but, given the success of developed countries in doing just this, it is not impossible. More appropriate forms of agricultural development, which do not rely on foreign inputs and foreign demand must be instituted, and there must be a move back into subsistence-style development. Clearly this requires that the wealthy, who currently own the land, give up some of their profit objectives. However, incentives from other governments, and economic institutions may make agrarian reform possible.

Governments should also cut military spending, since these expenditures do not assist in the survival of people. Those that have interests in maintaining this status quo should also get financial and moral incentives to encourage this change. We must support these initiatives.

But perhaps more importantly, we, in the developed worlds, have to begin to look at our own lives of excessive consumption. Why should many of the world's people live in poverty, while many of us have so much? It is only because of a twist of fate that we live in the developed world, and others do not. Why should the burden of adjustment only fall on the poor? Perhaps a system of symmetry of adjustment could be used, where responsibility for economics is shared amongst all nations. We must begin to consider these issues more carefully, if we are truly committed to justice and equity throughout the world.

The IMF itself, can begin to ensure such equity by allowing drawing countries and their poor to have a larger influence in the programs of conditionality. This can be done from a policy level, where IMF staff consider the impact of the programs both on the national, economic level, as well as the micro, individual level. Input from both the government as well as the people would be important and relevant, here. Conditionality should be designed specifically with a view of protecting the already poor; that is, adjustment with a human face. On a more formal level, the executive board could have more input into the conditionality programs, and the weighted voting system could be changed to reflect the interests of developing countries in a more equitable way. In this way, the targets of the IMF, which generally consist of economic indices, may be softened to reflect humanist interests as well. The timing of the IMF paybacks may also need to be changed, to reflect the realities of the developing country economies. Although the IMF was seen as a relatively short-term source of funding, (with the exception of the Compensatory Financing Facility that is no longer generally used), perhaps the length of term needs to be re-evaluated. A longer term of assistance may reduce the need for drastic devaluations and changes in monetary and fiscal policy. This would reduce the immediate, often devastating impact of conditionality.

Furthermore, an increase in the transparency of the IMF would increase the confidence that the world can put into the work of the IMF. This would provide an external check on the policies of the IMF and enhance our understanding of the choices that have to be made to avoid economic collapse. And finally, the IMF should work, directly in conjunction with the World Bank, and other international economic institutions, including commercial banks, to ensure a consistency of application of programs for developing countries. In this case, it is likely that a more comprehensive program of development could be devised.

Here, too, incentives for commercial institutions will have to be developed to ensure their cooperation. Even further, perhaps a central world bank could be developed, in order to solve some of the problems that the IMF faces, including the dangerously low level of resources that it

currently experiences. Global political will would have to be used to create such a system, and this may be difficult. Nevertheless, the implementation of some or all of these recommendations would be a beginning to improvement in the lives of the poor in developing countries.

Finally, with respect to the disenfranchised, poor women in developing countries, efforts must be made to both reduce systemic biases or blindness to their lives, as well as to reduce the actual, negative impact of structural adjustment on these women. Trickle down methods of addressing this issue are not enough; active efforts must be taken. Gender training, to reduce the systemic biases against women should be instituted at all levels of national governments as well as in the communities, both for men and women. Both sexes must realize that women may be the primary breadwinners, that they would benefit substantially from their education, and that the survival of the human race depends on the procreation ability and health of both women and men. To accomplish this, steps such as paying females to attend school, or not charging them fees would assist in the education of women. Another step could be to strengthen legislation on minimum wages and working conditions. Furthermore, women could be relieved of the burdens of child care coupled with wage labor by setting up child care systems, perhaps, even by employers. These steps would, of course, cause producers to object because the costs of labor will have increased. However, again, developed countries should be able to find sufficient incentives for these interests to be modified.

In addition, women should be assisted in opening their own bank accounts, or be paid in cash for their work, thus making their illiteracy not as immediately relevant in their lives. Institutions like the Grameen Bank should be encouraged, as they tend to make commerce transactions possible for the poor. And finally, programs designed specifically for poor women, such as self-help, or even financial assistance programs at household levels, including those dealing with health, food provision and child care can be instituted. These programs do cost money, but they should be part of the conditions that the IMF requests from a drawing country, in order to ensure the survival of the poor.

Even though these recommendations will improve the lives of poor women in developing countries, we must always remember that it is the removal of systemic biases against women, that is, all women, as envisioned by the Declaration of Sentiments that will lead to the eradication of their disproportionate disenfranchisement, and relatedly, to the promotion of even our own women's rights efforts. It is this long term goal that will remove women from their marginal reality, especially in the developing world. I am confident that with all our efforts, we can achieve changes in this area. Thank you.

FROM SENECA FALLS TO THE FIFTIETH ANNIVERSARY OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS - GAUGING THE CAMPAIGN FOR THE HUMAN RIGHTS OF WOMEN

*Jessica Neuwirth**

This year marks the 150th anniversary of the Declaration of Sentiments, a declaration of women's rights adopted in Seneca Falls at a meeting which inaugurated the women's suffrage movement in the United States. This year is also the fiftieth anniversary of the Universal Declaration of Human Rights, a United Nations document which sets forth many of the same rights referred to in the Declaration of Sentiments - the right to education, the right to own property, the right to equality in marriage, and the right to take part in government.

Many of these rights have been recognized, not only in the United States but in countries around the world. These rights are not fully enjoyed, however, in every country in the world. So how far have we come and how quickly are we moving forward? The Declaration of Sentiments complained that the law gave men power "to deprive [women] of liberty and to administer chastisement." The law has changed in this regard, but there are still 4 million women every year suffering from domestic violence in the United States. A woman is abused every 15 seconds, and several women are killed every day by domestic violence. And while domestic violence may now be prohibited by law, it is widely tolerated by those who are charged with law enforcement.

In 1994 in the State of Maryland, Judge Cahill, on sentencing a man charged with killing his wife after finding her in bed with someone else, said sympathetically from the bench, "I seriously wonder how many married men... would have the strength to walk away without inflicting some corporal punishment, whatever that punishment might be. I shudder to think what I would do." After an outcry from the women's movement, Judge Cahill was charged with failing to act during the sentencing hearing in a manner which promoted public confidence in the impartiality of the judiciary. But in May 1996 this complaint was dismissed with a finding that the judge's comments should be read in context. Two women on the

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Commission dissented from this decision, finding that "Judge Cahill's statements created an atmosphere where members of the public might reasonably conclude that cases involving spousal violence would not be heard in a fair and impartial manner by Judge Cahill."

This case is not unique; there are countless horror stories of police non-responsiveness and judicial bias in cases of domestic violence. Internationally, the situation is more or less the same everywhere. Surveys indicate that 25% of women in Canada, 33% of women in Mexico, 21% of women in the Netherlands, 44% of women in Zambia, 22% of women in India, 54% of women in Costa Rica, 38% of women in South Korea, and 59% of women in Japan report being physically abused by male partners. Other forms of family violence against women include acid throwing, bride burning and honor killing, and in many, if not most countries where this violence takes place, the legal system does not provide effective avenues of protection or recourse.

It is progress that in almost all countries, which hold elections, women do have the right to vote. Kuwait is a notable exception, as were some parts of Switzerland until not too long ago. Again, though, what does this really mean for women? Has the vote opened the door for women to take equal part in the conduct of public affairs and ensure equality under the law? In Nepal, under the law a woman cannot inherit property unless she is unmarried and over age thirty-five. Efforts to change this law have been highly controversial, and in an effort to compromise one proposal was drafted by the Ministry of Law suggesting that the right of inheritance could attach at birth, as it does for men, but that women would forfeit the right upon marriage. In Uganda, where the recently adopted Constitution has clear and unequivocal language regarding the equality of men and women, now that the Constitution is being translated into implementing legislation, polygamy is an extremely controversial subject, and there is almost no one who advocates an outright ban on polygamy, even in the women's movement, because it is perceived as being unrealistic. One compromise offered in public debate was to limit the number of wives to two. This was rejected, and the current thinking of women's rights organizations is to ensure that women are granted a real and effective right to consent to their husbands marrying additional wives.

So that is where we are, a long distance from the goalpost of gender equality, despite many verbal reaffirmations of the principle at the national and international level. The bad news is that there is so far to go before women can enjoy the fundamental human rights set forth in the Universal Declaration of Human Rights and the Seneca Falls Declaration of Sentiments. The good news is that the international women's rights movement is growing, and it is growing quickly. Particularly since the United Nations Human Rights Conference held in Vienna in 1993, the integration of women's rights as a central objective of the broader human rights movement has begun in earnest. Issues of violence against women are now perceived as legitimate concerns of state responsibility, and the so-

called public/private distinction which was used routinely by lawyers and others to exclude these issues is finally eroding, making way for a new human rights approach to domestic violence and traditional practices such as honor killing and female genital mutilation.

I want to end by reading from the Declaration of Sentiments, a paragraph which sets forth the plan of action:

In entering upon the great work before us, we anticipate no small amount of misconception, misrepresentation, and ridicule; but we shall use every instrumentality within our power to affect our object. We shall employ agents, circulate tracts, petition the state and national legislatures, and endeavor to enlist the pulpit and the press in our behalf.

We still suffer in our great work from the misconception, misrepresentation and ridicule that was anticipated by our foremothers. And we are still using the same basic strategies of mobilizing public pressure for social change. But we are now growing exponentially in strength. Globalization and its high-tech support mechanisms such as e-mail have brought the international women's rights movement together and made possible a level of coordination previously unimaginable. This new strength has accelerated progress, so that perhaps even in our lifetime we will be able to realize rather than just recall and discuss the aspiration of women for gender equality.

COMMENTS IN THE INTERNATIONAL LAW ASSOCIATION PANEL ON THE YUGOSLAV TRIBUNAL: NOVEMBER 13, 1998

*Theodor Meron**

I have been asked to assess briefly the track record of the Yugoslav tribunal. I would like to mention three aspects: the tribunal as an institution; the tribunal as a court of law; and, finally, the contribution of the tribunal to deterrence of crimes and to reconciliation between the peoples of the region. I will also want to make some comments on the role of the tribunal in the Kosovo situation.

Institutional aspects, first. The tribunal is a well-functioning and well-managed institution. Its output is good. Its technical, investigative and prosecutorial quality impressive. What is particularly important, is that the tribunal is no longer in danger of running out of defendants. Under strong international pressure, some defendants have surrendered or been surrendered to the tribunal; some have been captured *manu militari*, including by United States troops under the umbrella of the Stabilization Force and North American Treaty Organization (hereinafter NATO). Based on public indictments, twenty-seven persons are now in custody, while twenty-nine remain at large. Those at large include twenty-seven ethnic Serbs and two ethnic Croats. Altogether seventeen persons have been acquitted or had their charges dismissed.

Thus, most of those still at large are ethnic Serbs. The regimes of Milosevic and that of Pale have continued to resist cooperating with the Tribunal. Milosevic has consistently refused to recognize the competence of the tribunal.

Although some of the persons in custody are mid-level officials responsible for major offenses, the principal leaders responsible for atrocities are still free, including Mladic and Karadic, but they are forced to hide and their arrest remains a distinct possibility.

Although the tribunal has continued to enjoy major United States political, logistical, financial, logistical and intelligence support, the Security Council has not been consistently helpful. Verbal admonitions, even when made under Chapter VII, not accompanied by credible sanctions or threats of use of force have not proved adequate to force compliance. The need to back up international criminal tribunals with power, power of enforcement, has been demonstrated once again.

* Theodor Meron is a Professor of Law at New York University School of Law. Mr. Meron recently gave a panel discussion concerning the Yugoslav Tribunal.

I turn to the tribunal as a court of law. The tribunal has given a number of important decisions that clarify and give a judicial imprimatur to some rules of international humanitarian law. It elucidated some general principles of criminal law, such as duress and superior orders. It has given a significant impetus to development of customary law.

Its rulings, that the principles of the Hague law are applicable to non-international armed conflict and that apart from the limitations in its Statute, crimes against humanity are, under customary law, independent of any nexus with armed conflict, that crimes against humanity can be committed not only by states, but also by other organizations, are of historic importance and have already provided the foundation for the Rome Statute. The tribunal has thus had a considerable success in strengthening international law.

Given the newness of the tribunal, its achievements are praiseworthy and nitpicking is inappropriate. Nevertheless, some criticism might not be out of place, especially if it can contribute to course correction.

I believe that the appeals chamber in the 1995 Tadić interlocutory appeal on jurisdiction erred in leaving trial chambers to decide whether a particular accused was involved in an international or non-international armed conflict. This could have resulted in a crazy quilt of norms that would be applicable in the same conflict, depending on whether it is characterized as international or non-international. A potential was thus created for inconsistent and unequal treatment of the accused.

For cases considered non-international, the tribunal deprived itself of bringing in the grave breaches of the Geneva Conventions as treaty law. Moreover, it refused to bring in the grave breaches as customary law whose content parallels the pertinent provisions of the Geneva Conventions. The grave breaches of the Geneva Conventions, the core of international criminal law, was thus left out of the normative arsenal for cases deemed non-international.

I believe that the Court should have accepted the view of the prosecution and of the United States that the conflicts in Bosnia were international armed conflicts and that, therefore, the entirety of international humanitarian law was applicable.

Secondly, I believe that the Tadić 1997 trial chamber erred in applying the International Court of Justice's *Nicaragua* imputability test to whether conflicts in Bosnia were international or non-international. That resort was inappropriate because *Nicaragua* dealt with quite a different legal question, for example, whether the contras either constituted an organ of the United States government or were acting on its behalf for purposes of attribution and state responsibility. The question whether a conflict is an international armed conflict depends, as I explained in an *American Journal of International Law* editorial, on other considerations.

Finally, the Tribunal departed from the Nuremberg jurisprudence and customary law by holding that all crimes against humanity, not only

persecution, require discriminatory intent. The Statute of Rome follows a more correct position.

Let me now turn to the broader role of the tribunal. The great hope of the Tribunal's advocates was that decollectivization of guilt, placing responsibility on the leaders and the perpetrators of atrocities, rather than on whole communities, would help bring about peace and reconciliation. However, perhaps because of the inability or reluctance of the international community, to enforce the tribunal's orders, the tribunal has had no major impact on reconciliation.

Secondly, one of the tribunal's objectives was deterrence of violations of the law. Again, as Srebrenica and Kosovo amply demonstrate, the tribunal did not have any clear deterrent effect.

I am wondering whether Kosovo is not a case where a higher profile for the tribunal, especially a louder talk of indictments, would not have been in order. But, the real problem has been the inability of the Security Council, despite strong United States support, to force Milosevic to cooperate with the tribunal, especially with regard to visas for investigators. The most recent Security Council resolution on Kosovo, Resolution 1203, adopted under Chapter VII, calls for full cooperation with the tribunal, in regard to all atrocities against civilians, including compliance with orders, requests for information, and investigation.

Again, I am wondering whether visas and freedom of movement for the tribunal's investigators should not have been the special focus of Chapter VII resolutions, resolutions that should have been backed up by credible threats of sanctions. The fact that the Kosovo conflict is a non-international armed conflict, in addition to political considerations, may explain, but does not justify, the Security Council's timidity.

There are lessons to be learned here, for the future International Criminal Court as well. International justice and international criminal law are not just ethical statements. To be truly effective, and to serve as a real deterrent, they must be backed up by real power.

RWANDAN JUSTICE AND THE INTERNATIONAL CRIMINAL COURT

*Madeline H. Morris**

A complex and important feature of the International Criminal Tribunal for Rwanda is its concurrent jurisdiction with national courts. In order to provide a context for discussion of this concurrent jurisdiction, I will begin with a brief update on the national justice picture in Rwanda. I will then consider the relationship between Rwandan national justice and the International Criminal Tribunal for Rwanda (ICTR) with an eye to the implications of that ICTR experience for a future permanent International Criminal Court.

Two years ago, in late 1996, the Rwandan parliament passed an “organic” law to govern the handling of the criminal cases arising from the Rwandan genocide. I worked closely with the Rwandan government in designing that law. The organic law consists, essentially, of a confession and guilty plea program that provides very substantial sentence reductions in return for confessions and guilty pleas. This plea bargain arrangement is made available to all perpetrators except the very most culpable category, such as the leaders of the genocide. Those most culpable few are subject to the regular Rwandan Penal Code procedures and penalties. The confession and guilty plea program was intended as a compromise that avoided a complete amnesty on the one hand and averted the need for tens of thousands of full-blown trials on the other. That compromise, it was hoped, also would contribute to national reconciliation.

Unfortunately, political obstacles have prevented the effective implementation of the Organic Law. To date, almost four years after the genocide and two full years after passage of the Organic Law, fewer than ten thousand guilty pleas have been received and only 330 verdicts have been rendered by Rwandan Courts—while 135,000 prisoners are being held on suspicion of genocide-related crimes. The reasons for this impasse are largely political. Just as one would expect, Rwandan politics have been very factionalized on the issue of justice. While there are those within the government who are of good will on the issue, there are also those who do not wish to see justice processes go forward either because they sympathize with the perpetrators on the one hand or, on the other extreme, because they would rather see the prisoners continue to languish in prison. The practical manifestation of the political resistance to justice processes has come in two forms of inaction: first, failure to provide the information and other forms of assistance that prisoners would need in order actually to

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enter a guilty plea under the Organic Law; and second, failure on the part of prosecutors and judges to prepare the files and take the other steps necessary to move the cases.

In 1996, there was a moment of opportunity. At that time it looked as though there was some chance of a positive outcome on the national justice front in Rwanda. That opportunity has largely passed. Political obstructionism has, in large part, prevailed. Events in the former Zaire surely have contributed to this outcome – the security threat and war there strengthened the hand of hardliners on both sides as well as diverting resources and attention away from domestic matters.

Now, in very recent developments, there is the prospect that a large number, perhaps as many as 30,000 prisoners, for whom there are no files or empty files, will be released for lack of evidence. This is a positive development under the circumstances. There is also renewed discussion in Rwanda of utilizing a revised version of the traditional justice mechanism, called “Gacaca,” in dealing with the genocide cases. I will not take the time here to go into that matter, except to flag one issue. The Gacaca traditionally was comprised of the “wise men” of the village who would come together to adjudicate disputes. It has been reported that, under the revised version of a Gacaca now being discussed, the members of each Gacaca would be appointed by a local governmental official who, in turn, is appointed by the central government. The use of a body constituted in that way to adjudicate genocide-related cases clearly could result in a complete circumvention of the judiciary with whatever judicial independence it might have. Persons who wish to bolster respect for the rule of law should have serious questions about going in this direction. We will need to look very carefully at the Gacaca initiative as it develops.

I hope that this update is useful and provides some context for us to now turn our attention to the ICTR and, in particular, its interrelationship with national justice in Rwanda.

The ICTR recently issued its first two opinions. In each of those opinions, reference is made at various points to Rwandan national law. In almost every such reference the ICTR gets Rwandan law wrong. And these inaccuracies are not trivial. For instance, in its *Kambanda* decision, the ICTR states, “Rwanda, like all States that have incorporated crimes against humanity or genocide in their domestic legislation, has envisaged the most severe penalties in the criminal legislation for those crimes.” In fact, Rwanda, has *never* enacted criminal legislation for genocide. While it has ratified the genocide convention, Rwanda never enacted implementing legislation. For that reason, when drafting the Organic Law to govern the genocide-related cases, we had to carefully avoid retroactivity and apply the regular Penal Code offense elements and penalties to the crimes committed.

Also, in the *Kambanda* decision, the ICTR actually misquotes the Rwandan Organic Law provision that defines “Category One” as the most culpable category of perpetrators who will be subject to the death penalty.

The ICTR states that Category One perpetrators include those who, "committed acts of sexual violence." But that is not how the Organic Law reads. Rather, it reads: those who, "committed acts of sexual torture." The difference is very significant under Rwandan law. "Torture," committed in the course of another crime, gives rise to the death penalty under the Rwandan Penal Code; "violence" does not. Since Category One defendants are subject to the death penalty, the Organic Law would enact a retroactive increase in penalties if it read "sexual violence" rather than "sexual torture."

Perhaps most egregious, the ICTR, still in *Kambanda*, claims that "According to the list drawn up by the Attorney General of Rwanda . . . Kambanda figures in Category One." But the "list" in question, drawn up pursuant to the Organic Law, is a list of persons *suspected* of Category One offenses. To use that list as a legal finding that someone *is* a Category One perpetrator flagrantly violates the presumption of innocence and the core of due process of law. Here, the ICTR both misstates Rwandan law and, in an effort to apply Rwandan law, overlooks the most basic principles of due process. I could go on with further examples of ICTR error on Rwandan law but I will allow these few illustrations to suffice.

We can respond in one of two ways to the International Tribunal doing poorly in its rendition of national law. One response would be to require the International Tribunal to do better. An international court should be able to accomplish this task, even while it may have some difficulty in light of the paucity of materials on Rwandan law and the paucity of lawyers, especially after the genocide in Rwanda. The second response that we might have to the International Tribunal's poor performance on national law would be to say that an International Tribunal should, as much as possible, stick to international law, resorting to national law only when truly necessary. This would seem like a wise practice both because of the demonstrated perils of international courts applying bodies of national law with which they are unfamiliar, and also because this would promote the uniform development of international law. Where there are gaps in international law, these will need to be filled. In the short run, it might seem fair to defendants to fill those gaps with national law from their own countries. But this would either result in indefinite non-uniformity as different national laws are applied in different international cases or would result in an arbitrary international adoption of the national law that happened to have applied to the first international case where the issue arose. Given those problems, together with the inherent difficulties of international courts applying national law, it would seem preferable to have international courts do so as rarely as possible.

The Rome Treaty for a permanent International Criminal Court or "ICC" gets this issue about right, I believe. It provides that the law applicable by the ICC will include, first, international law from all relevant sources and only "*failing that*, general principles of law derived by the Court from national laws of legal systems of the world including, as

appropriate, the national laws of states that would normally exercise jurisdiction over the crime.” We may hope that this approach will help to avoid problems such as those of the ICTR that I have just discussed.

The other aspect of the relationship of the ICTR with Rwandan national justice that I want to mention involves the distribution of defendants between the national and international fora. I will touch on this issue only very briefly here as I have written about it at some length elsewhere.¹ The distribution of defendants between the ICTR and the Rwandan national justice system is essentially controlled by the ICTR. Under the ICTR Statute, the International Tribunal has “primacy,” meaning it can take jurisdiction over any given defendant and require national courts to relinquish jurisdiction. The ICTR has exercised its primacy with a policy of “stratified concurrent jurisdiction,” as I will call it, in which the international tribunal seeks to try the leadership-level stratum of defendants and leaves the followers to be tried in national courts, if at all. This stratified concurrent jurisdiction approach predictably gives rise to two sorts of problems.

First, stratified concurrent jurisdiction systematically produces anomalous outcomes in the handling of more and less responsible defendants. This is so because the leaders, by virtue of being tried in the international forum, typically receive more favorable treatment than the followers, who are tried in national courts. The advantages for defendants of international prosecution include: absence of the death penalty (applicable in many national courts); greater due process protections (including appointed defense counsel) than many national fora offer; better conditions of incarceration than those in some countries; and, not infrequently in post-conflict contexts, greater assurance of impartiality than national courts can provide. A policy of stratified concurrent jurisdiction thus leads to “anomalies of inversion” in which these crucial advantages flow to the leaders who are, by hypothesis, most responsible for the mass crimes while the followers are subject to harsher treatment.

Such anomalies of inversion have been pronounced as the ICTR has pursued its policy of stratified concurrent jurisdiction relative to Rwandan national courts. In Rwanda, many defendants who were not high-level leaders in the Rwandan genocide have been sentenced to death in national courts (and some executed) after summary trials, sometimes without defense counsel, while leaders of the genocide have received lighter sentences after trials with full due process at the ICTR. Anomalous outcomes of this type will predictably occur where an international forum with primacy pursues a policy of stratified concurrent jurisdiction.

Stratified concurrent jurisdiction also tends to impede national plea bargaining arrangements. National justice systems may see fit to grant

1. Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 *DUKE J. COMP. & INT'L L.* 349 (1997).

defendants benefits (such as sentence reductions) in return for guilty pleas or other cooperation. This may be done to facilitate investigations or to expedite prosecution of a large volume of cases. While plea bargaining may be an advantageous strategy, governments instituting such a system must avoid the appearance of excessive leniency toward perpetrators. One way to achieve the necessary balance is to offer such "bargains" to some or all *followers* while punishing *leaders* to the full extent of the law. Herein lies the second problem with stratified concurrent jurisdiction. If the international forum takes jurisdiction over the leaders to be prosecuted, then the national forum will lack leaders to prosecute. Indeed, far from being able to show that at least the leaders are being "prosecuted to the full extent of the law," the national government seeking to institute a plea bargaining arrangement will have to acknowledge that the leaders are receiving substantial advantages in the international forum. National justice systems, consequently may be impeded in their plea bargaining arrangements.

This problem has been exemplified, once again, by the Rwandan experience. As I discussed earlier, the Rwandan government adopted a specialized plea bargaining system to deal with the enormous volume of cases related to the Rwandan genocide. The ICTR's repeatedly taking jurisdiction over the leadership-level suspects has posed an obstacle to the political acceptability within Rwanda of the plea-bargaining system, and has led to conflict and acrimony between the government of Rwanda and the ICTR.

These difficulties that have arisen in the ICTR's exercise of concurrent jurisdiction with Rwandan national courts should alert us to potential problems that may confront a permanent International Criminal Court. The Rome Treaty establishing an ICC creates the framework for a permanent international institution whose jurisdiction over the most serious international crimes will, by the terms of the Treaty, be "complementary" with that of national courts.

The Rome Treaty's complementarity framework provides, in essence, that cases will be "admissible" before the ICC only where national justice systems are unable or unwilling genuinely to prosecute the cases in question. ICC complementarity incorporates a vestigial form of the primacy of jurisdiction exercised by the ICTR in the sense that, under the ICC Statute, it is the ICC that is to determine whether a case otherwise coming within its jurisdiction is "admissible."

If admissibility is challenged, the ICC will make the final admissibility determination. Thus, the ICC has the power to exercise jurisdiction where the admissibility criteria are met, even over the objection of a State that would otherwise have jurisdiction. ICC jurisdiction over an admissible case will be exclusive, precluding national prosecution of the case, under the Statute's *ne bis in idem* provisions. In the sense that it can assert exclusive jurisdiction, even over the objection of a State, ICC complementarity incorporates a revised form of primacy.

The ICC may thus decide, even over the objection of a State that would otherwise have jurisdiction, to exercise exclusive jurisdiction over a given case. The ICC's taking of jurisdiction over one prosecution would not, however, preclude the State's prosecution of other cases arising from the same context of mass crimes. Where a State decides to do so, concurrent jurisdiction with the ICC will be actively exercised. Where active concurrent jurisdiction is exercised, the problems of anomalies of inversion and impediments to plea bargaining will predictably arise, as they have in Rwanda, if the international forum pursues a policy of stratified concurrent jurisdiction.

For the complementarity principle of the ICC Statute to be meaningful, the ICC's operations must foster as much as possible (and impede as little as possible) *bona fide* efforts to achieve justice at the national level. Consistent with that premise, the appropriate response of the ICC to the potential problems arising in the context of active concurrent jurisdiction will depend, in part, upon why, in a given instance, State courts are actively operating concurrently with the ICC. If the State's justice efforts are *bona fide* and legitimate, then the ICC should take care to operate in a manner that is indeed complementary to those national efforts. If, on the other hand, the State's exercise of jurisdiction is not *bona fide*, then complementarity may require non-cooperation with the national jurisdiction.

A State might pursue cases arising from the same situation with which the ICC is occupied for a number of different reasons. First, a State might exercise active concurrent jurisdiction because, while it has a functioning judiciary, it is unable to handle the particular cases being brought before the ICC because the State cannot obtain extradition of those defendants or cannot obtain necessary evidence abroad for those cases.

In this case, avoiding anomalies of inversion or impediments to plea bargaining should present little problem. The ICC, consistent with its role as a complement to national jurisdictions and thus acting only where States are unwilling or unable to act, would pursue only those cases that the State cannot. In practice, this may result in the ICC disproportionately prosecuting leaders (because those are the individuals likely to have had the resources to flee the country and the political connections to block intergovernmental cooperation). Nevertheless, the "leader-drain" effect is likely to be far less pronounced than it would be under a deliberate policy of stratified concurrent jurisdiction. Therefore, the problems of anomalies of inversion and impediments to plea bargaining will be reduced if not eliminated.

The second reason for active concurrent jurisdiction would be that, while the ICC considers the State unable to prosecute because of a collapsed justice system, the government's constituencies, including victim populations, view the number or character of the prosecutions being brought by the ICC as inadequate, and the State therefore views it as worthwhile to proceed with prosecutions notwithstanding the impaired

condition of its justice system. Here, it may be fruitful for the ICC Prosecutor to negotiate with the national government to agree upon an ICC prosecutorial strategy, regarding the number and character of ICC cases, that would both satisfy the ICC's goals *and* adequately fulfill the justice interests of the national population, thus obviating the need for national trials. The existence and results of such a negotiation could be made public so that the State government's relevant constituencies would be aware of their government's role in securing the desirable prosecutorial approach. Such negotiations would not constitute improper influence on the Prosecutor or Court. While an overall approach as to the volume and character of cases would be agreed upon, the agreement need not involve commitments to prosecute particular defendants and, obviously, would not influence the outcome of the cases brought.

The situation is more complex where the third reason for active concurrent jurisdiction applies. Here, a State actively exercises jurisdiction concurrently with the ICC because, while the ICC considers the State unable to prosecute because of a collapsed justice system, the government desires to consolidate the rule of law or reinforce the authority of the national judiciary and therefore, on balance, views it as worthwhile to proceed notwithstanding the impaired condition of its justice system. In this situation, the State is interested not only in assuring a certain range of prosecutions, but also, specifically, in conducting some or all of those prosecutions in its national courts in order to reap national benefits.

Where the national justice system is completely collapsed and there clearly is no hope of any national prosecutions of acceptable quality occurring within an acceptable period, the ICC Prosecutor should attempt to convince the State to forego national trials. But, the completely collapsed justice system is the worst case scenario. Not all countries with substantially collapsed justice systems will be completely incapable of conducting absolutely any satisfactory trials. Where a largely disabled justice system is capable of conducting one or two or a handful of adequate prosecutions (perhaps with substantial international assistance), and that State desires to pursue justice at the national level for rule of law-strengthening and nation-building purposes, it may be possible to accommodate both national and international interests. Here, a useful strategy may be to reverse the traditionally-envisioned order of things and have the national courts conduct a very small number of high-profile prosecutions of prominent defendants while the international court conducts a somewhat larger number of other prosecutions.

A different strategy may be necessary where the fourth reason for active concurrent jurisdiction applies. Where a State is actively exercising jurisdiction concurrently with the ICC because State actors seek through national prosecutions to suppress, discredit or wreak vengeance upon political adversaries, the ICC Prosecutor may wish to negotiate with the national government regarding an ICC prosecutorial strategy that would fulfill legitimate national justice interests sufficient to obviate any real need

for national trials. Obviously, where political suppression is the State's motive, it is less than likely (though not impossible, given states' needs to maintain acceptable international appearances) that such an agreement could be reached.

In all cases where negotiations fail to forestall national prosecutions, the ICC's subsequent relations with the national jurisdiction should depend upon the quality of the national prosecutorial efforts as they are actually carried out. If national prosecutions are conducted with impartiality and something approaching adequate due process, then the ICC should attempt to foster those national justice proceedings. Such measures to foster national justice efforts should include the ICC Prosecutor's taking into account potential anomalies of inversion and impediments to plea bargaining when designing criteria governing the defendants over which the ICC will exercise jurisdiction. This will often require the ICC Prosecutor to pursue a prosecutorial policy other than stratified concurrent jurisdiction. If, on the other hand, national justice processes seriously lack impartiality or adequate due process, then the ICC may have to refuse to foster or cooperate with those national proceedings.

Evaluation of national justice processes to determine whether they should be fostered would, of course, be an exceedingly sensitive matter. Indeed, this necessarily is the case with a number of similar determinations that the ICC must make. For instance, under the Statute, the Court will make determinations of whether States are "unwilling or unable genuinely to [prosecute];" and of whether national prosecutions are undertaken "for the purpose of shielding the person concerned from criminal responsibility . . ." and of whether national proceedings were not "conducted independently or impartially . . ." The need for the ICC to make such sensitive determinations is an inherent feature of the overall complementarity structure.

ICC complementarity thus raises some of its most sensitive and complex issues when the ICC operates concurrently with active national fora. Based on an extrapolation from the Rwandan experience, it is clear that the ICC will have to employ a carefully constructed range of policy responses in exercising active concurrent jurisdiction if it is to foster justice both directly within the ICC and within the national fora with which it interacts.

Let me add, before closing, that the potential difficulties of ICC complementarity that arise when concurrent jurisdiction is actively exercised are only half the problem. The other half will arise, as you may have guessed, when concurrent jurisdiction is not actively exercised. When the ICC is the sole active jurisdiction, there are significant risks that, for structural reasons, the ICC will fail to address the distinct interests of the nations most affected and, particularly, the victim populations. That discussion, however, will have to be taken up on another day.

LESSONS FROM THE AKAYESU JUDGMENT

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The judgment issued on September 2, 1998 by the International Criminal Tribunal for Rwanda (hereinafter ICTR) finding Jean-Paul Akayesu guilty on various charges of genocide and crimes against humanity is likely to please those who have long struggled for the progressive development and effective enforcement of international criminal law.¹ This judgment, directed at the bourgmestre of the Taba commune in the Prefecture of Gitarama in Rwanda, is the first international conviction of an individual for genocide.² Its symbolic significance is not likely to be lost on international lawyers.

The Akayesu judgment makes a number of noteworthy determinations. First, its crucial finding, that the killings of between one half and one million people within Rwanda in the middle of 1994 were clearly aimed at exterminating the group that was targeted and, given their undeniable scale systematic nature and atrociousness, undoubtedly constitute genocide within the traditional definition of that term as reflected in both the Genocide Convention and the ICTR's statute should help to put an end to debates in academic and policy circles on the nature of that massacre. There have been some who have continued to assert that neither *ethnic cleansing* in the Balkans nor the Rwandan killings of 1994 constitute genocide because of the alleged intent of the perpetrators or because of the identity of the victims targeted. Some have suggested, for example, that since in both instances the perpetrators were primarily seeking to acquire land occupied by others, neither the Tutsis nor Muslims (or other groups in the Balkans) were ever really targeted for extermination. Others have questioned whether the people killed in Rwanda in the middle of 1994, namely Tutsis and Hutus regarded as sympathetic to them, were attacked on the basis of *ethnicity* as opposed to their political beliefs. Yet others

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1. See *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Sept. 2, 1998 (carried on the ICTR's web site at < www.un.org/ict/english/judgement/akayesu.html > .

2. The term genocide did not appear in the Tribunal's judgment at Nuremberg for the major Nazi defendants, although the prosecution made reference to the term during those proceedings and in its indictments. The later trials, in Germany, of Nazi defendants included charges of genocide. See, e.g., STEVEN RATNER AND JASON ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 25 (1997).

have suggested that, at least in the case of Rwanda, what occurred was a *double genocide* for which both Tutsis and Hutus share equal responsibility.

All of these contentions are explicitly or implicitly rejected in the course of this judgment. Akayesu's judges have no trouble identifying those aspects of the Rwandan massacre of 1994 that meet the requisite specific intent required of genocide. The judges point to specific testimony about the nature of the atrocities, including the killing of newborns and pregnant women and the cutting of Achilles' tendons to prevent escape, as evidence of the resolve of the perpetrators not to spare any Tutsi. Further, the chamber adopts a strikingly modern definition of *ethnic group* that accepts its *constructed* nature while acknowledging the power and potency of ethnic self-identification. The judges quote approvingly, for example, from the definition given by one expert witness, Alison Desforges, in which she notes that the *primary criterion* for defining an ethnic group is not a difference in appearance, language or culture but the sense of belonging to that ethnic group, a sense that can *shift over time* as definitions of relevant *groups* change over time. This malleable view of ethnicity is likely to be attractive to those anxious to extend the scope of the crime of genocide.

A second achievement relates to the preservation of collective memory. Akayesu's judges render barbaric killings more comprehensible (though no less horrible), thereby making it at least more likely that future generations will learn from the mistakes of the past. While the factual findings in the Akayesu judgment are not comparable in length or in level of detail to the *historical* sections in the International Criminal Tribunals for the Former Yugoslavia (ICTY) Tadic judgment,³ the judges still manage to indicate, albeit briefly, the background facts necessary to understand the 1994 genocide, including the origins of Tutsi/Hutu distinctions. The judges suggest that ethnic distinctions in that country were of recent, not ancient, lineage and can be traced to the legacy of colonialism. The judges state that in the minds of European colonizers, "the Tutsi looked more like them because of their height and color, and were, therefore, more intelligent and better equipped to govern."⁴ They further indicate how Belgian colonial administrators helped to institutionalize their racism by dividing the Rwandan population into three "ethnic" groups and issuing mandatory identity cards containing their holders' ethnic affiliation. Those seeking European complicity in the events leading to genocide need look no further than the judges' description of the historical context of the events in Rwanda in 1994. These early sections in the judgment also puncture any illusion that the 1994 killings

3. See Opinion and Judgment, Prosecutor v. Tadic, Case No. IT-94-1-T (Trial Chamber, ICTY, May 7, 1997) <www.un.org/icty/970507jt.htm>.

4. *Id.*

were in any sense spontaneous. On the contrary, the judges state that the genocide was *meticulously organized* and *planned* and included the preparation of lists of Tutsi to be eliminated, the training of militiamen by Rwandan Armed Forces, as well as a coordinated effort by Rwandan media (particularly radio). The judgment presents a concise account of how the killings were incited.

Third, the judges elaborate the controversial offense of incitement to genocide. They find that incitement need not be *direct* but *can be implicit*. They point out that a conviction can result from behavior that “plays skillfully on mob psychology by casting suspicion on certain groups, by insinuating that they were responsible for economic or other difficulties in order to create an atmosphere favorable to the perpetration of the crime.”⁵ Perhaps most significantly, the judges find that public incitement to commit genocide can be punished even where such incitement was unsuccessful. Drawing from the common law’s notion of inchoate offenses, the Akayesu judges find that the drafters of the Genocide Convention did not intend, by omission, to suggest that unsuccessful incitement was not punishable. The judges affirm that even incitement that fails to produce the results intended by the perpetrator warrants punishment because of the high risks such actions pose for society.

Fourth, the judges apply the evidentiary rules of the ICTR in a way that responds to the difficulties presented by these cases from the perspective of the prosecution. Doubtlessly aware of the challenges to successful prosecutions posed by the wariness of witnesses to come forward in situations that present little real prospect for effective witness protection, the judges affirmatively reject the evidentiary rule, contained in some civil law systems, requiring corroboration of evidence prior to its admission. The judges state that they are not bound by such national rules. Citing to their own procedural rules as well as the precedent established by the ICTY’s Tadic judgment, the judges affirm their own ability to “freely assess the probative value of all relevant evidence” even when such evidence is presented only by a single witness.

Fifth, advocates of progressive development of international criminal norms will also be pleased by the chamber’s clear affirmation that the ICTR’s statute “does not establish a hierarchy of norms,” but grants jurisdiction over distinct offenses on equal footing. The judges therefore find that the offenses of genocide, crimes against humanity, and war crimes each have different constituent elements and can lead to multiple convictions even in relation to the same set of facts.

Sixth, the Akayesu judgment shows a sensitivity to gender-specific violence that, to date, has been absent from previous international judgments either at the end of World War II or more recently within the ICTY. Critics of the Tadic trial’s dismissal of the sole rape charge against

5. *Id.*

that defendant, and of the handling of gender-specific international crimes by the ICTY more generally, will be reassured by the judicial backing given here to the ICTR's statute's provision indicating that genocide includes "measures intended to prevent births within the group." The Akayesu judgment affirms that such measures, specifically targeting women as both members of an ethnic group and as women, can constitute genocide. The Akayesu judges note that, "in patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group."⁶ The judges affirm that the facts underlying the Rwandan genocide indicate that sexual violence was "a step in the process of destruction of the Tutsi group" and that acts with the requisite genocidal intent "were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public . . . and often by more than one assailant."⁷ The judges also indicate that "measures intended to prevent births within the group"⁸ may be mental as well as physical, noting that "rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate."⁹

The judges also affirm that mass rape can constitute a crime against humanity. In this connection, the judges note that while there is "no commonly accepted definition of rape in international law, it includes acts used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. The judges define rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. For this purpose, the judges affirm that rape when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity constitutes torture."¹⁰ They specifically recognize that sexual violence, including rape, when committed as part of a widespread or systematic attack on a civilian population on a discriminatory basis constitutes a crime against humanity.¹¹ Indeed, Akayesu is found guilty of

6. See *supra* note 3.

7. *Id.*

8. Prosecutor Jean-Paul Akayesu ICTR-96-4-T, Sept. 2, 1998.

9. *Id.*

10. *Id.*

11. More generally, the judges affirm that, as stated in article 3 of the ICTR's statute, a prosecution for crimes against humanity requires proof of acts committed either in a widespread

genocide and crimes against humanity in part due to his links to sexual violence.

Seventh, even with respect to the charges against Akayesu that do not result in convictions, namely those arising under the laws of war,¹² progressive developers of international humanitarian law will nonetheless be pleased by the judges' recognition that, at least ever since the Tokyo trials, it has been well established that civilians may be held responsible for violations of international humanitarian law.

As those familiar with the ineffectual history of international criminal norms will attest, these judicial findings, rendered in the course of a real international trial of a real perpetrator are significant achievements. The Akayesu judgment, as the Tadic judgment by the ICTY before it, is a valuable symbolic affirmation that international war crimes trials are viable. Further, since Akayesu was functionally at least the equivalent of a town mayor, his conviction, unlike Tadic's, shows that even relatively high government officials can be held accountable. Under the circumstances it is understandable if international lawyers see the Akayesu judgment as their badge of honor, a testament to what has been achieved to make international criminal law finally (if belatedly) effective. It is also all too easy, given the dismal, and apparently worsening, state of affairs within Rwanda reported by my fellow panelist, Madeline Morris, to draw another related lesson as well: namely, that it is futile to expect countries that have been involved in mass atrocities to themselves make credible efforts at providing criminal accountability. Given the *successful* and progressive precedents being established by the ad hoc criminal tribunals, including the ICTR, as compared to the struggles with Rwandan national prosecutions and plea bargained guilty pleas, it is all too tempting to conclude that international criminal prosecutions are invariably superior to national attempts since the latter are only too apt to compromise either with respect to the rights of victims, as in the case of the Former Yugoslavia, or the rights of alleged perpetrators, as in the case of Rwanda. International trials are likely to be regarded as less destabilizing to fragile governments, less likely to cede to the short term objectives of national politics, more likely to have the expertise of better qualified jurists of an international stature better able to progressively develop the law in a uniform fashion, more impartial than proceedings conducted by those caught up in the milieu that

fashion or systematically. Such crimes do not require evidence that acts of violence were both widespread and systematic.

12. Akayesu is found not guilty on these charges due to lack of what the chamber calls "factual" evidence showing a sufficient link between his actions as bourgmestre and the actions of those conducting the underlying armed conflict in Rwanda in 1994. It is unclear why the judges failed to find such a link based on the presented evidence.

gave rise to the atrocities, and better able to investigate crimes with interstate dimensions.¹³

It is all too easy to conclude that international criminal accountability is best able to fulfill our Nuremberg-inspired goals -- that is, preserve collective memory, vindicate and respond to the needs of victims, affirm the national and international rule of law, and promote national reconciliation. While drawing such a sanguine lesson from the operation of the ICTR to date would be a grave mistake, there is some evidence that the international legal community may indeed be making that mistake. There is a risk that the international community may become engaged in a two track approach: (1) an emphasis on and preference for international venues; and (2) benign neglect for domestic approaches.¹⁴ This is suggested by the criteria by which some international lawyers propose to judge domestic criminal prosecutions. Thus, in a recent, well received book, Steven Ratner and Jason Abrams argue that local criminal prosecutions will yield benefits only if there is, at the national level:

[a] workable legal framework through well-crafted statutes of criminal law and procedure; a trained cadre of judges, prosecutors, defenders and investigators; adequate infrastructure, such as courtroom facilities, investigative offices, record-keeping capabilities, and detention and prison facilities; and, most important, a culture of respect for the fairness and impartiality of the process and the rights of the accused.¹⁵

This is essentially a recipe for preferring, in the wake of virtually every instance of mass atrocity, international venues for prosecution. It is difficult to imagine what country, in the immediate aftermath of mass atrocities, could fulfill, for example, Ratner and Abrams' expectations for a desirable legal culture. It would appear that the first victim of atrocity is precisely the culture of respect for the rights of the accused that they find so important. Acceptance of the Ratner/Abrams premises is reflected in the jurisdictional primacy enjoyed by the ICTY and ICTR over national courts.¹⁶

13. For arguments along these lines, see, e.g., Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1 (1998).

14. Consider in this regard the abundance of law review articles addressing the international ad hoc tribunals compared to the relative paucity of pieces addressing the local Ethiopian or Rwandan prosecutions. Indeed, as is suggested by the case of Rwanda, there is some question about how "benign" the neglect of domestic venues has been. Still, at the level of rhetoric at least international lawyers have not condemned out of hand national prosecutions and usually stress the need to encourage them.

15. RATNER AND ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 159 (1997).

16. See, e.g., art. 8 of the ICTR's Statute.

Further, the Ratner and Abrams' recipe for preferring international venues over domestic ones could prevail even with respect to the "complementarity" contained in the new treaty for a proposed permanent international criminal court (hereinafter ICC). The Rome treaty's recipe for permitting an international prosecution, when national authorities are "unwilling" or "unable" to do so,¹⁷ could lead to a preference for international venues in situations like those in Rwanda -- where, in the immediate wake of mass atrocities, local investigations or trials are simply not possible not because of lack of political will by the new government, but due to very real and serious resource constraints. While much will depend on the discretion exercised by the ICC's prosecutor (and its judges), the ICC's proposed "complimentary" jurisdiction could become, in the worst case scenario, a race to the courthouse between international and domestic prosecutors, with the first to emerge with a plausible criminal investigation precluding retrial by the other. As my fellow panelist here, Professor Morris, argues, such contests of concurrent jurisdiction could produce destructive *anomalies of inversion* that is, serious perceptions of injustice if, for example, higher level perpetrators secure fairer and kinder treatment before international bodies as compared to those guilty of lesser crimes who receive expedited justice (and perhaps the death penalty) in national courts.¹⁸ At best, the proposed ICC suggests the international lawyer's willingness to leave the issue of international support for domestic venues to another day. It reflects the notion that domestic venues for accountability, whether in states that have suffered the atrocities or third states, need to be factored into our schemes only to the extent no international alternatives exist or because local courts are closer to where the evidence and witnesses are located, but not because local approaches might afford preferable methods for achieving our grand goals, including national reconciliation. The contemplated operation of the ICC does not envision that national venues may need to be affirmatively encouraged and supported by international proceedings or that strengthening local methods for accountability may be, at least in cases like Rwanda, the more important task.

As with the ad hoc tribunals now in place, there are no provisions in the ICC treaty (at least not yet) for joint investigations between national and international prosecutors or for the international prosecutor's turning over cases or investigations to domestic processes once these emerge. As appears to have occurred with respect to Rwanda, there is a risk that scarce international resources could well be diverted in the future to the new international court rather than to restoring the credibility of national judicial

17. See arts. 17-19, Rome Statute.

18. Also, as Professor Morris indicates, less severe international sentences may also undermine local attempts to convince perpetrators to plead guilty to lesser offenses in order to escape more severe punishment -- as appears may now be occurring with respect to Rwanda.

institutions. As with respect to the ICTR, the new ICC is not seen as needing to be complimentary in this sense to domestic venues. The latter are seen as mere concessions to real politik. There is nothing in the ICC's treaty, and little in the underlying legal literature, that suggests thoughtful discussion of how local criminal trials, reflective of local community sentiments, significantly enhance the prospects for preserving collective memory, vindicating victims, and affirming the national and the international rule of law. Further, there has been relatively little attention paid to what "accountability" can mean in cases like Rwanda involving thousands if not millions of perpetrators where individual trials for all those accused are impossible at either the national or international levels.¹⁹

The lesson we should be drawing from Rwanda is that attention to domestic processes, from Rwanda-styled plea bargains to South Africa-styled truth commissions, and to making international venues compatible with these are vital to the prospects for restoring the rule of law where it matters most: that is within communities and nations devastated by mass atrocities. Encouragement of and sensitivity to grass roots efforts when these are consistent with making perpetrators accountable confers a sense of legitimacy to both international and domestic efforts. The prospects for national reconciliation would appear to be enhanced to the extent those who are to be reconciled are accorded a sense of ownership in the process. As the Tokyo trials should have taught us, top-down "foreign" efforts are less likely to leave a lasting imprint on the societies international elites hope to influence.

To Rwandans it seems to matter a great deal whether an alleged perpetrator of mass atrocity is paraded before the local press, judged in a local courtroom, subjected to local procedures (with all its attendant imperfections), and given a sentence that accords with local sentiments, including the death penalty.²⁰ This should not surprise as any Oklahoman

19. For rare counter-examples, see Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127; Madeline H. Morris, *International Guidelines Against Impunity: facilitating Accountability*, 59 LAW & CONTEMP. PROBS. 29.

20. The result of the ICTR's jurisdictional primacy, together with the protection against a second trial, is that Rwanda is barred, by Security Council fiat, from imposing the death penalty on the most culpable perpetrators of genocide, at least to the extent these are tried by the ICTR. This highly exceptional imposition of the international community's will, seen by human rights advocates as a significant step towards the abolition of the death penalty, is the source of considerable tension within Rwanda. Unlike some European states, Rwandan authorities have never consented to any independent treaty restricting the imposition of the death penalty and Rwanda's Organic Law for the handling of these crimes specifically reserves the right to impose death on the most serious offenses and, to date, over thirty such executions have taken place. See Organic Law No. 08/96 of Aug. 30, 1996 on the Organization of the Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since Oct. 1, 1990 <<http://www.rwandemb.org/prosecution/law.htm>>.

will tell you if asked whether Timothy McVeigh should have faced a trial abroad for terrorism instead of one in the United States. Given a choice between local and foreign justice (as in a trial in Tanzania under unfamiliar processes and judges), it should hardly surprise if most survivors of the Rwandan genocide prefer local trials or local plea bargains, especially where it appears that national venues may produce quicker results. The place where trials are conducted, as well as who conducts them, has consequences, particularly to the prospects for the restoration of faith in credible local legal institutions.

Despite its numerous achievements with respect to the progressive development of the law, the Akayesu judgment itself suggests some of the hazards presented by international processes for criminal accountability. The length of the Akayesu proceedings is a problem. Akayesu was indicted on Feb. 13, 1996 and a verdict was issued against him more than two years later. The undue length of these proceedings was not caused by the case's complexity but by numerous delays caused by the defense; there are inefficiencies built into the ICTR's operation that go beyond the well-known difficulties relating to its establishment. Such a lengthy trial not only exacerbates the differences between such international trials and expedited proceedings or plea bargains within Rwanda but also presents a challenge to those who would draw public attention to international trials. It is difficult to use such proceedings to send messages of deterrence or messages of reconciliation to victims of mass atrocities if no one hears about the trials or if media outlets devote their short attention spans to other matters. Moreover, it is not at all clear that the most important audiences for such messages, namely those who have suffered the consequences of the Rwandan genocide or remain incarcerated within Rwanda, have much access to the media coverage of such international trials that manages to occur. The evidence is all to the contrary: in a country with as high an illiteracy as Rwanda's, it should scarcely surprise us that most Rwandans get their news from local radio emphasizing local events. Thus, even critics of Rwandan local prosecutions admit that such trials have received far more extensive local coverage than have events in distant Arusha involving the ICTR.²¹

Although international lawyers have reserved their harshest criticism for local Rwandan prosecutions, ICTR proceedings present difficulties of their own which should not be underestimated. As we have just heard from Professor Morris, the international legal specialists within the ICTR are not adept at criminal law and the judges are getting national law wrong. This is a matter of enormous potential significance to the legitimacy of

21. Thus, the July 1997 report of the Lawyers Committee for Human Rights reports that one of the best public education campaigns was the live radio broadcast of the trial of Froduald Karimara, a trial conducted inside Rwanda which drew massive crowds to the local courtroom. Lawyers Committee for Human Rights, *Prosecuting Genocide in Rwanda: The ICTR and National Trials* at 64 (July 1997).

ICTR verdicts. On a number of crucial issues, including the propriety of multiple convictions or the meaning of *complicity*, the gaps in international legal norms make recourse to national law inevitable. International lawyers need to be concerned about how *progressive* gap-filling occurs and about whether those expert in international law are necessarily best able to do it. We should also be concerned about the number of gaps that are now being filled by judges in the course of their decisions. The criticisms of Nuremberg for imposing *ex post facto* criminal liability should have taught us to be leery about relying on judicial innovations in the course of applying them. The downside of many of the developments identified above are precisely that they might be perceived to constitute *progressive development (lex ferenda)* instead of the application of well-established legal norms (*lex lata*). There are, in addition, a number of places in the judgment that present troubling (if predictable) issues of cultural misunderstanding or linguistic difficulties. These are difficult to avoid when foreign judges need to have recourse to translators and cultural experts in order to determine, for example, whether a witness understands the difference between reporting something as an eyewitness and presenting a second-hand account or whether perpetrators truly understood that they were meant to go out and kill those who were portrayed as their ethnic enemies. Despite the substantial improvement made with respect to the rights of defendants since the days of Nuremberg, the Akayesu judgment shows that the *ad hoc* tribunals remain vulnerable to fairness critiques for both defendants and victims.

Above all, international lawyers need to bear in mind that the primary benefit of the Akayesu judgment, and of the ICTR generally, remains symbolic. The realities are stark. While the ICTR will be fortunate, at the end of the day, to conduct trials for more than a few dozen perpetrators, at this writing approximately 135,000 Rwandans remain in detention in local jails, about one percent of the entire population. Plainly, the ICTR has not yet had a beneficial effect on the restoration of the rule of law within Rwanda or on the prospects for national reconciliation.²² International lawyers should not pat themselves on the back for establishing a process that manages to ignore the needs of the vast number of defendants or of survivors of that genocide. We should not congratulate ourselves for creating international processes that have left a devastated Rwanda to handle the vast bulk of perpetrators or risk a renewed bloodbath if detainees are summarily released. Although international lawyers may be justifiably proud of the advances made with respect to the due process rights now accorded defendants before international courts (as compared to Nuremberg), we should not lose sight of the fact that the ICTR does nothing for the vast majority of those detained in Rwanda in horrendous

22. Indeed, as Professor Morris has suggested on this panel previously the ICTR's effect on the effectiveness of the plea bargain process within Rwanda has probably been negative.

conditions. Only a minuscule proportion of Rwandan perpetrators are likely to see the inside of an international courtroom and the international process has done nothing for their due process rights. These facts make the international community's critiques of Rwandan proceedings to date seem hollow and hypocritical. While Rwandan plea bargains are doubtless a flawed alternative, some kind of expedited arrangement designed to avoid individualized trials for the vast majority of perpetrators would appear to be inevitable under the circumstances. It is unimaginable how even rich nations could provide individual trials for one percent of their own populations. While we may be disappointed that the Rwandan plea bargained arrangements have fallen far short of expectations, the number of domestic trials conducted to date (over 300) and of guilty verdicts accepted and awaiting processing (some 8,000) is undeniably impressive for a country that less than four years ago had sixteen lawyers left alive. Three hundred trials, even trials ranging from two to three days in length, are still 299 more trials than the international community has managed to conclude in four years within the ICTR. Before we condemn Rwandan authorities for the serious lapses in due process or for the slow pace of local proceedings,²³ the international community needs to accept its own share of responsibility for the inadequacies of Rwandan processes. It is the international community, after all, that has failed to prevent on-going incursions into Rwandan territory by Hutus bent on continuing their unfinished genocide and we need to consider to what extent the continuation of violence has exacerbated tensions between factions within Rwanda and encouraged retaliatory acts by Rwandan authorities. As we have just heard from Professor Morris, ethnic tensions are on the rise within Rwanda, amidst continuing suspicions of the international community and its intentions within the ICTR. While it may be true that the willingness to deal fairly with the accused may be withering away within Rwanda, we should be leery of simple-minded attempts to point the finger solely at the Rwandan authorities. Attempts to conduct criminal proceedings amidst on-going violence are bound to be severely compromised.

Drawing lessons from the Akayesu judgment and from the case of Rwanda is a treacherous business precisely because the likely lessons depend on the time horizon. Through at least 1996, there was a serious prospect that the new Rwandan government that took control in the wake of the 1994 genocide would undertake a serious and even-handed effort to conduct fair trials for those accused of mass violence, including of Tutsis accused of violent retaliation. For the most part, the international community failed to support such efforts and devoted most of its attention and resources, now reaching between \$40 and \$50 million a year, to establishing and operating an international tribunal with primacy over

23. See, e.g., Lawyers Committee Report, *supra* note 21 at 67.

national proceedings. The international community took a cookie-cutter approach to the ICTR, establishing an entity that was essentially a weaker, more impoverished replica of the tribunal established for the former Yugoslavia a year earlier. It took this approach, including provision for jurisdictional primacy, despite the fact that the situations with respect to the two regions were vastly different. In the former Yugoslavia there was little prospect for serious or even-handed local prosecutions while the same cannot be said once the government changed hands in Rwanda in the middle of 1994. At that time the local governmental authorities were only too willing to prosecute and could have used extensive international assistance to make such efforts more credible.

The challenges facing the international community at the end of the Rwandan genocide in 1994 were vastly different from what it faced with respect to the former Yugoslavia. With respect to Rwanda the challenge was to help fashion processes for criminal accountability that would take into account the vast number of likely defendants, the necessity of complimenting and not undermining local approaches, and the need to convince Rwandan authorities that the international community that failed to act to prevent the 1994 genocide could now be counted upon to prevent on-going violence. The international community failed on all three counts and the ICTR threatens to become, for these reasons (and not merely due to well-publicized inefficiencies or fiscal improprieties), an embarrassing failure. In my view, the international community has been more cognizant of internationalist priorities than of the needs of people who in the case of Rwanda continue to suffer egregious atrocities. In fashioning an exclusively international process for criminal accountability, international lawyers failed in this case to consider to whom accountability is ultimately owed.

AN OVERVIEW OF THE LEGAL ASPECTS OF CONCESSION AGREEMENTS IN LATIN AMERICA

*Quirico G. Serina**

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Over the past decade, the method by which Latin American governments have implemented infrastructure projects has changed dramatically. In the past, a governmental agency would simply apply for a development loan with a multilateral lending agency which would then step into the project and impose its own rules for pre-qualification and the tendering process. In the early part of the 1990's, Latin American governments, in response to the changing global economic environment and their nations own increasing demand for improved infrastructure, began to open up their respective markets to attract foreign investment into the infrastructure development and operation sectors. In order to accommodate private investment for infrastructure development, a sector of the economy that has traditionally been undertaken by the government, many Latin American nations were required to modify and adapt their foreign investment and public works legislation. This presentation provides a general overview of the types of changes that have taken place in this field as well as an introduction concerning the issues that are most likely to arise for foreign investors interested in building and operating infrastructure in Latin America.

In many nations of Latin America, new legislation was enacted changing the scope of existing public works laws to accommodate private investment. The main legislative vehicle for attracting private investment is the granting of a concession by the government to an individual investor or a group of investors for the construction and operation of an infrastructure project or a specified period of time, thereby allowing the private investor to recoup its investment costs and a reasonable profit for the life of the concession. Due to the magnitude of these projects, the

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developer and the concessionaire rarely act alone in this process. They can normally count on the participation of the project designer, the contracting engineer, financial institutions, and equipment manufacturers and suppliers which in and of themselves require the negotiation and execution of several agreements.

I. THE EXAMPLE OF COLOMBIA

In 1993, Colombia enacted Law No. 80 (General Statute Regarding Public Administration of the Republic of Colombia), which contained the legislative framework for public contracting including the granting of concessions. While the law allows the government to extend concessions to private investors, it also guarantees to the project investors that economic equilibrium will be maintained throughout the long term of the concession. The concept of economic equilibrium is well established under the public works law of Colombia and other Latin American countries. This legal doctrine is one that applies to long term contracts wherein, during the term of the contract, circumstances change that alter the original agreement in such a way that to comply with the contract as originally agreed would result in a more onerous burden for one or both of the parties.

In Article 20 of Law 80, the government may modify a concession agreement where, in the public interest, it must maintain the economic equilibrium of the contract for both parties and respect the economic advantages that have been given to the contractor. In the event the contract does not maintain the required economic balance, the law provides that the parties shall take the necessary steps to re-establish the equilibrium.

Under Law 80, public entities entering into concession agreements with private investors are required to maintain annual reserves in their budgets to cover contingencies that may bring about an economic imbalance. Moreover, the law permits the government to extend certain guarantees on behalf of the private investor as an incentive for attracting private investment. This is particularly helpful when financing is required for the development of the project and the start-up of the concession.

As a result of this legislation, concessionaires developing and operating infrastructure over a long-term period are provided with a measure of protection for their investment. Should economic circumstances change that detrimentally impact the concessionaire, the developer may insist that the concession be modified to reestablish the economic balance of the agreement. Moreover, the law contemplates maintaining monetary reserves available to attend to any perceived imbalance.

II. THE EXAMPLE OF PANAMA

The law governing public contracting and concessions in Panama is found in Public Contracting Law No. 56, which was enacted on December

28, 1995. The doctrine of economic equilibrium is also enshrined in Law No. 56. The Panamanian statute includes provisions, whereby in case an extraordinary or unforeseen event occurs that materially affects the conditions upon which the contract was originally based, the parties may modify their contract in order to return the parties to their original contractual position. This law also permits the parties to execute the required agreements in order to re-establish the contractual equilibrium, including contract amounts, forms of payment, and for additional costs such as financing fees and interest.

Notwithstanding the fact that Law 56 clearly places the burden and risk of the concession squarely upon the concessionaire, the government has several mechanisms at its disposal to maintain the economic balance of the contract. In the case of a toll road concession, the government may reduce the tolls charged by the concessionaire to benefit the users of the service, but in so doing must offer the concessionaire a form of compensation to restore the economic balance. One of the unique features of Concession Law 5 of 1988, as amended by Law 36 of 1995, is that the government may grant state-owned property to the concessionaire. This includes granting the right to the concessionaire to fill in portions of the seabed from which the concessionaire has the right to develop and market such newly created lands for the benefit of the concessionaire.

III. THE CASE OF VENEZUELA

The Republic of Venezuela has also passed legislation whereby concessions may be granted to private parties. This legislation is found in Decree 138 of 1994 and contains the rules for granting concessions and for public works in general. The Venezuelan laws, like its other Latin American counterparts, have included the doctrine of economic equilibrium as a key element of the concession law. This is also unique since it allows the government to offer sovereign guarantees on behalf of the concessionaire to assist the concessionaire in arranging financing and for ensuring that the project remain financially viable during the life of the concession. As an additional inducement to attract private investment, the Venezuelan law contemplates certain tax benefits, international arbitration in the case of disputes, and financial assistance in the event a state of emergency is declared that affects the works.

IV. THE CASE OF MEXICO

For the past ten years Mexico has been in the process of reforming its domestic legislation to attract foreign investors. Under the terms of the Foreign Investment Laws of 1994 and 1997, markets that were once reserved either for the state or to Mexican nationals have been opened to foreign capital participation. These activities include: 1) Transportation and Distribution of Natural Gas and Electricity; 2) Oil Exploration and Operation of Secondary Petrochemical Plants; 3) Operation of Port

Facilities, Railroads, Airports and Highways; and 4) Telephone and Satellite Services.

One of the most recent examples of Mexico's attempt to attract private investment for infrastructure relates to the privatization of the Mexican airport systems. In 1995, the Mexican Congress enacted the Airports Law in order to privatize the existing airport system and to allow for the participation of foreign capital in the process. The most important aspects of the Airports Law include the creation of four regional airport concessions and the creation of their respective holding companies. The participation in the holding companies is to be initially shared between the federal government and a strategic partner to be made up by a qualified Mexican partner and one or more foreign investors. The strategic partner will initially be entitled to own 15% of the holding company and may increase its participation to 20% after five years. Once the concession of thirty years is awarded to the strategic partner, the government will then sell its shares in the holding company through a public offering through the international capital markets. Under this scheme, the Mexican government seeks to turn the running of the airport system over to private investors and world class airport operators.

Mexico's prior experience with the privatization of the railroad system paved the way for the airport privatization. Under the 1995 Railroads Law, the Mexican Congress authorized that the nation's railroad system be divided into three regions each having its own concession. Once the concession was awarded, the government sold off 80% to 100% of its participation in each railroad group allowing the concessionaire to retain the sole right to administer and operate the railroad for a year period.

Bidding for public works and concessions is highly regulated and transparent. Under the Law of Acquisitions and Public Works, the Mexican Congress has mandated that competitive bids be received from qualifying candidates. Although the law permits direct assignation of contracts without competitive bidding, said assignation is only permitted in time of emergency and is subject to review by the Comptroller General's Office.

V. CONCLUSION

As Latin America continues to respond to the growing needs of its population and the international pressures of globalization, infrastructure will continue to be a necessity. As such, the legal systems of these nations must be subject to increasing scrutiny, and changes must occur if they intend to attract private funds for infrastructure development. Many of the innovations referred to in this presentation are still being tested and challenged. Moreover, as development funds are most sought after, the nations of Latin America are competing with each other to affect legal changes to offer the most attractive investment opportunities. Based on these pressures to grow and to attract the necessary funds to propel much

needed development, the legal systems of Latin America warrant close attention in considering future investment in infrastructure.

TEACHING INTERNATIONAL LAW: VIEWS FROM AN INTERNATIONAL RELATIONS POLITICAL SCIENTIST

*Christopher C. Joyner**

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I. THE RELEVANCE OF INTERNATIONAL LAW

Contrary to common belief, international law is real and relevant to many professors of political science.¹ When analyzed in the context of the

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actual process of policy-making, it becomes clear that political scientists cannot help but be mindful of international law's real-world effects. International law provides stability and regularity in the conduct of international relations. International law thus creates expectations for decision-makers about the behavior of other actors in the international system.² Likewise, if policy-makers know what the law is, they can then fashion policy to conform with the expectations of other governments. In this way, international rules perpetuate regularity in international behavior, which should promote less conflict and greater stability in interstate relations.

International political science professors are increasingly coming to realize that legal concepts and principles actually contribute much to shaping the components and contours of the international system.³ For one, international law embraces and legitimizes the concept of sovereignty. Sovereignty is the paramount political characteristic of the state. Sovereignty means that a state is independent from any authority superior to its own, that a state can not be bound without its consent, and that it enjoys judicial equality among other states. The state is politically independent, with equal legal status in the international community. While the exercised sovereignty of a state may fluctuate, the concept still constitutes a fundamental operating principle of international relations, and sovereignty remains a cardinal principle of international law.⁴

International law also determines the rules for membership in the international community. International law sets the standards for one

1. See generally JOHN KING GAMBLE & CHRISTOPHER C. JOYNER, *TEACHING INTERNATIONAL LAW: APPROACHES AND PERSPECTIVES* (1997); JOHN KING GAMBLE, *TEACHING INTERNATIONAL LAW IN THE 1990'S* (1993).

2. See Christopher C. Joyner, *The Reality and Relevance of International Law in the Post-Cold War Era*, *THE GLOBAL AGENDA: ISSUES AND PERSPECTIVES* 252-65 (Charles W. Kegley, Jr. and Eugene R. Wittkopf eds., 5th ed. 1997).

3. Unlike most international relations textbooks of the 1950's and 1960's, international relations texts since 1985 have included at least one chapter on international law and the search for order in world politics. *C.f.*, e.g., FREDERICK L. SCHUMAN, *INTERNATIONAL POLITICS* (4th ed. 1969); ARNOLD WOLFERS, *DISCORD AND COLLABORATION* (1962); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* (4th ed. 1967); ROBERT STRAUSS-HUPE, *POWER AND COMMUNITY* (1956) with CHARLES W. KEGLEY & EUGENE WITTKOPF, *WORLD POLITICS: TREND AND TRANSFORMATION* 478-513 (6th ed., 1997); FREDERICK S. PEARSON & J. MARTIN ROCHESTER, *INTERNATIONAL RELATIONS: THE GLOBAL CONDITION IN THE LATE TWENTIETH CENTURY* 311-38 (1992); and BRUCE RUSSETT & HARVEY STARR, *WORLD POLITICS: THE MENU FOR CHOICE* 406-434 (5th ed. 1996).

4. See generally ALAN JAMES, *SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY* (1986); LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (1979).

government's recognition of the lawful existence of another state.⁵ This means that international law determines the ground rules for a state's legitimacy in the international system. In this connection, international law also sets out the rights and duties of states. These general rights and duties send clear signals to foreign policy makers as to whether certain actions are permissible in international intercourse.⁶ All these considerations are relevant for the analyst of international relations.

Further, international law provides the language of interstate diplomacy for national foreign policy makers.⁷ When a government communicates with another state, it usually does so through international legal channels, using the discourse of international law. When foreign policy elites in a state criticize another government for its actions, some reference to the other state's failure to abide by international legal precepts is made in virtually every case. When a dispute or confrontation breaks out between a state and another government, legal principles nearly always become pivotal considerations in the international negotiations that usually ensue. Professors of international political science can not ignore these realities.

No less important for the professor of international political science is that international legal rules enable normative judgments of actions and assertions made by governments. Legal rules serve as indicators or guidelines for policy-makers regarding the procedures or actions to be pursued in order for some particular policy to be considered internationally legitimate. Foreign policy makers might decide to disregard those guidelines because they are not compatible with national interests or foreign policy objectives. But that does not obviate the fact that those officials are aware of those rules' existence, legal meaning and policy implications, and they do know when those rules have been breached: International political scientists must be mindful of these considerations.

The point here is clear: Government decision-makers nearly always will seek to determine what international legal implications are posed by a particular course of action. While they might opt not to comply with the law, decision-makers want to know what relevance the law holds for the policy in question. To do otherwise is to be blind to the rules of the road for international intercourse and to invite unintentional and unnecessary collisions with other governments. This is fundamental to the ability of states to engage in diplomatic and commercial intercourse, and thus it is essential to the study of state behavior in international political science.

5. See GERHARD VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 66-90 (7th ed. 1996); MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 183-86 (2nd ed. 1993).

6. See G. VON GLAHN, *supra* note 5, at 123-200.

7. See generally Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics*, 38 VA. J. INT'L L. 107 (1998).

International political scientists tell us that the rules of international law are interpreted by decision-makers to serve national interests. The plain facts of policy-making in the real world are these: when international law is viewed away from the academic realm of *realpolitik* (where it is regarded as weak, debilitated idealism), its role becomes elevated to the dimension of practical policy utility. International legal considerations remain salient and significant ingredients for international political scientists to assess in the mix of analyzing policy choices and motivations by governmental decision-makers.

II. PEDAGOGY FOR THE INTERNATIONAL LAW PROFESSOR

International law is real and relevant to the study of political science. But, how can the political science professor teach international law more effectively at the undergraduate level? While few political science academics have experience as international legal practitioners, that need not be a handicap. Indeed, that a professor has not been an international lawyer may be a strength, since students in undergraduate political science courses are more likely to be interested in what the law is, why it is necessary, and how it works, rather than the niceties and nuances of cases derived from international adjudication.

For international political scientists, the pedagogical schema used to organize an international law course is critical. Such criteria are salient, since they determine how essential concepts and principles of international law will be relayed to students. Regardless of whether the approach taken is through lecture, case method, or seminar, the political science professor teaching international law to undergraduates should bear in mind six fundamental considerations as a framework for outlining concepts and sharing experiences:

A. *Come to the Classroom with a Clear Pedagogical Purpose in Mind*

The most important element in teaching an international law course is to know what information should be presented and how it can best be conveyed to students. This task is also likely to be the most challenging for the political science professor teaching international law. It is essential that he/she be able to package and deliver the information so that students can learn from and build upon that knowledge. While developing students' appreciation for theory and conceptual reasoning about international affairs is important, no less important is the need to emphasize that international law is actually applied in the real world and constantly works to facilitate interstate relations.

B. *Relate Conceptual Materials and Examples in a Coherently Organized and Intelligible Fashion*

Keep comments simple and straight forward. Most students appreciate crisp, cogent explanations. In answering questions, be thorough, succinct,

and honest. If you do not know the answer to a question *do not try to fabricate one*. Students detect that. More importantly, students will respect you as a teacher if you admit that you do not know an answer, but will try to find it out by the next class meeting. It is imperative that you follow through on this pledge. Otherwise, students will see through this as a ploy, or discursive tactic.

C. *Avoid Over-Analyzing Points and Issues*

Do not make the classroom experience tedious and overly pedantic. As the instructor, you know where the discussion should go. Your questions and comments should channel the discussion in that direction. In the same vein, use common examples to illustrate fundamental points. For instance, in underscoring the pervasive relevance of international law, make the following point: International law is essential to all our lives, even though we may not realize it and take it for granted every day. Ask the class: Do you drink coffee, tea, or coca cola? Do you own a car, television, camera, VCR, clothes, or CD player? If that product, or any part of it was made abroad and imported into the United States, international law was the means for getting it here. International trade works through international legal channels. Ever fly in an airplane to a foreign country? Take a cruise to the Caribbean? Send a letter to a friend or relative in a foreign country? Watch the Olympics or CNN covering an event in a foreign land? Have foreign classmates who studied here in the United States? It is international law that permits and facilitates all these occurrences. International law is practically everywhere, and it affects nearly everyone. The fact that it works so well, so much of the time leads most of us to take it for granted until the sensational event occurs, the invasion, or act of armed aggression, by one government against another state that brings the credibility of international law into question.

D. *Use the Classroom Experience to Arouse Interest and Provoke Discussion of Key Concepts, Issues and Problems*

A course in International law in political science usually attracts a wide variety of student interest, including foreign students. This situation can make for a very rich learning environment, as students of differing nationalities bring to the classroom disparate views and opinions on international events and issues. Take advantage of that range of attitudes. Encourage students to react to various legal concepts and points. A profound educational point can be made with the realization that international law is often subject to varying interpretations, depending on an observer's national perspective. Where a student stands on an international legal issue may well reflect the national perspective of the state where he/she is from. Substantiating that point in the classroom can make the discussion a microcosm of international relations.

Class discussion about international law can be substantially enriched by relating key legal concepts being discussed to contemporary issues and events. Not only does this compel students to take a more active interest in *what's in the news*, it also underscores the relevance of international law to the real world today, as opposed to cases *back then*. Use reports and analyses in the daily newspaper as illustrations that highlight the relevance of international law to foreign policies and world events, as well as the successes, frustrations, or controversies in international legal concerns. That is, before meeting a class early in the term, pick up any major newspaper (e.g., *New York Times*, *Washington Post*, *Los Angeles Times*, *Wall St. Journal*), and circle in bold red magic marker the stories having to do with foreign affairs. (I suspect that nearly every one you find will have certain international legal implications). Bring the paper to class and show the stories to the class, point out and discuss with students what possible international legal ramifications could be involved. After this exercise, students are more likely to read international stories with an eye to their international legal implications, rather than consider them merely to be about some event that happened to foreign people, over there. International law becomes more than an academic subject; the international legal repercussions of foreign events will take on real world relevance.

E. Promote Decision-Making and Problem-Solving in the Classroom

An essential purpose in teaching a course on international law is to make students think in a reasoned, more analytical fashion. Teaching such legal logic in an international political science course is not intended to prepare them for law school (although many students think it will do so). Rather, such pedagogy aims to instill in students a greater appreciation for the rationale of creating international law to fulfill specific purposes in regulating the conduct of states. The use of the case method approach and hypothetical situations has proved extremely effective in this regard.

For example, consider the fundamental question that all professors must confront in teaching international law, namely: Why do governments obey international law? For much the same reason that drivers are inclined to stop at a four-way intersection. Nearly all drivers stop their cars at a four-way intersection in order to protect the driver and passengers from being hit by other vehicles, either those that are being driven recklessly, carelessly, or dangerously by other drivers. Most people do not stop because it's the law and the right thing to do. Most drivers do not stop because they actually fear getting caught by a policeman who might be watching from some hidden location. Rather, drivers stop because they realize that it is in their personal safety and interest to stop, to watch what other cars do, and then to proceed cautiously, even though they have the right of way.

Governments tend to obey international legal rules for the same reason. Stop, look and listen. Proceed with caution. That is what the law

says. The expectation is that if you follow through on that, you will in all likelihood pass through international relations unscathed and unharmed. But watch out for the drunk driver, whose senses are impaired (by ideology or parochial national interests). And watch out for the big truck that comes barreling through the intersection (the hegemonic regional power) who does not care who gets in its way because it has the largest engine and greatest bulk on the road. If you drive recklessly long enough, accidents will happen; furthermore, sooner or later, you will pay a high price, perhaps the ultimate price, for your recklessness.

F. *Relate Class Lectures to Theoretical Underpinnings of Legal Precepts, then Apply These Concepts and Principles to Real World Situations in Order to Draw Lessons for Contemporary State Conduct*

International law is often depicted as little more than idealistic ambitions, when in fact its rules provide the essential sinews that hold processes of international relations together. International treaties and conventions (including arms control agreements, environmental accords, and telecommunications arrangements), as well as civil aviation flight routes, international commercial transactions, campaigns by non-governmental organizations, actions by the United Nations and other international organizations--all these activities involve real world international law efforts to promote more orderly conduct in interstate relations. Simple news stories can be used amply to demonstrate this point.

Here is another analogy. International law functions with authority much akin to the role of officials in a football game. Football is a game of power, strategy, and interests, played on a field according to rules. Large, mighty linemen, fast backs, and quick, brutish line-backers all collide during the course of the contest. The referees and other officials determine when rules are broken, and when penalties should be imposed. Why is it that all these strong men, who are much bigger than the officials, all condescend to a referee's rulings? The strength and power of the team does not determine the rules or how the game is played. The rules are actually intended to put the game figuratively on a level playing field—to allow all teams to play by the same rules, and to have expectations about what will happen if those are broken: penalties result, penalties are called and marked off against those big strong football players by little men in black and white striped shirts. The big strong football players accept those penalties, regardless of the power differential between them and the referees. Why? The answer is similar to why governments most often decide to obey international law: because it works to their interests to play by the rules. But if they get caught in a violation, it is best for them to accept the appropriate penalties for the sake of the game being played out.

The role of international law is to provide the rules of the international relations game. So long as states abide by those rules, international relations will work fairly smoothly. But if some government decides to

cheat, to violate the rules by going offside, or using its hands to hold or block, or interfere with a pass illegally, then it violates the laws and becomes subject to international sanctions or punishment. Granted, there is no impartial group of officials in international relations to make the call in international law as during the football game. The states themselves become the referees, call the violations themselves, and impose the penalties. Still, more often than not, governments, like football players, know the rules and tend to play by them. It serves their interests to do so. Otherwise they become known as rogue states, trusted by few but known by all on account of their ill-repute.

III. COLLABORATIVE LEARNING

For many international law courses taught from a political science perspective, the most sustained and most rewarding learning experience can come from a collaborative process. Teaching international law is not supposed to be a platform for the professor to pontificate or proselytize. Rather, it furnishes an opportunity for a community of persons to learn together, in effect, to use the classroom experience for shaping and testing new ideas after being exposed or basic philosophical concepts and general principles of international law.

For collaborative learning experiences to be especially meaningful for political science students, it is essential that they reflect exposure to various legal problems, hopefully set out in authentic setting with real world analogies. This means that hypothetical cases, if used as learning devices, should be constructed in such a manner that mirrors as truly as practicable real world events and real world circumstances. International law must function in a real world political environment, and simulation exercises should reflect that fact.

One successful collaborative learning experience is to assign a series of topics for team debates before the classroom. This compels students on each debate side to conduct legal research on the merits of a particular issue, formulate proposed rationales for its lawfulness, follow the debate, and take questions from class members on the legal implications and merits of their respective positions. It combines individual responsibility with the necessity of collaborative intra-group learning.

Confronting international law in practice is critical to achievement of the course objectives, and this is effectively done through a series of debates in a course that I teach on International law and United States Foreign Policy. Students try to WIN the games by garnering support from the rest of the class based on the merits and suasion of their legal arguments, although past experience indicates that clear winners are not often produced. The degree of success this exercise enjoys depends on two key factors: first, the willingness of students to assume their adopted roles with energy and, second, the extent to which student participants in the debates can learn and relate how, where, and why international law is

integrated into the United States foreign policy decision-making process and can demonstrate the tensions between national security considerations and international legal constraints in formulating United States foreign policy. Taken in tandem, these two ingredients can produce a successful and unique learning experience that fosters a deeper understanding of the subject matter than would likely be attained through a lecture-format course.

IV. WHY DEBATE INTERNATIONAL LAW AND UNITED STATES FOREIGN POLICY?

Use of the debate can be an effective pedagogical tool for education in the social sciences. Debates, like other role-playing simulations, help students understand different perspectives on a policy issue by adopting a perspective as their own. But, unlike other simulation games, debates do not require that a student participate directly in order to realize the benefit of the game. Instead of developing policy alternatives and experiencing the consequences of different choices in a traditional role-playing game, debates present the alternatives and consequences in a formal, rhetorical fashion before a judgmental audience. Having the class audience serve as jury helps each student develop a well-thought-out opinion on the issue by providing contrasting facts and views and enabling audience members to pose challenges to each debating team.

These debates ask undergraduate students to examine the international legal implications of various United States foreign policy actions. Their chief tasks are to assess the aims of the policy in question, determine their relevance to United States national interests, ascertain what legal principles are involved, and conclude how the United States policy in question squares with relevant principles of international law. Debate questions are formulated as resolutions, along the lines of: "Resolved: The United States should deny most-favored-nation status to China on human rights grounds;" or "Resolved: The United States should resort to military force to ensure inspection of Iraq's possible nuclear, chemical and biological weapons facilities;" or "Resolved: The United States' invasion of Grenada in 1983 was a lawful use of force;" or "Resolved: The United States should kill Saddam Hussein." In addressing both sides of these legal propositions, the student debaters must consult the vast literature of international law, especially the nearly 100 professional law-school-sponsored international law journals now being published in the United States. This literature furnishes an incredibly rich body of legal analysis that often treats topics affecting United States foreign policy, as well as other more esoteric international legal subjects. Although most of these journals are accessible in good law schools, they are largely unknown to the political science community specializing in international relations, much less to the average undergraduate.

By assessing the role of international law in United States foreign policy-making, students realize that United States actions do not always measure up to international legal expectations; that at times, international legal strictures get compromised for the sake of perceived national interests, and that concepts and principles of international law, like domestic law, can be interpreted and twisted in order to justify United States policy in various international circumstances. In this way, the debate format gives students the benefits ascribed to simulations and other *action learning* techniques, in that it makes them become actively engaged with their subjects, and not be mere passive consumers. Rather than spectators, students become legal advocates, observing, reacting to, and structuring political and legal perceptions to fit the merits of their case.

The debate exercises carry several specific educational objectives. First, students on each team must work together to refine a cogent argument that compellingly asserts their legal position on a foreign policy issue confronting the United States. In this way, they gain greater insight into the real-world legal dilemmas faced by policy makers. Second, as they work with other members of their team, they realize the complexities of applying and implementing international law, and the difficulty of bridging the gaps between United States policy and international legal principles, either by reworking the former or creatively reinterpreting the latter. Finally, research for the debates forces students to become familiarized with contemporary issues on the United States foreign policy agenda and the role that international law plays in formulating and executing these policies.⁸ The debate thus becomes an excellent vehicle for pushing students beyond stale arguments over principles into the real world of policy analysis, political critique, and legal defense.

A debate exercise is particularly suited to an examination of United States foreign policy, which in political science courses is usually studied from a theoretical, often heavily *realpolitik* perspective. In such courses, international legal considerations are usually given short shrift, if discussed at all. As a result, students may come to believe that international law plays no role in United States foreign policy-making. In fact, serious consideration is usually paid by government officials to international law in the formulation of United States policy, albeit sometimes *ex post facto* as a justification for policy, rather than as a *bona fide* prior constraint on consideration of policy options. In addition, lawyers are prominent advisers at many levels of the foreign-policy-making process. Students should appreciate the relevance of international law for past and current US actions, such as the invasion of Grenada or the refusal of the United States to sign the law of the sea treaty and landmines convention, as well as for

8. The choice of issues for debate reflects this objective: each debate topic is a concern widely discussed in the news media, and often in Congressional hearings and debates. In addition, each subject tests the lawfulness of US policy vis-à-vis current treaties, principles, and norms of international law to which the United States is formally committed.

hypothetical (though subject to public discussion) United States policy options such as hunting down and arresting war criminals in Bosnia, withdrawing from the United Nations, or assassinating Saddam Hussein.

Through collaborative learning students become problem solvers, contributors and analytical discussants. The more undergraduate students learn through these exercises to form and test their own ideas about international law, the more significant the professor's role becomes as the class mentor and source of authority in the learning process. Teaching international law offers a unique opportunity to depart from the traditional approach to classroom learning from lecture and rote regurgitation of dates, events and situations. The interactive quality of the learning environment allows for students to move from a strategy of peer competition to one of peer collaboration. Participation in these exercises can be important for the learning process, particularly since students are encouraged to develop keener judgment on the merits of legal questions, gain insights into the potential of group decision-making, and acquire greater self-confidence about their contribution to planning and decision-making for the class presentation.

The role of the professor in this collaborative learning process comes principally as a bridge between international law theory and the real world.

Much of the emphasis in contemporary international relations courses aims at emphasizing theoretical concepts to students in order to make them think more critically about the process and motivations of state behavior in international affairs. Symbolic thinking is often substituted for historical analysis. The teacher of international law as international relations should strive to introduce the theory and conceptual thinking behind the law as states have created it. More than this, however, he/she should offer to students various models and examples for real world engagement with situation-specific exercises. This should permit students to engage in a collaborative learning process, such that they can improve their critical, flexible, and creative thinking skills in dealing with real-world problems that are ambiguous, ill-defined and unfamiliar.⁹

V. CONCLUSION

International law is expressly relevant for the foreign policy process and international relations. While some political scientists note and highlight theoretical deficiencies of international law, governments do not deem international rules to be irrelevant in formulating real world foreign policy choices. Indeed, governments attach considerable importance to international rules, and decision-makers expend much energy and effort contending over issues concerning their interpretation and evolution. Clearly, policy-making elites strive to fashion, revise and interpret

9. See Christopher C. Joyner, *Crossing the Great Divide: Views of a Political Scientist Wandering in the World of International Law*, 1987 AM. SOC'Y INT'L L. Proceedings 385-91 (1990).

international law such that the outcome best serves their state's purposes and advances their national interests. This is evident from the functional role assigned to legal advisers in a government's foreign policy apparatus, and it should be reflected in the teachings of international political scientists.

A debate exercise provides students with deeper insights into and appreciation of the complexities of integrating international law into the foreign policy making process. The success of any given debate depends upon the quality of the team members' efforts to research and present a topic, and on their ability to relate concepts and principles of international law to the ways in which foreign policy objectives are formulated and achieved. The exercise is not intended to train international lawyers or to promote forensics as a skill, but rather to give undergraduate political science students a greater sense of the real-world process by which foreign policy is made and implemented, and of the place international legal considerations must be given in that process. In this way, the relevance and reality of international law can be more effectively demonstrated for students of political science in general and of international relations theory in particular.

THE FUTURE OF WORLD PEACE AND OUTER SPACE

*Edward R. Finch**

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I. INTRODUCTION

Space debris is both natural and man made. The Space Shuttle several times changed course to avoid debris. In 1998 there has been a very large increase of about 912 United States satellites and payloads, for telecommunications, in low earth orbit. In geostationary orbit with more than 700 catalogued objects we are down to less than two degrees spacing. That is definitely "crowding," both for essential satellite controls and communications purposes. The United States Space Surveillance Network tracks 8,500 objects in low earth orbit. It is well aware of these 1998 United States 912 additions from Iridium of Motorola, from Globalstar of Loral Space and Communications, and from other Satellites. To these we must add the new satellites of the European Space Agency nations, the Japanese NASDA, the Chinese satellites, and, of course, the new Indian, African, and South American satellites. Despite the International Telecommunications Union Agreement and the World Administrative Radio conferences in 1999, and particularly in the year 2000, the satellite payload crowding, in both equatorial and polar LEO orbits, becomes serious. The linear geometric progression of increased space debris from satellites hitting on themselves, physically and communications' wise, has become a much more serious international problem than envisaged just a few years ago. To all this we add much increased natural meteor shower activity in 1998 and 1999, which is now confirmed. Thus, there is a space debris national security problem for all nations that will make news headlines in 1999 and the year 2000.

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It is important not to mix operational orbiting satellite payloads with non-operational space debris satellite payloads. Only when operational satellite and payloads become totally non-operational are they legally space debris. About five to ten percent of satellites and payloads tracked above 10 centimeters, are fully operational. Crippled satellites are not legally space debris. Explosions are one large source of space debris.

Many in government and in diplomacy point to the technical and legal voluntary compliance programs, laws, regulations, and decrees of nations, in their own self-interest, to control this rapid increased spread of space debris. The United States has promptly and voluntarily complied in United States Presidential Executive Orders, and in Department of Defense, Department of Transportation and Department of Commerce work to measure, model, reduce, control, and mitigate space debris. The subject is under continued national and international review.

In United Nations General Assembly document A/AC.105/C.1/L.217 of 12th January, 1998 states, "The (voluntary) control measures to be considered fall into two categories; (1) those requiring minimal impact on the design and operations, and (2) those requiring significant changes in hardware or operations." Neither category of measures require development of new technology. Measures of Category I should be applied immediately, while measures of Category II should be applied by all space operators from an agreed time point onwards.

II. CATEGORY I MEASURES

Category I comprises those measures that require no or limited changes to the design, and cost impacts are, in general, minimal. They may imply changes in hardware and operations. Some performance reduction may, however, result. These have first priority for implementation and should be implemented by all space operators immediately. Category I measures include the following: (1) no deliberate break-ups of spacecraft that produce debris in long-lived orbits; (2) minimization of mission-related debris. Often cost-effective engineering solutions are available with low cost for implementation. In several cases, however, the cost will no longer be minor as significant design changes will be needed (e.g. yo-yo devices and separated Apogee Boost Motors); (3) passivation (venting, burning to depletion, and battery safing) of upper stages and spacecraft in any Earth orbit at end of a mission; (4) for spacecraft and rocket upper stages below 2,000 kilometers with excess fuel, at the end of operations, lower the perigee altitude to minimize the orbital lifetime; (5) re-orbiting of geostationary satellites at end-of-life to a disposal orbit; (6) minimum altitude increase 300 kilometers (location of perigee above the geostationary orbit) above the geostationary orbit; (7) upper stages and spent Apogee Boost Motors used to move geostationary satellites from GTO to GEO should also be inserted into a disposal orbit at

least 300 kilometers above the geostationary orbit and freed of residual propellant.

III. CATEGORY II MEASURES

Category II comprises those options that require either significant changes in hardware or operational procedures. However, no new technology developments are needed. Category II options are aimed at removing used upper stages and defunct spacecraft from orbit within T_{max} years, thus eliminating a major debris source. The measures below provide candidate quantitative values. Agreement on T_{max} and the time after which these measures have to be applied should be achieved through discussion and deliberations in suitable international forums, such as the Inter-Agency Space Debris Coordination Committee or the Committee on the Peaceful Uses of Outer Space. There is some urgency for the application of measures of Category II in some orbital regions. An undue delay in their application will lead to a further degradation of the space environment. Removal of large or compact objects, which could partially survive entry heating, is accomplished with a de-orbiting maneuver to ensure atmospheric entry over oceanic areas during the next perigee pass. Objects which will completely burn up during atmospheric entry should be placed in orbits with limited lifetime, say twenty-five years, (T_{max}). Hence, in these cases natural perturbations will be exploited. Category II measures include the following: (1) removal after the end of a mission within T_{max} years of all rocket upper stages and defunct spacecraft in orbits with an apogee below 2,000 kilometers altitude; (2) removal after end of a mission within T_{max} years of all rocket upper stages and spacecraft in geostationary transfer orbits, transfer orbits to 12-h orbits or other eccentric orbits with a perigee altitude below 2,000 kilometers altitude; (3) re-orbiting of upper stages and satellites at end-of-life into a disposal orbit (as a temporary measure) for circulate orbits above 2,000 kilometers altitude. The debris control measures in Categories I and II can be carried out with existing technologies.

IV. OUTLOOK TO THE FUTURE

The search for new mitigation methods, technical feasibility, and cost-efficiency should be pursued further. Of great benefit for the space environment would be advanced propulsion capabilities and reusable launch systems, in particular, reusable upper stages. Advanced propulsion techniques could lower cost for de-orbiting or render feasible de-orbiting from high-energy orbits.

For example in 1997, 200 space debris experts from eighteen countries took part in the Second European Conference on space debris under European Space Agency and International Astronautical Federation. NASA, NASDA, CNES, and ESA are issuing behavior protocols to nations in order to avoid space debris. These are accepted by many

nations. Station keeping and operations satellite insurance is already substantially effected. Shielding, construction, monitoring, and final power boost to junk orbit or burn up orbit of satellites is in place. There is a serious problem, however, with regards to outer space terrorism and intentional use of space debris to destroy the eyes and ears of nations in outer space for purposes of national security. All nations are seeking to monitor their security on a full time basis in order to protect from possible space or ground war like action. The 1967 Outer Space Principles Treaty bans fractional orbital space weapons of mass destruction. The United States, ESA, and Russia maintain, both ground and space based, extensive technological monitoring of all objects in outer space over ten centimeters in size, and sometimes of even smaller space objects. There exists the United Nations Treaty that requires reporting of all satellite launches to the United Nations Secretary General Register. Unfortunately, the prompt timing of compliance reporting with it has been lacking. Amendment of that Treaty for prompt reporting would be a real contribution to world peace for the national security of all nations.

For some years the Space Committee of the International Law Association has drafted and completed a Space Debris Treaty, which has been extensively and repeatedly reviewed by international, scientific, and legal experts. Such a draft also has been informally discussed in Subcommittee meetings of the United Nations Committee on Peaceful Uses of Outer Space. It is not yet a full Committee United Nations agenda item. Dr. Nandasiri Jasentuliyana, Director of United Nations Outer Space Affairs Division, a brilliant international space lawyer and scientist, has reviewed it. Because of the advent of UNISPACE III in July, 1999 (and the importance of advancing the spread of outer space spin-off technologies, especially to the developing countries of the world), space debris is not a high priority in the United Nations yet. When it hits the front-page news it will be too late. Treaty action takes a couple of years for over 100 nations.

The writer has drafted ten principles for the advancement of a space debris treaty for the peaceful uses of outer space in the year 1999 or 2000. It is called the Magna Charta of Outer Space. It has been published in a number of languages, Its economic, political, and legal principles remain unchanged since October 15, 1963 when presented at the 34th International Astronautics Federation Congress in Budapest.

These were often considered in the pending space debris treaty drafts. These ten principles below are fully supported by the UNISPACE 1982 Resolutions, the I.T.U. Convention and the 1967 Outer Space Principles Treaty. A UNISPACE 1999 space debris workshop by the International Astronautical Academy at the 1999 UN-COPUOS-UNISPACE III Meeting in July 1999 is planned by the IAF and the United Nations. That is a good time for a world space debris treaty discussion. The extensive in depth 3-year United Nations space debris science and law study will soon be completed. The International Academy of Astronautics space debris

Position Paper will be ready in March 1999. Technology on space debris has been much advanced.

V. MAGNA CHARTA OF OUTER SPACE FOR ALL NATIONS

- A. Outer space is the key to world peace.
- B. Outer space requires long range, consistent policy planning to be successful, economically and scientifically.
- C. Outer space is inherently international by nature.
- D. Outer space holds an important solution to the global resources shortages, and needs of every nation.
- E. Outer space is a key factor for world information, world trade, national development and national security.
- F. Outer space progress will be advanced by the maximum number of nations participating in a space policy, agreement or project. Thus, the greater is the non-threat to any nation's national security, the greater the popular support, and the greater the contribution to world peace.
- G. Outer space is necessary for all nations for command, control, communications, intelligence, and national security. For all nations these common problems and their solutions are compounded by timing and scientific breakthroughs. The geostationary orbit is important for all nations.
- H. Outer space balance of power is necessary for the peace of all nations.
- I. Outer space economic demands on all nations compete with national economic demands of every nation.
- J. Outer space, manned or unmanned, space stations on the Moon, Mars, L-5, or elsewhere in outer space are the economic and scientific steps to the future of outer space for the true benefit of all nations and of all mankind.

INTRODUCTION TO THE PANEL ON "PREVENTING ASIAN TYPE CRISES: WHO, IF ANYONE, SHOULD HAVE JURISDICTION OVER CAPITAL MOVEMENTS?"

*Cynthia Crawford Lichtenstein**

Now, to set the stage for the speakers, I want to remind you that when the International Monetary Fund was founded in 1944, "the Treaty establishing the Fund could be viewed as an adjunct to the attempt to restore the world's open international trading system which had completely foundered during the 1930's and the subsequent World War."¹ The idea that lay behind the International Monetary Fund Agreement, which is setting out the rules governing trading in currencies and sets up a fund to make short-term loans to countries that have currency crises, was that exchange controls on payments for goods and services were another barrier to free trade. Thus, the rules of the Fund Agreement forbidding, for countries accepting the obligations of convertibility, the imposition of exchange controls without the approval of the Fund, apply *only* to "restrictions on the making of payments and transfers for current international transactions" and do not have any application to exchange controls that countries maintain over the use of their currencies in the capital markets. The Fund was set up as the overseer of the removal of exchange controls that interfere with free movement of goods and services. It was not given any jurisdiction over the use by countries of exchange controls on capital movements.

The history of the British economist John Maynard Keynes' role in the drafting of these provisions and his views on why capital movements should not be liberalized are very well set out in an article by John Cassidy called *The New World Disorder*.² It was simply assumed by Keynes and by the founders of the Fund that countries would deal with balance of payment difficulties occasioned by capital outflows with capital controls. Indeed Article VI of the Fund Agreement provides, "[a] member may not use the Fund's resources to meet a large or sustained outflow of capital . . . and the Fund may request a member to exercise controls to prevent such use of the resources of the Fund."

In the early 1970's, however, the international community and the Fund began to change its collective view concerning the evils of capital

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1. Original Source on file with the author.

2. *The New World Disorder*, NEW YORKER MAGAZINE, Oct. 26/Nov. 2.

controls. One of Margaret Thatcher's first actions as a free marketeer Prime Minister of Britain was to remove the United Kingdom's exchange controls on capital flows. The OECD, the club of western industrial nations, produced its Code of Liberalization of Capital Movements, and the European Community included among its rules for achieving a single market the freedom of movement of capital. It appears to be accepted by most free market economists that if the removal of barriers to the free movement of goods and services demonstrably increases the general welfare, this should also prove true for freedom of capital movements. By the 1990's, the Fund's and the World Bank's Joint Development Committee was attempting to ensure that developing countries had maximum access to international capital markets and the Fund itself was including in its programs for borrowing countries the condition (among many others) that they liberalize their capital accounts. In July 1997, The Interim Committee, the Fund's top governing Committee, recommended amendment of the Fund Agreement to provide as one of the purposes of the Treaty the liberalization of capital accounts.

The speakers will now continue for you the story of the international community's interest in asserting some sort of international oversight over capital flows.

MEETING THE CHALLENGES OF THE INTERNATIONAL FINANCIAL CRISIS

*Jonathan T. Fried**

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I. INTRODUCTION

I had earlier been invited to focus on the Canadian proposal for enhanced surveillance of international financial systems. However, the depth and breadth of the current global economic crisis, rapid developments, and the scope of international response prompt me to be more expansive about Canada's and the G-7's, approach to the challenges of the global economy.

The international economy has entered a period of turmoil not seen for a very long time and it is far from easy to predict how long the uncertainty and volatility will last. What began as a financial crisis in Asia in the summer of 1997 has evolved into a broader and deeper global economic crisis which concerns and affects us all.

More than ever, in our search for solutions, all of our countries recognize our global interdependence. And, we also recognize that our domestic economies are increasingly affected by the overall international situation.

II. CAUSES OF THE CRISIS

While we are still looking for the right answers, we have gained some understanding of some of the factors that have led to this global crisis.

There is no doubt that the same rapid economic growth that caused Asian countries to be dubbed the miracle economies contributed to the Asian crisis. Over the past three decades, per capita income levels

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increased tenfold in Korea, fivefold in Thailand, and fourfold in Malaysia. In Hong Kong and Singapore per capita income levels now exceed those in some Western industrial countries. And until the current crisis, Asia attracted almost half of total private capital inflows to developing countries over \$100 billion in 1996.

So, given the many years of outstanding economic performance, how could the crisis occur? An IMF report tells us that Thailand, the first country to be seriously hit, experienced large macroeconomic imbalances, a marked slowdown in export growth, a current account deficit that was persistently large and financed increasingly by short-term inflows, and a real exchange rate that had appreciated to a level that appeared unsustainable in part due to circumstances beyond their control, as reflected in the wide swings in the yen-dollar rate. These problems, in turn, exposed other weaknesses in the economy, including substantial, unhedged foreign borrowing by the private sector, an inflated property market, and a weak and over-exposed financial system. These weaknesses reflected undisciplined foreign lending and weak domestic policies.

Developments in Thailand prompted market participants, especially those who had initially underestimated the problems, to take a much closer look at the risks in neighboring countries. It was evident that many of the problems in Thailand existed in varying degrees in much of the Asian region. These included overvalued real estate markets, weak and poorly supervised banking sectors, and substantial private short-term borrowing in foreign currency.

Markets began to look more critically at weaknesses that had previously been considered minor, or at least manageable, given time. Market doubts were compounded by a lack of transparency in financial systems. These systems were characterized by lax enforcement of prudential rules and inadequate supervision and associated lending practices that led to a sharp deterioration in the quality of bank loan portfolios, and problems of data availability. This hindered market participants from maintaining a realistic view of economic fundamentals and added to uncertainty about governance and political regimes. This crisis of confidence led to reluctance of foreign creditors to roll over short-term loans and caused downward pressure on currencies and stock markets.

In Asia, international investors looking for high yields underestimated the risks involved. The downturn in the health of the Asian economies and shifts in international competitiveness proved to make their investments unsustainable. Fears of contagion have surfaced in the current reality of Brazil, which remains vulnerable to external shocks, while it seeks salvation through tough fiscal measures and an IMF package. Brazil's proposed measures are aimed at reducing a mushrooming public sector deficit which is eroding investor confidence and inviting currency pressures. Success in deficit reduction would allow the government to lower benchmark interest rates from levels exceeding 40%. The high rates

were adopted to forestall a looming currency collapse provoked by last August's turmoil in Russia.

The crisis in Russia reflects the confluence of three critical situations. First, as a resource exporter Russia has been severely affected by the fall in world commodity prices. The government's budget, already strained by poor tax collection, took a severe hit when oil export revenues fell. Second, was Russia's political crisis, where the continuing instability of successive governments has resulted in an inability to move forward with necessary reforms, including tax reform, better accounting practices and bankruptcy procedures, elimination of subsidies to unproductive sectors, and concerted effort to improve governance, both public and private. Third, the global *crisis of confidence* in emerging markets hit Russia—capital flight accelerated, pushing the ruble's value down sharply, and resulting in Russia's inability to pay debts, both public and private.

III. SEEKING SOLUTIONS

The G-7 and the international financial institutions are seeking solutions to ensure that international finance and the global economy can be managed to ensure stability and growth, to minimize adverse consequences including social impacts, and, to ensure the avoidance of crises.

Canada's Finance Minister, Paul Martin, stated in his October 1998 Economic and Fiscal Update: "Until recently we've seen and benefited from several years of significant economic expansion around the world. Now we are seeing globalization's other face. . . . Very clearly, the global economy has entered uncharted waters. This might well be the first real test of the stability and sustainability of globalization."

How are G-7 countries, including Canada, addressing the challenges of globalization?

The challenges are both immediate and longer term, covering the financial, economic, and social dimensions of the global situation and the interlinkages, both domestic and international.

On the financial front, we believe it is necessary to take immediate steps towards restoring confidence in the most affected economies. We must ensure our citizens enjoy systems that are safe, sound, and efficient. Prudential regulation, designed to require prudent conduct on the part of regulated financial institutions and to minimize the occurrence and cost of failures, is key, as are consumer protection and privacy issues, without intruding on the ability of financial institutions to operate as businesses.

We recognize that on the international front, concerns remain about the rapid increase and globalization of international financial flows. On balance, we believe that an open and liberal system of capital movement is highly beneficial. By facilitating the movement of savings to their most productive uses, liberalized capital flows can have a positive impact on investment and growth, and on economic prosperity. For these efforts to be realized, however, capital account liberalization needs to proceed in an

orderly manner. Including an appropriate mix of macroeconomic and exchange rate policies, sequencing liberalization with structural measures, especially in the monetary and financial sector, and pacing liberalization to the circumstances of individual countries.

Cooperation and concerted action by like-minded countries is especially critical. That is why the efforts of the G-7 to strengthen the global financial system is so important. These reforms, begun at the 1995 Halifax Summit, have assumed far more meaning in the past year as we have all struggled to come to terms with the Asian financial crisis, which evolved into a global crisis.

Canada, as an active participant in the G-7 effort, has been particularly concerned about finding ways to ensure that international financial sector supervisory regimes become stronger and more transparent in order to lessen the likelihood and severity of possible future financial crises. Last spring, Canada proposed enhanced surveillance of international financial systems that could take the form of peer review. We brought this to the attention of APEC Finance Ministers in May at the meeting hosted by Canada in Kananaskis, Alberta, and to G-7 Leaders at Birmingham. This concept was widely endorsed, and was recently incorporated into a Canadian six-point plan to deal with the global financial turmoil, announced by our Finance Minister on September 29.

This six-point plan includes:

1. Ensuring appropriate monetary policy through G-7 central banks paying close attention and giving appropriate weight to the risk of a further slowdown in the global economy;
2. A renewed commitment by the emerging economies to sound macroeconomic and structural policy;
3. Expeditious action to strengthen national financial systems and international oversight;
4. Development of a practical guide or roadmap for safe capital liberalization in developing countries;
5. Agreement to work towards a better mechanism to involve private sector investors in the resolution of financial crises; and
6. Greater attention to the needs of the poorest countries to ensure they receive the resources and support they need to reduce poverty and begin growing.

This plan is designed to address the most immediate dangers by ensuring interest rates support continuing sustainable growth, promoting a sound policy environment in the emerging markets, and ensuring that the poorest countries receive support for poverty alleviation.

The Canadian plan is also designed to address the underlying causes of financial instability by strengthening financial sector supervision, ensuring that private investors bear their share of the financial burden during times of crises, and in helping developing countries to liberalize their capital markets safely and securely.

The elements of our six-point plan are reflected strongly in the Declaration by G-7 Finance Ministers and Central Bank Governors and a G-7 Leaders Statement on the World Economy, issued on October 30.

These statements highlighted various steps already being taken to strengthen confidence in the world economy, including progress made towards agreeing on the IMF Quota increase and the New Arrangements to Borrow; the reduction of interest rates by several countries including Canada, the USA, Japan, the United Kingdom, Italy, and several other European countries, to help maintain strong growth without jeopardizing commitment to low inflation; policy commitments by Brazil which the G-7 would support; a commitment of resources by Japan to strengthen the financial system; and progress made in Asian economies toward establishing the foundation for recovery.

Leaders also welcomed the Finance Ministers' proposals for immediate financing arrangements to ward off destabilizing market contagion, including establishing an enhanced IMF facility to provide, if necessary, a precautionary line of credit for countries pursuing IMF-approved policies, accompanied as appropriate by bilateral finance and private sector involvement; and agreement to establish a World Bank facility to provide, in times of crisis, support for most vulnerable groups, financial sector restructuring, and increased use of financing tools to encourage private flows.

The G-7 Leaders and Finance Ministers did address longer term architectural reforms for the global marketplace that would capture the full benefits of international capital flows and global markets, minimize the risk of disruption, and better protect the most vulnerable. These longer term measures include global action to promote greater openness in the financial operation of domestic financial and corporate institutions, and IFIs, including through internationally agreed codes of good practice to increase transparency of governments' fiscal and monetary policies, and to strengthen corporate governance; enhancing surveillance of national financial and regulatory systems, with better cooperation between national authorities and key IFI and regulatory bodies; orderly and progressive capital account liberalization; cooperative resolution of future crises, particularly mechanisms to involve the private sector; and principles of good practice in social policy and the development of adjustment programmes to protect the most vulnerable groups in response to crises.

Leaders called on their Finance Ministers and Central Bank Governors to also pursue further proposals to strengthen the financial system, including strengthening financial systems in emerging markets, establishing a process for surveillance of the international financial system, maintaining

sustainable exchange rate regimes in emerging markets backed by macroeconomic policies that promote stability, developing new forms of official finance and promoting a greater role for the private sector in addressing crises, and encouraging policies to minimize the human cost of financial crises.

Canada was particularly insistent that the G-7 Leaders' Statement include reference to the impact of the crisis on the poor and most vulnerable, the need to engage the private sector in restoring financial and economic confidence, and the importance of open markets through trade and investment liberalization within the framework of the WTO.

On the broader economic front, we are working to maintain and foster sound economic fundamentals that build strong and resilient economies. The macroeconomic prescription reduction of deficits, keeping interest rates and inflation low is being encouraged. We are also working to promote business climates conducive to the development of SMES and enhanced job creation. We recognize the need to put in place policies that ensure a smooth transition to a more knowledge-based and technological society.

And we must also keep markets open. This involves actions designed to restore the conduct of business such as opening lines of credit, delivering on our intentions to keep markets open, and making progress on APEC early voluntary sectoral liberalization. We are mindful of carefully managing public expectations through engagement with civil society.

Increasingly, we recognize that financial and economic crises have social consequences and that, as stated by Joseph Stiglitz of the World Bank, the poor and most vulnerable often carry a disproportionate burden. In the short term, on the social front, it is important that aid to most affected countries is appropriately targeted given fiscal constraints and the drying up of capital flows. As need arises, bilateral and/or multilateral efforts will be undertaken for food aid and distribution (or other forms of humanitarian assistance) to hard-hit countries such as Indonesia and Russia.

IV. THE CONTINUING AGENDA

Our work is not over. We recognize that reform of the international financial system is an ongoing process. The momentum for reform begun in Halifax in 1995, and reaffirmed at Denver, Birmingham, and in the recent G-7 Statement, must be maintained. We also recognize that the global crisis has longer term and wide-spread impacts, not only on the financial and business communities but on the lives of the citizens of affected countries. There are, therefore, many issues that we continue to grapple with in our search for solutions.

On the financial front, we must, of course, be vigilant in ensuring effective implementation of the G-7 Finance Ministers' and Central Bank Governors Declaration. We will be tackling difficult issues and posing

challenging questions as we continue the agenda to reform international financial tools to ensure global economic stability and growth.

1. Is there agreement that the IMF should be policeman more than fireman, since we cannot sustain, politically or economically, the funds necessary to make it a lender of last resort?
2. How do we ensure the optimum effectiveness of our Bretton Woods institutions? What are the most compelling options for refocusing, refining, or redesigning them?
3. How do we achieve overall architectural coherence between the IMF, World Bank, Asia Development Bank, European Bank for Regional Development, and other international financial institutions?
4. What prescriptions should be offered regarding capital account liberalization and exchange rate volatility?
5. What further steps could be taken to address the private sector moral hazard issue?

We need to address the general malaise associated with globalization.

1. How can we provide a solid foundation for new WTO negotiations, and build support for the development of an agenda for trade negotiations?
2. What are the most effective actions to be taken to encourage the modernization of governance structures?
3. How can we promote most effectively the results of the OECD work on corporate governance expected next spring.

To deal with the social impacts, it is important that the social consequences of the economic and financial crises be addressed.

1. How could the G-7 scope be broadened to address social impacts and adjustment measures in affected economies?
2. How can we most effectively encourage the development of social safety nets and skills development in affected economies?
3. How do we achieve more buy-in and coherence across international institutions and fora? How do we foster a greater role in the area of social impacts for the OECD and APEC?

V. CAPITAL ACCOUNT LIBERALIZATION

In view of the observations offered by the other panelists, permit me to share some personal views on recent proposals to amend the IMF Articles of Agreement to give the Fund an explicit role to promote capital account liberalization. I understand that capital account liberalization in this context refers to removal of restrictions on inward and outward flows of investment and other types of capital, including cross-border flows of stocks, bonds and bank deposits. I also understand Mr. Holder's remarks to suggest that current proposals might exclude direct foreign investment from the purview of the proposed IMF oversight of liberalization.

In my view, it would seem appropriate to have the Articles of Agreement recognize explicitly that liberalization of international capital movements is a "specific purpose" of the Fund. I believe, however, that much more analysis is needed before giving the Fund more specific rule-making or enforcement role, for several reasons.

First, several international fora have some oversight of international capital markets, including the WTO, the BIS, and the OECD. As suggested by my question on international architecture earlier, we should be working towards an appropriate division of labour between relevant international organizations active in the area.

Second, taking the financial sector as an example, many countries permit capital movements to be constrained in circumstances where prudential supervision demands restraint. Indeed, the NAFTA explicitly recognizes prudential exceptions to liberalization of financial services activities. In considering oversight, we should ask whether the IMF is better placed than other international bodies to assess the legitimacy of such measures.

Third, speaking from some experience as a trade negotiator, I would note that the NAFTA, as well as U.S. bilateral investment treaties (BITs), Canadian Foreign Investment Protection Agreements (FIPAs), and thousands of other bilateral investment agreements around the world provide for investment liberalization, with implications for the capital account, subject however to explicit and diverse exceptions. Excluding direct foreign investment from IMF rule-making may not be sufficient to afford full respect for the exceptions in these agreements (for example, U.S. legislative restrictions on foreign ownership of newspapers or airlines), since the agreements cover both portfolio and direct investment.

Fourth, even if filing of exceptions were to be contemplated, experience suggests that these kinds of restrictions are more effectively liberalized in the context of bilaterally or multilaterally negotiated reductions. Even if such exceptions were permitted, absent significant new resources for administration and dispute settlement, the IMF would not appear to have the institutional capacity to resolve differences that may arise.

VI. CONCLUSION

In a recent article entitled *Glimmers of Hope*, Jeffrey Sachs stated: "Financial crises are tragic and largely unnecessary, short-run phenomena. It bears emphasizing that East Asia's and the rest of the world's, challenges will not end with the end of the financial crisis. In fact, the true hard work will begin again." We recognize that it is a fact of our rapidly changing and challenging global economy that "the true hard work" never really ends, that there are always more and different questions to grapple with, and, hopefully, that there are new and innovative solutions to be put into real effect.

FUND JURISDICTION OVER CAPITAL MOVEMENTS COMMENTS, PANEL ON “PREVENTING ASIAN TYPE CRISES: WHO IF ANYONE SHOULD HAVE JURISDICTION OVER CAPITAL MOVEMENT?”

*William E. Holder**

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I. INTRODUCTION

Within the last two years, the Fund has given extensive consideration to the question of whether the liberalization of capital movements should be pursued through an amendment of its Articles of Agreement and, in particular, whether the Fund’s approval jurisdiction should be extended to capital movements. In this respect, a number of staff papers were presented to the Executive Board, examining the framework of a possible amendment and some of the more detailed related legal issues. In September 1998, the Interim Committee stated:

* These comments are made in a personal capacity. They draw extensively on two earlier presentations: (1) F. Gianviti, IMF Seminar on Liberalization of Capital Movements, March 10, 1998, and (2) R. Leckow, IMF Singapore Training Institute Seminar on Capital Movements, June 5, 1998.

[t]he Committee invites the Executive Board to complete its work on a proposed amendment of the Fund's Articles that would make the liberalization of capital movements one of the purposes of the Fund, and extend, as needed, the Fund's jurisdiction through the establishment of carefully-defined and consistently applied obligations regarding the liberalization of such movements. Safeguards and transitional arrangements are necessary for the success of this major endeavor. Flexible approval policies will have to be adopted. In both the preparation of an amendment to its Articles and in its implementation, the members' obligations under other international agreements will be respected. In pursuing this work, the Committee expects the IMF and other institutions to cooperate closely.¹

At the same time, the Asian crisis has broadened into a world crisis, and the Fund has been devoted to dealing with evolving events, as well as seeking to understand their implications² and taking steps towards a stronger international monetary system.³

Nonetheless, the new significance of international capital movements must be recognized. As put recently, "[T]he explosive growth of international financial transactions and international capital flows is one of the single most profound and far-reaching economic developments of the late twentieth and early twenty-first centuries."⁴ Accordingly, governments, international organizations, private market participants and informed observers must deal with the phenomenon. Several complex and fundamental issues need to be raised. Factually, what do capital movements involve? What policy responses at the national and international level are to be recommended? What legal structures and prescriptions are necessary? Finally, what form of international cooperation is appropriate?

The Fund will have a direct involvement in these matters. Even under the existing Articles and within its present functions, the Fund is intimately concerned with capital movements. In particular, the Fund already has the nominal responsibility for the oversight of the international monetary system (Article IV § 3(a)). In addition, the way in which countries deal

1. Statement of the Interim Committee on the Liberalization of Capital Movements Under an Amendment of the Articles, Attachment to the Communiqué of the Interim Committee of the Board of Governors of the International Monetary Fund, Sept. 21, 1997. The Committee reaffirmed its view in its Communiqué of Apr. 16, 1998, but no reference was made in the subsequent Communiqué of Oct. 4, 1998.

2. See IMF, *International Capital Markets: Development Prospects and Key Policy Issues* (September 1998), Chapters I-IV.

3. See Report of the Managing Director to the Interim Committee, *Strengthening the Architecture of the International Monetary System* (Oct 1998).

4. IMF, *Capital Account Liberalization: Theoretical and Practical Aspects* 1 (1998).

with capital movements has direct and profound implications for financial stability and economic growth, in both the national and world economies. The Fund's view remains, therefore, that capital liberalization contributes economic benefits, although the liberalization process must be carried forward in an orderly and properly sequenced way.

In this context, my comments relate to the Fund's legal structure, present and potential. First, I will summarize briefly the Fund's existing jurisdiction. Secondly, I will turn to possible changes that could be made in order to extend that jurisdiction to capital movements. Thirdly, I will comment briefly on some broader matters that are likely to condition the prospect for such an expanded Fund jurisdiction.

II. EXISTING JURISDICTION

There are two relevant aspects of existing Fund jurisdiction: (1) its regulatory or approval jurisdiction; and (2) its general involvement in capital movements. In various respects, the Articles distinguish between payments for current transactions and capital movements.

A. *Regulatory Jurisdiction*

Article I sets the tone. Underlying as a purpose of the Fund its assistance on the "establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions that hamper the growth of world trade."⁵ Thus, liberalization for current transactions is a designated purpose of the Fund. Liberalization of capital movements is not.

Under Article VIII § 2(a), members of the Fund submit to an obligation not to impose restrictions on payments and transfers for current international transactions without the approval of the Fund. At the same time, members may opt to maintain and adapt existing restrictions; in that event, only newly imposed restrictions require Fund approval (Article XIV § 2). An additional point is that the Fund's Articles include in the concept of current payments elements that might otherwise be treated as capital (Article XIX (d)).⁶ To that extent, the Fund's approval jurisdiction already extends to capital movements.

The Articles further accentuate the distinction between current and capital restrictions. Under Article VI, members may impose ("*such controls as are necessary to regulate international capital movements,*") as long as they do not restrict the making of payments and transfers for current international transactions (Article VI § 3). In addition, the Fund

5. See *supra* note 2.

6. The definition of "payments for current transactions" set out in Art. XXX(d) includes: (i) "payments of moderate amount for amortization of loans or for depreciation of direct investments;" (ii) "normal short-term banking and credit facilities;" and (iii) "moderate remittances for family living expenses."

may request members exercise capital controls to prevent a large or sustained outflow of capital that could make it necessary for them to turn to the Fund for financial assistance (Article VI § 1(a)).

The distinction between current and capital is maintained in other respects. First, the obligation to convert official balances held by other members is confined to balances derived from current transactions (Article VIII § 4). Secondly, the prohibition from engaging in multiple currency practices or discriminatory currency arrangements has been confined by interpretation to payments and transfers for current transactions (Article VIII § 3).

B. *Capital Liberalization Under the Present Articles*

While the Articles contain a distinction between current payments and capital movements in various significant respects, the Fund is nonetheless closely involved with capital movements in the performance of its several major functions. Accordingly, within the present Articles, the Fund has engaged in the pursuit of capital liberalization.

First, in the conduct of its surveillance function, the Fund is mandated to exercise firm surveillance over the exchange rate policies of members (Article IV § 3) and to oversee members' obligations, articulated in Article IV § 1 (Article IV § 2). Of note, capital movements are part of the Article IV surveillance process; not only was the concept of capital introduced by the Second Amendment in 1978 (Article IV § 1), but it is specifically recognized in the principles and procedures for Surveillance over Exchange Rate Policies.⁷ In essence, however, the role of the Fund in surveillance is essentially analytical and recommendatory; the obligations of members under Article IV § 1 are essentially hortatory in nature, and the surveillance process consists essentially of the rendering of policy advice by the Fund to the member advice which the member may accept or reject.

The second major function of the Fund is the provision of financial assistance to members for balance of payments purposes. This use of Fund resources entails the imposition of conditionality, but the Fund's power in this respect is not unlimited; conditionality needs to be consistent with the Fund's Articles and must provide the Fund with sufficient safeguards to ensure that the Fund will be repaid (Article V § 3(a)). As already noted, capital liberalization is not a stated purpose of the Fund, and the Articles confer on the member the right to exercise capital controls.

In this regard, a distinction can be drawn between the imposition of capital controls and the removal of capital controls in Fund conditionality. For the former, the Fund has imposed controls on capital inflows as part of its conditionality, for example, by the inclusion of performance criteria establishing limits on public sector external borrowing. Such measures can be justified in light of Article VI § 1. The removal of capital controls in

7. *IMF, Selected Decisions*, 23rd Issue 10 (1998).

Fund conditionality is harder to justify, in that it could be viewed as an unjustified circumvention of the right of members to control capital movements.

The third major function of the Fund consists of technical assistance, whereby the Fund, in response to a request by a member, is prepared to provide "financial and technical services" (Article V §2 (b)). In recent years, the ambit of this function has grown, extending, in particular, to exchange policy and the exchange system. Meanwhile, the possible constraint in Article V § 2(b) that the financial and technical services be "consistent with the purposes of the Fund," has not been constraining, and advice has extended to issues of capital liberalization. Within the function of technical assistance, however, it is for the member to assess and to react to that advice as it decides.

C. *Article VIII §2(b)*

Article VIII § 2(b) imposes an obligation on members relating to the recognition of exchange control regulations of other members. Specifically, members have undertaken not to enforce in their territories exchange contracts involving the currency of any other member, if those contracts are contrary to the exchange controls of the other member that are consistent with the Fund's Articles.

This provision has been a fertile source of legal commentary. National courts have diverged widely in their interpretations and applications of the provision. Some observers have suggested that a formal Fund interpretation would clarify matters, but such an interpretation has not been forthcoming.

With reference to the application of the provision to capital controls, the view could be taken that such measures would be included in the term "regulations maintained or imposed consistently with [the Articles]." Recently, however, the German courts held that Article VIII § 2(b) should reflect the scope of Article VIII § 2(a), and thus be restricted to exchange restrictions on current transactions.⁸

III. OUTLINE OF PROPOSED AMENDMENT

As the existing jurisdiction of the Fund is the starting point for consideration of a possible amendment for capital movements, the analogy to the current provisions and practice is an appealing one. In summary, a general prohibition on restrictions on capital movements, the concept of approval of newly imposed restrictions in order to create consistency with the Fund's Articles, and transitional provisions for existing restrictions. At this stage of the discussion of an amendment, a wide variety of approaches could be considered. This spectrum includes the following:

8. See *Johann Has v. Raiffeisen - Volksbank Isen e.g.*, XI ZR 16/93; *Bank for Economic Projects-Minerabank v. Wolfgang van Beteray*, II ZR 216/92, WM 1994, 54,56.

A. *Amendment of the Fund's Purposes*

The most basic form of an amendment would be to add the liberalization of capital movements as a purpose of the Fund in Article I, as endorsed by the April 1998 Interim Committee communiqué.

Under such an amendment, the orientation of the Fund's interest in capital liberalization would be emphasized. While lacking a general obligation on all members, the most direct effect would be to legitimate capital liberalization through the use of the Fund's conditionality, during the period of a Fund-supported program.

Several consequential changes might accompany an amendment of the Fund's purposes. First, to avoid an apparent contradiction, the express right of members to maintain controls under Article VI § 3 would presumably be eliminated (though this by itself would not prevent members from resorting to such controls as a manifestation of sovereignty). Secondly, in terms of Fund financing, the present restriction on the use of Fund financing for *large or sustained* capital outflows (Article VI §1) might be reconsidered though, in so doing, the capacity of the Fund to meet an increased demand for its financial assistance would have to be weighed. Thirdly, the preamble and obligations of Article IV §1 could be re-thought though the risks associated with re-visiting that provision, arrived at only after difficult negotiations, might argue against such an initiative.

B. *Payments and Transfers for Capital Transactions*

The current Article VIII § 2(a) provision on "payments and transfers for current international transactions" could be reflected, so that there would be a prohibition on restrictions for payments and transfers associated with capital transactions. The present provision is confined to outward payments and transfers only for capital movements. This could be extended to inward capital flows. (At the same time, the existing jurisdiction for current payments and transfers might be expanded similarly.)

C. *Capital Transactions*

The Fund's existing jurisdiction relates to restrictions on the making of payments and transfers for current international transactions, not to the underlying transactions themselves (with one limited exception, namely, short-term banking and credit facilities: Article XIX (d)). The reason for this limitation was well understood. There was to be another global international organization that would have jurisdiction over current account transactions, that is, the International Trade Organization (a complementarily put into effect by the GATT and continued by the WTO).

It can be argued, therefore, that a broader approach should be adopted in the case of capital movements, in that there is no existing universal international organization charged with liberalization of capital

transactions. In support of this view, it can be seen that, were the expanded jurisdiction to be limited to payments and transfers, the impact would be marginal, in that most capital restrictions are imposed upon the underlying transactions, not on the payments and transfers related to such transactions. In addition, it seems that other international organizations and agreements with competence over capital movements do not distinguish between underlying transactions and payments and transfers.

D. *Concept of Restriction*

On the assumption that the amendment would extend to underlying transactions, the concept of restriction will need to be defined or anticipated. Given that the Fund does not at the moment have jurisdiction over underlying transactions, there is no developed practice in the Fund at this point. Based on other experience, however, an operative principle could be developed to the effect that a restriction would consist of an official measure that treats international transactions less favorably than domestic transactions. Inevitably, this generality will need elucidation in practical situations; for example, while a national measure may formally treat domestic and international transactions in the same fashion, in the particular circumstances international transactions might in fact be treated less favorably.

E. *Exceptions to Jurisdiction*

Despite the general coverage of the possible amendment, specific types of capital transactions might be excluded, totally, in part, or subject to later inclusion by appropriate action. For example, an important question is whether inward direct investment (that is, direct investment made by non-residents with residents) should be excluded, and whether its inclusion could be considered at a later time.

An argument can be made for the exclusion from Fund jurisdiction of certain measures, such as inward direct investment, that are not directly linked to the Fund's interest in balance of payments and macroeconomic management. An alternative, however, would be to exclude inward direct investment from Fund jurisdiction initially but provide that it could be activated later (in whole or in part, or with certain thresholds) by a special majority of the Board of Governors, and so put into effect without further amendment.

Members would need to be assured of their right to maintain existing restrictions. As with the present jurisdiction over current account payments, countries could expect to rely on transitional provisions to maintain and adapt restrictions without breaching the obligations of the Articles. A related question arises to what extent, and by what mechanisms, would a member be persuaded or pressured to adopt the full obligations of capital liberalization and thus terminate its reliance on transitional provisions?

F. *Approval Policies*

As with the current Articles, a member might be able to impose restrictions on capital movements in certain situations, for example, for restrictions introduced for balance of payments reasons, for prudential reasons, and for reasons of national security. Given national sensitivity on these matters, however, it is possible that members will require additional assurance before signing on to a proposed amendment in terms of detailed and relatively objective criteria to be stipulated in the Articles, rather than a general power of approval.

G. *Article VIII § 2(b)*

An amendment to expand the Fund's jurisdiction in the interests of capital liberalization would raise the question of whether to put teeth into Article VIII § 2(b).

Views and possibilities differ, especially given the diversity of national interpretation of the existing provisions, on the one hand, and the greater impact of a strengthened provision on the enforcement of contractual arrangements, on the other hand. For instance, the provision could be retained in its present form, or even abolished.

A further possibility would be to amend Article VIII § 2(b) in order to provide a mechanism to facilitate orderly international debt reorganizations. Specifically, a new Article VIII § 2(b) could provide a means of imposing a stay on the enforcement of creditor claims during the time in which a member's adjustment program is being supported by a Fund arrangement.

IV. SOME BROADER ISSUES

The choice of the scope and approach of an amendment to extend the Fund's jurisdiction will be conditioned by a number of factors. Let me mention three of them.

A. *Type of Obligation*

In designing an amendment to expand the Fund's jurisdiction, the type of obligation has to be considered.

First, a preliminary question is whether it would be better to specify the nature of the liberalization obligations or, alternatively, to confer the authority to establish such obligations on the Fund to be identified and activated at a later date. A number of treaties follow the latter approach. It rests, however, on the principle of unanimity for decisions (e.g., the OECD). In the Fund, however, that approach is not permissible; under the Articles neither the Board of Governors nor the Executive Board possesses the authority to establish obligations though they can interpret and enforce obligations.

Secondly, there is a pervasive question of the appropriate specificity of the new provisions. Notably, the existing Articles are often rendered in

terms of general principles and concepts. For example, the concept of exchange *restriction* in Article VIII § 2(a), while relatively general in its content, was left to be filled out by later decision and practice. Similarly, the Articles does not specify the policies or criteria to control the Fund's approval of exchange measures subject to the Fund's approval jurisdiction.

For capital liberalization, however, given the sensitivity of members, there may be a bias towards a more detailed description of such determinative concepts, without which members might be unwilling to choose to support an amendment.

B. *Enforcement of Obligations*

Till now, the identification, invocation, application and enforcement of members' obligations in the Fund take a different tack to that of some other organizations, such as the WTO. In the Fund, enforcement is not adversarial, as between members, and contains few formal and evidentiary procedures. Instead, they are based on the application of relatively objective criteria relating to the actual exchange measures and the practices of the governments. Significantly, also, the Articles do not envisage retaliatory action of members; rather, enforcement is for the Fund itself, by means of representation, peer pressure, conditionality, and sanctions. A relevant question arises, therefore, whether the extension of Fund jurisdiction to capital movements, given its nature and scope, would require a different system for enforcement.

C. *Conflicting Treaty Obligations*

The relationship between the amended Articles and other treaties that deal with capital movements is a further important matter for consideration.

First, it could be expected that the extension of Fund jurisdiction would need to seek accommodation with other international organizations and treaty regimes dealing with capital liberalization. One way to achieve this end would be to provide specifically in the amendment that Fund jurisdiction would be subject to obligations in other treaties.

Secondly, to the extent that other treaties provide for a more favorable regime for foreign investments than the amended Articles, a question of discrimination among members would arise. In response, a "most favored nation" type of clause could be considered.

Thirdly, while in general a conflict of rights and obligations between different treaty regimes should be avoided, a solution would be for other treaty regimes to defer to the Fund's specialized function of regulating and approving restrictions on capital movements, so that the Fund's approval of restrictions would make them consistent with those other treaties. (See, in this regard, Articles 11 and 12 of the General Agreement on Trade in Services.)

PREVENTING ASIA TYPE CRISES: WHO, IF ANYONE, SHOULD HAVE JURISDICTION OVER INTERNATIONAL CAPITAL MOVEMENT?

*Betty Whelchel**

Thank you, Cynthia, for the opportunity to be on this very distinguished panel. I am presenting a view from the private sector of the proposals discussed by my colleagues. However, I should make clear from the outset that these are my own views and do not necessarily represent the views of Deutsche Bank or the Institute of International Finance.

These are interesting times. The capital markets are going through a phase of enormous disruption as a direct result of the financial crises in Asia and Russia. Net private capital flows to emerging markets have plummeted from a peak of \$300 billion in 1996 to a projected \$160 billion in 1998. The fundamental question before policy makers today is how best to respond to Asian/Russian style crises, maintaining both confidence and discipline in the market? The debate of who, if anyone, should have jurisdiction over capital flows has renewed in this context.

It is interesting that the issue is now framed as a question of whether an international entity (usually the IMF) should have the ability to assist or sanction a country's *imposition* of capital controls. Prior to the Asian crisis there seemed to be broad consensus that the elimination of capital controls in emerging market economies would be generally desirable. As recently as 1997, proponents of expanding the IMF's jurisdiction over capital flows argued it was necessary to promote *liberalization* of such flows. The Asia crisis has made it abundantly clear that even the best and brightest are still learning about the workings of the modern financial markets, a task not made easier by the rapid pace of change. We are now reconsidering our positions on whether such controls have a place in today's economic world; the debate is now when, and what type of capital controls are appropriate.

Without question, the issue is important. Private capital flows have been a major part of the engine for growth in emerging markets in the 1990's, replacing much of the financing formerly provided by official sources. Much of the flows have been to the private, rather than sovereign sector. A large component has continued to be in the form of portfolio (often short-term) investment, despite the concerns raised about this type of investment's volatility after the Mexican peso crisis of 1994 through 1995. Derivatives, particularly deliverable and non-deliverable currency

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forwards, have also become an important part of the equation. A very large and active secondary market developed both for bank debt and for securities. Technology has dramatically increased the speed with which these funds can be transferred out of a country perceived as troubled.

These changes, as you have heard, have given rise to a view in some circles that the old systems no longer work - that a new financial architecture is needed to promote resolution of crises. Feelings have been expressed that the private investors and lenders have not borne their fair share of the burden in debt restructurings, and that rapid uncontrolled capital flows have had a destabilizing influence on attempts to resolve recent crises. Certain officials, including Michel Camdessus, Managing Director of the IMF, have argued that the IMF needs authority over capital flows to provide a basis for moratoria, standstills and similar arrangements involving an element of involuntary deferral of performance of financial contracts. In this context, the G-7 statements call for greater private sector participation in resolution of debt crises, strengthening of the IMF and expansion of the IMF's policy of lending into arrears.

What exactly is meant by the G-7 statements is unclear. But the international financial community is concerned that certain proposals made after the 1994 through 1995 Mexican peso crisis may be resurfacing. A recurring theme is that an international organization or agency should have powers similar to a U.S. bankruptcy court. The IMF continues to be frequently mentioned as a potential repository of such powers. Government officials, in recent pronouncements, have referred to giving the IMF explicit power to impose a standstill. Expansion of the IMF's jurisdiction over capital flows - in particular expansion of the scope of Article VIII 2(b) to clarify that any contract in contravention of IMF approved capital controls will not be enforceable in member courts - has also been suggested as a means to achieve this result. Implicit in the proposals is the proposition that such a standstill or capital controls will have retroactive effect - i.e., that contracts in compliance with exchange controls at the time they were entered into will not be enforceable if IMF-imposed or -approved controls are subsequently adopted.

Given these recent proposals, my remarks tonight will focus upon the issues presented by expanding the IMF's jurisdiction over capital flows to more explicitly empower the IMF to implement or support a country in implementing stays, moratoria and other involuntary deferrals of performance of financial contracts. However, it should be stressed that vesting any other international organization with similar authority would raise many of the same issues (and perhaps even more so).

It should be noted that the IMF, in practice, has considerable influence over member countries' decisions to eliminate or impose capital controls. Perhaps most importantly, the IMF has significant leverage when a country seeks IMF support. Outside of a crisis, it also has influence over members' economic and financial policies in exercise of its powers of

surveillance. It has also indirectly supported country decisions to defer payment to banks by lending into arrears.

The perceived need to further expand IMF powers is based upon the changed structure of the market. In particular, there is a view that an international entity needs to have the authority to take quick action in a crisis to stop the bleeding and give the country breathing room. While banks in the 1980's generally observed effective standstills so long as good faith negotiations were taking place, concern exists that today's widely dispersed holders of debt may not have the same incentives - whether arising from relationships, contractual terms such as sharing clauses or political pressures - to participate in an organized debt restructuring. Consequently, the risk of the creditors attempting to seize assets, or of a rogue creditor, using strike suits and other means to hold a restructuring hostage to receive more than its fair share, is perceived to be greater. As mentioned above, many also believe that a mechanism should be in place to facilitate debt reduction instead of merely a stretch-out of existing principal and interest.

Not surprisingly, the private sector reaction to expanding IMF powers along these lines is one of nervousness. Such proposals give rise to fears that international respect for private contracts is being undermined and, particularly, those decisions as to enforceability of creditors rights will be made i) in fora where the creditors have a limited, if any, voice; and ii) by entities with conflicting interests and objectives. Giving an international entity explicit power to impose a standstill (unsettling enough to many lenders, particularly since it is unclear how long such a standstill will last) raises the specter that this power will lead to the next step, to the ability to effectively impose cram-down, or reduction of debt. The result is greater anxiety about returning to emerging markets at the very time that the official and private financial communities seek to rebuild confidence. Whispers about the use of other peoples' money to achieve international political objectives can be heard.

Proponents of giving the IMF or another international entity power to impose a standstill or otherwise modify creditor rights through imposition or sanctioning of capital controls draw an analogy to the United States bankruptcy system. They rightly point out that creditors continue to lend to United States companies even though creditors know that their rights may be compromised in a bankruptcy proceeding. However, there are fundamental issues presented in attempting to translate such concept into the international arena.

From the outset in the United States, there is a question, never fully resolved, as to whether the nullification or modification of United States contract rights as a result of an international treaty or IMF edict - particularly if *ex post facto* - could be challenged as an unconstitutional taking of property. United States bankruptcy law has its foundation in the United States Constitution. Even with this authority, bankruptcy proceedings attempt to strike a balance between property rights and the

objectives to be achieved through the bankruptcy law. For example, stays are lifted if the court determines that the stay is unnecessary or that creditors are not being adequately protected. It also should be noted that the United States philosophies regarding debt relief underpinning Chapter 11 are not yet broadly accepted in other countries. Whether impediments will exist to according the IMF such powers under the laws of other jurisdictions is yet to be determined. Accordingly, there may be legal issues presented under United States and other laws by any attempt to grant the IMF bankruptcy-like powers. However, for today, we will put these interesting questions aside and focus upon the merits of these proposals.

The United States bankruptcy procedure generally involves a forum widely perceived to be impartial, focused largely upon maximizing the value of the estate for the creditors. Creditors participate in development of a plan, which is worked out between the debtor and representatives of the creditor groups (indeed, some commentators have referred to the role of the bankruptcy judge more as a referee than a decision maker). A party to the contracts, i.e., a significant creditor or the debtor, must initiate the proceeding. And, even in the United States, a bankruptcy filing is not a step lightly taken. The owners and management of the debtor are at risk of losing their equity and their jobs. Creditors fear losing control of the process.

Furthermore, in the context of private sector proceedings, stays are not imposed on a country-wide or industry-wide basis, but rather in the context of each individual debtor. As noted above, there is a balancing of the creditors' property rights and debtor relief objectives; exceptions to stays are accordingly granted taking into account the individual circumstances.

It will be very difficult for the IMF to provide a forum that creditors will view as impartial. The IMF is, by its nature, political. Its objectives, quite rightly, are not to maximize the debtor's estate for the benefit of private creditors. And, given that the IMF and its major shareholders are lenders themselves, the IMF has a conflict of interest not easily susceptible to remedy. It is likely to have a policy agenda that may preclude it from acting predominately as a referee, letting the debtors and creditors work things out as they see fit. It may even be the party directing the country to institute the proceedings. In this regard, it should be noted that neither the IMF nor the country will have the same disincentives as in a United States style bankruptcy to institute a stay or other proceeding - in fact, there may be incentives to take such action. Arguably in the case of the existing government, imposition of a stay would even strengthen its position; the IMF cannot be expected to have a bankruptcy court's power to force changes in management of the sovereign debtor. To the extent private sector debt is involved, the stay would shield debtor companies and their existing management from the consequences of their actions; furthermore, to the extent that they are doing business outside of their home jurisdiction,

such companies would have protection not afforded to their competitors in such other jurisdictions.

As a result, accountability and pressure for reform will be further reduced. Creditors will be effectively defanged to the extent their contract rights become unenforceable. They will retain little or no leverage to force a recalcitrant country or company to the negotiating table (other than a refusal to lend further money). Furthermore, in the private context, the international stays would most likely be imposed across the board. There would be no consideration of the merits of individual cases, industries or companies or, if there were to be, the decisions would most likely be made by either the IMF or the country affected (with the endorsement/encouragement of the IMF). In short, the IMF would wield a very powerful, but blunt instrument. Creditors would have little, if any, input or control.

Many major private sector participants consequently are not convinced that expanding the IMF's jurisdiction over capital flows to give it enhanced power to impose or support standstills or moratoria is either necessary or desirable at this time. Historically, at times of crises, stays effectively have been implemented through creditor cooperation with a country. Litigation has not been a major factor where the country has been negotiating in good faith. Whether litigation becomes more of a problem in today's environment remains to be seen. However, there are still factors (in addition to expense and time) which discourage creditors from engaging in an unseemly rush to the courthouse.

Generally, sovereign debtors have few assets outside of their home country that can be relied upon. This is often true of private debtors as well. There are special defenses to suit or attachment that must be overcome, based upon sovereign immunity, act of state, and comity. Courts can be hostile to a creditor that they do not believe is acting in good faith and with commercial reasonableness. In a recent decision, *Elliott Associates, L.P. v. the Republic of Peru*, the Southern District of New York refused to enforce a claim against Peru invoking the medieval defense of champerty, providing a warning to those who buy claims strictly for the purpose of bringing strike suits. Countries have long memories of those who take legal action against them. Among other things, financial institutions who sue may find themselves locked out of lucrative business opportunities for many years to come.

Leading creditors who have negotiated debt restructuring packages in the context of the London Club have never had the authority to bind those not at the table. As a result, they have been extremely cognizant of negotiating a package that other creditors would be willing to accept - ensuring at least some level of fairness. Bondholders, protection councils, and similar groups have performed similar functions for securities holders in the past. The secondary market also, frankly, creates certain opportunities for sovereign and other debtors. Although certainly not endorsed by the international financial community, debt reduction has been

achieved by some countries, most notably Peru and Nigeria, who have arranged for buy-backs of their debt in the open markets after it began trading at a deep discount. Where perceived as necessary, moratoria have also been imposed by governments, albeit at a steep price in later ability to access capital markets. Although this has unsettled markets, this may not be a bad thing - particularly if markets can learn to differentiate among different debtors. It is not a step taken lightly.

Even using the United States model for a stay in bankruptcy does not achieve all, perhaps, desired. One question is how long should the standstill last? Debt restructurings have taken as much as 14 years to conclude. What happens when the standstill is taken off? If the country's fundamentals have not improved, the capital outflow situation may be even worse than before. Also, what should be done with derivatives? United States law exempts many such contracts from the automatic stay, recognizing that time is of the essence in these transactions due both to their nature and the intricate network of hedges institutions use.

A brief mention of lending into arrears. Statements have been made implying that this may be the way to indirectly give the IMF power to sanction a deferral of payment to creditors and even a reduction in debt. To the extent that this is the case, it presents the problems discussed above and consequently risks further unsettling the markets rather than building confidence. Any decision to expand the IMF's policy in this regard should be carefully evaluated for its potential impact on the markets.

The private sector recognizes that the current situation is not perfect. When we look at the system today and the mechanisms available for risk management, we can see that the markets do look different than the 1970s - but many of the changes are positive. The markets are more liquid, more diversified, more open. New methods of quantifying and managing risk have been developed in response to these changes and it can be expected that, as the markets continue to change and new problems arise, there will be further development.

This evolution is taking place in the context of the issues discussed today. Private sector groups such as The Institute of International Finance are actively promoting practical, private-sector based, approaches to debt crises, including greater public-private sector dialogue and cooperation. For example, private circles are currently debating whether introduction of contractual provisions to facilitate private debt restructurings (such as *collective representation* clauses) would be desirable. Plans, such as the Jakarta Initiative, are being developed and implemented to promote organized out of court workouts of troubled private sector companies. Steps are being taken to strengthen local bankruptcy systems, and international protocols and concordats for recognition of foreign bankruptcy proceedings (including court-imposed stays) are being developed, to provide relief in the case of private sector companies. The IMF and the world financial system may well be better served by the IMF supporting these measures rather than trying to substitute for them.

The desire for a more orderly and theoretically tidy process is understandable. However, the temptation to resort to a quick fix, especially with respect to complex and dynamic markets, should be resisted. Some humility may be appropriate when we think that, only in 1997, the desired objective was to promote the elimination of capital controls in emerging markets. Before implementing radical solutions, we should proceed cautiously and ask hard questions about their overall impact on private capital flows creatures that have proved to be extremely fickle over the last year.

RECENT WORK ON DISPUTE RESOLUTION BY THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

*Howard M. Holtzmann**

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I. INTRODUCTION

My assignment today is to discuss the recent work of the United Nations Commission on International Trade Law ("UNCITRAL") in the field of arbitration and other forms of dispute resolution. Because UNCITRAL's recent activities are built on the foundations of its past accomplishments, they can best be viewed in the perspective of history.

That history began when UNCITRAL was established by the United Nations in 1966. At that time, the General Assembly, to use the words of one United Nations source, "recognized that disparities in national laws [and practices] created obstacles to the free flow of trade"¹ and assigned to UNCITRAL the goal of removing, or at least lessening, those obstacles. Over the years, to again quote the same United Nations source, UNCITRAL "has come to be the core legal body in the United Nations system"² devoted to facilitating international trade.

UNCITRAL's latest activities in the field of dispute resolution are closely related to its earlier projects for improving the laws, procedures and practices for resolving disputes that may arise in international trade transactions. It may, therefore, be useful to review briefly those earlier activities.

The first UNCITRAL project in the field of dispute resolution was the preparation of the UNCITRAL Arbitration Rules, which were completed in 1976. The Rules are widely used by agreement of parties, but even when the parties agree to arbitrate under institutional rules, the UNCITRAL Rules have a major influence because most modern institutional rules

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1. UNCITRAL Informational Release, p. 1 (Nov. 1996).
2. *Id.*

resonate with strong echoes of the UNCITRAL Rules, and some, indeed, include key provisions identical to the UNCITRAL text. Further, some new arbitration centers adopt the UNCITRAL text as their institutional rules.

Four years after publishing its Arbitration Rules, UNCITRAL broadened its approach by issuing the UNCITRAL Conciliation Rules. It is my impression that many more parties use institutional conciliation rules than apply the UNCITRAL Rules directly, but UNCITRAL nevertheless has an indirect effect because modern institutional conciliation rules often include key provisions that first appeared in the UNCITRAL text. In particular, UNCITRAL pioneered widely-followed provisions designed to protect confidential communications made in the conciliation process from being later used in arbitration or court litigation if the conciliation fails, and also, provisions for terminating an unproductive conciliation without needless delay. I have used the word "conciliation" because that is the term used by UNCITRAL, but it is synonymous with the term "mediation" and the process is the same whichever name is used.

UNCITRAL's most ambitious program in the field of dispute resolution and perhaps its most influential, was drafting the Model Law on International Commercial Arbitration, which was completed in 1985. It was prepared to assist legislators in reforming and modernizing arbitration laws, and has been enacted both in developed and developing nations, including several states of the United States. In some jurisdictions, the UNCITRAL text has been adopted with almost no changes, while elsewhere its principles and some of its wording have been enacted with modifications to reflect local legal preferences.³ In any event, the UNCITRAL Model Law is the yardstick by which all arbitration laws are measured.

You may have noticed that I have not mentioned the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards that is the foundation on which the legal structure of effective international arbitration has been built. The task of drafting the Convention was completed in 1958 before UNCITRAL was born, but since UNCITRAL has come into existence the promotion of the Convention has been an integral part of UNCITRAL's work and all of its texts relating to dispute resolution have been carefully written to take account of the New York Convention.

UNCITRAL's most recent dispute resolution text is the Notes on Organizing Arbitral Proceedings, which were completed in 1996. I will comment on them briefly before moving on to describe UNCITRAL's newest task, which is a systematic exploration of what projects it might undertake in the future to improve the dispute resolution process.

3. See G. Hermann *The UNCITRAL Arbitration Law: A Good Model of a Model Law*, UNIFORM L. REV. 483, 473-96 (1998).

Before turning to a discussion of the Notes, however, let me point out a noteworthy fact: Every one of the UNCITRAL texts that I have mentioned was recommended by the United Nations General Assembly by consensus, without a single voice or vote raised against it by any nation. That is, indeed, remarkable evidence of the broad acceptance that UNCITRAL's work has achieved in this field.

II. UNCITRAL'S MOST RECENTLY COMPLETED TEXT: THE NOTES ON ORGANIZING ARBITRAL PROCEEDINGS⁴

In considering the usefulness of the UNCITRAL Notes on Organizing Arbitral Proceedings, it is important to recognize that a basic characteristic of all leading international commercial arbitration rules is that they provide great flexibility for arbitrators to determine how each case will be conducted. This is a valuable feature because it permits the rules to be used in all legal systems, in many different kinds of transactions and in widely varying cultures. While such flexibility in arbitration rules and laws is also valuable in that it provides latitude for arbitrators to take into account the circumstances of particular cases, it can leave parties and their lawyers uncertain concerning the specific procedures that the arbitrators will choose to follow. The problem is acute in international commercial arbitration because there are likely to be three arbitrators, each from a different country, and there may also be lawyers from different countries. These participants often have different legal backgrounds and, consequently, varying expectations as to procedural details.

Typical of the flexibility of arbitral rules is a key provision of the UNCITRAL Arbitration Rules which states that "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided the parties are treated with equality and that at any stage of the proceeding each party is given a full opportunity of presenting its case."⁵ The American Arbitration Association's International Rules include substantially identical wording.⁶ Similarly, the London Court of International Arbitration Rules state that the tribunal shall have the widest possible discretion to conduct the proceedings in a manner which it considers to be the most efficient and effective in the particular circumstances of each case,⁷ and other rules, such as those of the International Chamber of Commerce⁸ have provisions to the same effect.

4. This section is based in part on H. Holtzmann, *Introduction to the UNCITRAL Notes On Organizing Arbitral Proceedings*, 5 TUL. J. INT'L & COMP. L. 407 (1997).

5. UNCITRAL Arbitration Rules, art. 5 (1976).

6. American Arbitration Association International Arbitration Rules, art. 16 (1997).

7. London Court of International Arbitration Rules, art. 5.2 (1985).

8. International Chamber of Commerce Arbitration Rules, art. 11 (1998).

These provisions are consistent with many national laws which also permit arbitrators wide discretion in determining how to conduct cases.⁹

In 1993, UNCITRAL undertook a project to help solve the practical problems that arise from such flexibility. The approach was to prepare the Notes on Organizing Arbitral Procedures which provide a checklist to remind parties and arbitrators of procedural matters that it is useful to consider early in the proceeding in order to assist in the orderly planning of arbitrations and so as to give lawyers timely advance information needed in preparing their cases. The task was completed in May 1996 after three years of discussion and drafting by delegates and observers from more than fifty countries, representing a wide range of legal, social and economic systems, with the assistance of experts from a number of non-governmental organizations. Thus, the Notes drew on a deep reservoir of actual experience in conducting arbitrations.

In the time available this morning, I cannot describe the nineteen topics that are covered by the checklist. Suffice it to say that they are intensely practical and are designed to help parties and arbitrators fill the gaps left in flexible rules. Thus, for example, while rules and laws typically include provisions on hearings, they do not tell you which side will speak last or for how long, nor do they indicate whether summations are expected or as is customary in some, but not all, systems the tribunal expects first to hear arguments of each party on the facts and later hear each party argue the law. Let me give you a simple example of the surprises that can occur if procedural matters are not clarified in advance. I recently heard of an international case in which an American lawyer representing the claimant delivered a rousing summation that he thought was to be the last word in the Hearing. The American lawyer was taken aback when the Chairman, who was from a civil law European country, then asked counsel for the respondent to give the final argument. I cannot say that fundamental principles of justice require that the claimant be given the last word because he or she bears the burden of proof or whether the respondent is permitted to speak last in order to exercise the right of defense. What is important is that the lawyers on both sides know in advance when they prepare for the Hearing what the procedure will be. And while on the subject of the last word, all of the lawyers in the case I described went through the entire Hearing without knowing whether or under what circumstances the Tribunal might permit submission of post-hearing briefs. Use of the Notes avoids such surprises and uncertainty by alerting parties and arbitrators to decide on such questions early.

It is important to recognize that the Notes do not prescribe any one way to proceed; they simply point out, in a neutral manner, issues that should be decided early. Moreover, the Notes do not establish any legal requirements binding on parties and arbitrators. Thus, there is no legal

9. See, e.g. *UNCITRAL Model Law on International Commercial Arbitration*, 24 I.L.M. 1302, 1307, art. 19 (Sept, 1985).

requirement that the checklist be used, and, if it is used, it is subject to modification at the discretion of the arbitral tribunal. Arbitrators using the list may consult with the parties at any stage of the proceedings in person, by conference telephone calls, by electronic means or in written communications. While this will typically be done early in the case, further consultations on some of the items may also be useful at one or more later stages.

The Notes are intended for universal application and their use is not restricted to cases conducted under the UNCITRAL Arbitration Rules. The checklist provides helpful guidelines for cases under other arbitration rules and are especially useful in ad hoc arbitrations in which the parties have not agreed to any established rules.

The text of the Notes has been published by the United Nations in a booklet that is accompanied by a separate removable folder that lists the nineteen topics in the checklist and can be used as a convenient pocket agenda.

III. A LOOK INTO UNCITRAL'S FUTURE

The key texts that support international arbitration have had time to mature and parties and arbitrators have had time to gain experience in applying them. The New York Convention celebrated its Fortieth Birthday. The UNCITRAL Arbitration of Rules of 1976 have been in use for more than twenty years and the Model Law born in 1985 is now a teenager of thirteen. Neither time nor the imagination of man stands still. Recognizing that, UNCITRAL has embarked on a program to identify areas where improvements might be made and to determine suitable methods for effectuating them.

Appropriately, UNCITRAL began the process on the occasion of the Fortieth Anniversary of the New York Convention. A meeting was convened at United Nations Headquarters in New York on June 10, 1998, forty years to the day after the Convention was opened for signature by States. UNCITRAL, particularly its forward-looking Secretariat, recognized that this occasion should not just be a celebration of the past but a celebration concerning possibilities for the future. They therefore organized a symposium in which suggestions of areas for improvements were solicited. While there was much to cheer and celebrate, celebration, which the dictionary defines as thinking, was the principal order of the day. In statements by rapporteurs and interventions by the highly sophisticated audience, a number of ideas were launched.

UNCITRAL is now continuing the process begun on New York Convention Day. At the Plenary Session of the full Commission in Vienna in June 1999, about three days will be devoted to exploring where experience reveals needs for improvements and how they might be achieved. As is the usual practice at UNCITRAL, the Commission's discussion will be aided by an analytical Note prepared by the Secretariat.

The text of the Note is not yet available, but on the basis of the discussion during New York Convention Day, it may be possible to forecast topics that may be considered in Vienna as possible subjects for future UNCITRAL actions.

One area of likely interest is the definition of what constitutes an arbitration agreement. In the light of experience, trade practice and the rapid evolution of means of electronic communication, some commentators have noted that the New York Convention and the UNCITRAL Model Law may be unduly cautious in requiring signed or written exchanges to constitute a valid agreement to arbitrate. As one observer noted, "[t]here is a strong case for a more expansive definition of agreement in writing," and indeed, for consideration of whether writing should be required in all circumstances.¹⁰

Another area in which improvements have been suggested is clarification of the scope of the kinds of disputes that may be arbitrated. While the frontiers of arbitration have expanded in some parts of the world, that development is not universal and there is less than international uniformity concerning the arbitration of disputes relating to anti-trust matters and issues relating to intellectual property. Harmony in these areas would enhance international trade.

While arbitration rules typically permit arbitrators to grant interim measures of relief, such measures can be largely meaningless without methods to enforce them on a world-wide basis. Can UNCITRAL help in devising ways to plug that loophole?

Confidentiality of arbitration is another area of active concern. Rules and laws are largely silent and case law in different countries conflict. Here, too, is an area where experience discloses need for improvement.

Another major issue that has recently attracted the attention of courts and commentators is the extent to which foreign courts should enforce arbitration awards that have been annulled for purely local reasons by a court in the country where the arbitration took place. Can UNCITRAL assist in this contentious and uncertain area?

Other areas where arbitrators have noted the need, or at least the advisability, for improvements include: (i) clarifying the power of arbitrators to award interest, including compound interest; (ii) adding procedures concerning consolidation in arbitration; (iii) drafting more specific provisions on costs; and (iv) providing firmer guidance concerning the immunity of arbitrators.

UNCITRAL's future agenda may well include consideration of ways to encourage and improve the practice of conciliation and other non-arbitral forms of ADR, including, for example, simplification of means of enforcing settlement agreements arrived at as a result of conciliation. Another item for possible consideration is what can be done to help

10. Report of Gavan Griffith, Q.C. at U.N. Convention Day (Jun. 10, 1998).

familiarize national courts with decisions of courts elsewhere in the interest of achieving uniformity and predictability.

I have mentioned some possible improvements but have not discussed the modalities for accomplishing them. One such modality might be modification of the New York Convention, a solution that was favored by almost no-one during the discussion at New York Convention Day. Or, perhaps, preparation of an additional Convention complementary to the New York Convention, as suggested by Dr. Werner Melis of Austria.¹¹ Also, I suggest States and arbitral institutions might be encouraged to act as *amicus curiae* or to submit statements of interest to support uniform application of the Convention by their national courts. Other possible steps to achieve improvements that UNCITRAL might spearhead include drafting of additional provisions for the Model Law and for the Arbitration Rules, as well as practice guides for conciliation and other non-arbitral forms of ADR.

All of these questions are likely to be subjects of discussion at the next UNCITRAL Session. I must caution, however, that I cannot pretend to predict with accuracy what subjects for discussion the Secretariat will suggest or the Commission might determine to explore. Nor would it be appropriate for me to comment at this early stage on the positions that the United States delegation might take on any of these matters. My purpose today is to alert you to issues on which your views will be needed as UNCITRAL moves forward with deciding its future agenda and in carrying out its future projects.

We should also note that UNCITRAL is not alone in looking to the future. The Office of the Legal Adviser of the United States Department of State is preparing for a meeting in the coming year to explore ways to improve the application of ADR in resolving disputes arising in trade between the NAFTA countries.

There are exciting times ahead!

11. Report of Dr. Werner Melis at UN Convention Day (Jun. 10, 1998).

THE 1996 UNITED NATIONS' COMMISSION ON INTERNATIONAL TRADE LAW MODEL LAW ON ELECTRONIC COMMERCE AND GUIDE TO ENACTMENT

*Houston Putnam Lowry**

The United Nations' Commission on International Trade Law (hereinafter UNCITRAL) was formed by the United Nations General Assembly in 1966.¹ UNCITRAL has undertaken many projects since that time.² The projects have dealt with the important issues of international commerce, including arbitration, the sale of goods,³ bills and notes,⁴ and letters of credit.⁵

UNCITRAL even prepared a resolution on the legal value of computer records in 1985.⁶ UNCITRAL recognized early that computers have a profound influence on the day-to-day conduct of business. Something had to be done to harmonize domestic laws and to eliminate barriers to take advantage of computers, a technology that knows no boundaries. The law must keep up with technology if it is to remain relevant. UNCITRAL's

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1. G.A. Res. 2205, U.N. GOAR, 21st Sess., Annex II, at 41, 42, U.N. Doc A/6394/Add. 1/Add.2 (1966).

2. Such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards <<http://www.un.or.at/uncitral/english/texts/arbconc/index.htm>>; 1974 Convention of the Limitation Period in the Sale of Goods, as amended in 1980 <<http://www.un.or.at/uncitral/english/texts/sales/limitcon.htm#TOP>>; 1976 UNCITRAL Arbitration Rules <<http://www.un.or.at/uncitral/english/texts/arbconc/arbitrul.htm>>; 1980 UNCITRAL Convention on Contracts for the International Sale of Goods, commonly called the 1980 Vienna Convention <<http://www.un.or.at/uncitral/english/texts/sales/salescon.htm#TOP>>; 1985 UNCITRAL Model Law on International Commercial Arbitration <<http://www.un.or.at/uncitral/english/texts/arbconc/ml-arb.htm>>; 1988 UNCITRAL Bills and Notes Convention (<<http://www.un.or.at/uncitral/english/texts/payments/bilnote.htm#TOP>>); 1996 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (<<http://www.un.or.at/uncitral/english/texts/payments/guarant.htm>>) and 1996 UNCITRAL Arbitration Notes <<http://www.un.or.at/uncitral/english/texts/arbconc/arbnotes.htm>>.

3. See U.C.C. art. 2 (1997).

4. *Id.* art. 3 (1997).

5. *Id.* art. 5 (1997).

6. <<http://www.un.or.at/uncitral/english/texts/electcom/legval.htm>>.

solution, the Model Law on Electronic Commerce (hereinafter Law),⁷ was approved by the General Assembly on December 16, 1996. UNCITRAL also prepared a Guide to Enactment of the Law. While the Law has been enacted only in Singapore, it has been introduced in a number of jurisdictions.⁸

The Law governs a number of technologies. First of all, it governs faxes.⁹ There has been a lively debate for a number of years as to whether a faxed document was a legally binding document. This law puts that question to rest, but for a novel reason. Businesses use faxes on a day-to-day basis. It is getting increasingly difficult to tell where the fax ends and the electronic technology begins. Should the way a person sends a data message¹⁰ from a computer (by a fax instead of an e-mail) determine the legal effect of the document?¹¹ Should the fact that a person sends a fax from a computer instead of a fax machine change the legal effect of the fax (particularly since the recipient cannot tell which method was used)? Should how the recipient elects to store a fax (on a piece of paper or in a computer) determine the legal effect of a document (particularly since this fact cannot be determined by the sender)? Logic prevailed because all three questions were answered in the negative.

When UNCITRAL's project began, the focus was on electronic data interchange (hereinafter EDI).¹² EDI is a structured system. The sender agrees to send data in a certain format. The recipient agrees to accept data in a certain format. By the time the project was several years old, the drafters realized the EDI concept was as outmoded as trying to conceive of data messages in columns punched on the proverbial IBM computer card. EDI technology was certainly used in the past. Some organizations were still using the technology when the drafting started. Everyone agreed they hoped to shift to a different technology in the near future, even if only to a web based technology. Therefore, the scope of the Law was expanded to include all kinds of data messages and not just EDI.¹³

The drafters also recognized they could not predict where technology was going. While the new topic is a Java based world wide web technology today, no one could say what will be the new topic tomorrow.

7. UNCITRAL Model Law on Electronic Commerce with Guide to Enactment. <http://www.un.or.at/uncitral/english/texts/electcom/ml-ec.htm> [hereinafter Law J.].

8. See, H.B. 5470 introduced in the 1998 Session of the Connecticut General Assembly, for an example.

9. Law, *supra* note 7, art. 2(a).

10. *Id.* art. 2(a).

11. Particularly since the creation of fax modems.

12. Law, *supra* note 7, art. 2(b).

13. *Data message* means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

The Law was designed to be technology neutral. It will not have to be re-drafted as new technologies come into use.

The very concept of a model law requires it to be interpreted in a consistent manner in different jurisdictions. Precedent from other jurisdictions must be considered, as well as the *travaux preparatoire* from UNCITRAL. This concept was included in Article 3 of the Law.¹⁴ As a result, UNCITRAL will begin reporting cases under the Law as part of their CLOUT (Case Law on UNCITRAL Texts)¹⁵ project.

In keeping with its stated position of providing flexibility with the commercial area, the United States took a strong position in favor of party autonomy. Many, if not most, of the provisions of the Law can be varied by agreement. Chapter II of the Law provides a "floor" of mandatory rules. The parties to a transaction cannot vary these rules by agreement.

Information¹⁶ shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.¹⁷ The reasons for denying legal effect to data messages are as varied as the number of legal systems which enact the Law.

Some courts deny legal effect to electronic documents because electronic documents are not considered a writing. In case of the United States, the Statute of Frauds¹⁸ (and the related Statute of Wills¹⁹) is part of our legal heritage from England. The concepts behind it are included in

14. While the Guide to Enactment says Article 3 was inspired by Article 7 on the Vienna Sales Convention, it is common practice to insert such clauses in legislation drafted by the National Conference of Commissioners on Uniform State Laws. For example, Uniform Commercial Code Section 1-102 provides:

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are:

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

The October 8, 1998 draft of the new Uniform Arbitration Act provides in Section 28 that: "In applying and construing the [Act], consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it."

15. For subscription information, please contact UNCITRAL Secretariat, Vienna International Centre, P.O.Box 500, A-1400 Vienna, Austria; Telephone No. (011)(43 1) 21345-4060; Fax: (011)(43 1) 21345-5813; E-mail: uncitral@unov.un.or.at.

16. This term is not defined in the Law.

17. Law, *supra* note 7, art. 5.

18. 29 Charles II C. 3 (1677).

19. 32 Henry VII C. 1 (1540).

numerous pieces of legislation, ranging from the Uniform Commercial Code²⁰ to the Uniform Probate Code.²¹

The definition of a writing was not specified in the original Statute of Frauds or any subsequent enactment. It is very likely the original framers intended whatever medium a prudent businessman would use.²² Over time, this would have ranged from stone tablets to clay tablets, papyrus, parchment, paper, microfilm, and electronic storage media. This means the concept of what constitutes a writing has been left to a case-by-case analysis by our judges.

Scholars have written on this topic. Some have argued data messages meet the requirements of the statute of frauds.²³ Others have advocated the concept of having a more traditional paper writing to validate subsequent electronic writings for the purposes of the Statute of Frauds.²⁴ These writings seem to have gone unnoticed by most of the judiciary.

The Law mandates that every data message shall be deemed a writing as long as it is preserved in such a way that can be referred to in the future. The Law allows each state to exempt certain types of transactions from this rule. For example, deeds to transfer commercial real estate are arguably within the scope of the Law.²⁵ A state may elect to exclude deeds for commercial real estate because it has no facilities to record electronic deeds. While the general rule may be uniform, the exceptions will be based upon local concerns and conditions.

The next hurdle imposed by the Statute of Frauds is that the writing must be signed. When most people sign a document, they place a handwritten signature on a piece of paper. The reason they place a handwritten signature on the paper is to authenticate the contents of the writing. A signature is simply any mark²⁶ made with the present intent to authenticate a writing.²⁷ While a handwritten signature at the bottom of a

20. U.C.C. § 1-206, § 2-201, § 2 A-201 and § 5-104 (1997).

21. Uniform Probate Code § 2-502(a)(1).

22. Houston Lowry, *Does Computer Stored Data Constitute a Writing for the Purposes of the Statute of Frauds and the Statute of Wills?*, 9 RUTGERS COMPUTER TECH L. J. 93, 99 (1982); See, Clason v. Bailey, 14 JOHNS. 484 (N.Y. 1817); Rabel, *The Statute of Frauds and Comparative Legal History*, 63 L.Q. REV. 174, 182 (1947); Comment, *Sufficiency of the Writing and Necessity of a Signature in the Statute of Frauds of the Uniform Commercial Code*, 4 U.S.F. L. REV. 177, 184 (1969).

23. *Does Computer Stored Data Constitute a Writing for the Purposes of the Statute of Frauds and the Statute of Wills?*, 9 RUTGERS COMPUTER & TECH. L.J. 93 (1982).

24. American Bar Association Electronic Data Messaging Task Force, *The Commercial Use of Commercial Data Interchange - Report and Model Trading Partner Agreement*, 45 BUS. LAW. 1645, 1680 (1990).

25. It is difficult to claim a will is within the scope of the Law. There are grey areas, such as trusts (which can be used for business purposes, such as a Massachusetts Business Trust).

26. Can include marks, such as an X. See U.C.C. § 1-201 comment 39 (1997).

27. U.C.C. § 1-201(39) (1997).

piece of paper may be presumed to show a certain intent, that presumption can be rebutted. The presumption may be overcome by testimony or other competent evidence.

A similar result occurs in the electronic world, even though there is no handwritten signature. An electronic signature must identify the signer and indicate the signer's approval of the information contained in the data message.²⁸

The next issue is the reliability of the signature. Simply typing the author's name at the end of a data message carries virtually no indicia of reliability because anyone with a computer can do it. Taking the typed name in conjunction with the internet e-mail address on the data message adds slightly more reliability.²⁹ Signing a data message with public key cryptography system is even more reliable.³⁰ Future technologies may be even more secure.

The Law does not require absolute security. Forgers and forgeries still exist in a paper based world. Forgers and forgeries will continue to exist in an electronic world. The Law merely requires the method of signing to be appropriate for the circumstances.³¹ For large but infrequent transactions, it makes good business sense to require a very secure signature. The risk of loss is great enough to justify the time and expense of using a secure signature.

When the transactions are small and frequent, a very secure signature is not necessary. The risk of loss on each transaction is small. It might not be possible to use a secure signature on each transaction due to time constraints. In very small transactions (such as ATM transactions), the signature may not be very secure at all.³²

The parties are free to agree on the level of security necessary for their transaction.³³ This agreement is but one of the factors which must be evaluated to determine the reasonableness of the signature.³⁴ Other factors include:

1. The sophistication of the equipment used by each of the parties;
2. The nature of their trade activity;
3. The frequency at which commercial transactions take place between the parties;

28. Law, *supra* note 7, art. 7(1)(a).

29. Although an internet e-mail address can be forged, doing so is fairly difficult.

30. As the bit size of the key-pair increases, it becomes much harder to forge.

31. Law, *supra* note 7, art. 7(1)(b).

32. The signature may consist of only a four-digit number.

33. Law, *supra* note 7, arts. 4(1), 7(1)(b); Guide to Enactment, para. 60.

34. Guide to Enactment, para. 58.

4. The kind and size of the transaction;
5. The function of signature requirements in a given statutory and regulatory environment;
6. The capability of communication systems;
7. Compliance with authentication procedures set forth by intermediaries;
8. The range of authentication procedures made available by any intermediary;
9. Compliance with trade customs and practice;
10. The existence of insurance coverage mechanisms against unauthorized messages;
11. The importance and the value of the information contained in the data message;
12. The availability of alternative methods of identification and the cost of implementation;
13. The degree of acceptance or non-acceptance of the method of identification in the relevant industry or field both at the time the method was agreed upon and the time when the data message was communicated; and
14. Any other relevant factor.

The next problem that arises is the best evidence rule.³⁵ Simply put, this rule requires the original of a document to be put into evidence. The whereabouts of an original must be accounted for before a copy may be put into evidence. Even then, only a reliable copy may be put into evidence.

This creates problems in the computer context. The original of a data message is on the sender's computer.³⁶ A copy was made to read the data message from the hard drive into the computer's central processing unit. From there, another copy is placed into the computer's random access memory.

Once the decision is made to send the data message, another copy is made from the random access memory and put into the central processing unit. From there, another copy goes into a data bus to a modem. The data message may go through one, or more than one, electronic intermediaries³⁷

35. See FED. R. EVID. 1002 and 1003.

36. And no one can see it without making a copy of it.

37. Law, *supra* note 7, art. 1(e).

to reach the other end. At the receiving end, a similar process happens to put the data message on the recipient's hard drive.³⁸

So which is the original? The sender views the copy on his hard drive as the original. The recipient views the copy on his hard drive as the original. The copies in between may not be writings within the meaning of the Law because they are not accessible for future reference.³⁹ Any printout of the hard disk data message from either the sender or the recipient is still only a copy.

This is an interesting intellectual exercise, but it overlooks one important fact. All of the copies are identical in all meaningful ways. The purpose behind the best evidence rule is to make sure the copy is an accurate, reliable copy.

The Law recognizes this purpose. A data message is considered an original if it meets two tests.⁴⁰ First, there must be a reliable assurance the copy of the data message is accurate.⁴¹ The fact that additions are made to the original data message, such as endorsements, certifications, and notarizations, does not change the nature of the data message as an original (the same as in a paper context).⁴²

What constitutes a "reliable assurance" is not clear. There is no explanation in the Law's Guide to Enactment. Therefore, this will have to be developed on a case-by-case basis. Courts may turn to the factors used to evaluate the reliability of a signature by analogy.⁴³

The second test requires that the information can be displayed on demand.⁴⁴ This is a corollary of the writing requirement.⁴⁵ The data message must be preserved sufficiently so it can be referred to in the future. Businesses keep records so they can operate. Such records are not merely kept for no purpose at all; they will be referred to in the future. A business will not allow a computer to operate without creating a sufficient audit trail to show what happened and why it happened.

If data messages are to be given true legal effect, they must be admissible into evidence. When computer records were new, courts required computer experts to testify about the underlying computer system as an evidentiary predicate.⁴⁶ A business person could testify how the

38. And even then, the data message cannot be seen without making one or more further copies of it.

39. Law, *supra* note 7, art. 6(1).

40. *Id.* art. 8(1).

41. *Id.* art. 8(1)(a).

42. *Id.*; Guide to enactment, para. 67.

43. Law, *supra* note 7, art. 8(1)(a); Guide to enactment, para. 58.

44. Law, *supra* note 7, art. 8(1)(b).

45. *Id.* art. 6(1).

46. *American Oil v. Valenti*, 179 Conn. 349 (1979), compare *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594 (1998).

computer was used in the business once the reliability of the underlying computer system was established. Article 9 may very well eliminate the need for a computer expert to get computer documentation into evidence.

The court should no longer require a systematic analysis of how the underlying computer works. The data message should be allowed admission into evidence once a simple business record foundation is laid. Evidence of the reliability of the underlying computer system will only go to the weight of the evidence, not its admissibility.⁴⁷

Evidence about the reliability of data message may be satisfied by the signing requirement instead of a description of the underlying computer system. For example, public key cryptography may prove reliability of a data message without reference to the underlying computer system through the signing process. In the future, there may be even more reliable ways to determine when a data message is altered.

The law often requires that information must be stored. Sometimes the method of storage is specified. Article 10 of the Law imposes three requirements to determine if a data message was properly stored.

First, the information in the data message must be accessible for future reference.⁴⁸ This is the same requirement used to determine if there is a writing.⁴⁹ It is similar to the requirement of a reliable assurance about the integrity of the information contained in a data message.⁵⁰ It boils down to a record must be of such a nature that it can reliably referred to when needed.

Second, the information must be retained in the form it was sent.⁵¹ This means a data message cannot simply be split up into separate parts and stored separately. There must be a copy of the original data message preserved in such a way that any alterations will be evident.⁵² In essence, there must be a complete audit trail. It is not sufficient to simply show what your computer did when it got the data message. You must show what data message your computer got in the first place.⁵³

Third, certain information from the data message must be preserved.⁵⁴ While there is no requirement this information exist, the information must be preserved if it exists. This information includes an identification of the data message's origin, the date and time it was sent, the date and time it was received, and an identification of the data message's destination. Once

47. Law, *supra* note 7, art. 9(2).

48. *Id.* art. 10(1)(a).

49. *Id.* art. 6(1).

50. *Id.* art. 8(1)(a).

51. *Id.* art. 10(1)(b).

52. Compare this to the reliable assurance standard in Law, *supra* note 7, art. 8(1)(a).

53. As time goes on, court interpretation of this requirement will loosen.

54. Law, *supra* note 7, art. 10(1)(c).

again, all of this information is likely to be present in the commercial context.

The duty of storing a data message may be delegated to a third party.⁵⁵ The Law does not require the preservation of information whose sole purpose is to permit the data message to be sent or received (i.e.: internet headers).⁵⁶ Such information may be deleted before the data message is stored.

The Law goes on to clearly indicate that an offer and an acceptance can occur by data messages.⁵⁷ The casual reader may wonder why this provision is even necessary. The simple reason is electronic agents.

While there may be a human being at either end of a data message today, this will not always be true in the future. Eventually, one side will be a computer program.⁵⁸ Eventually, there may even be computer programs at both ends.

The fact that a program is at one end of an exchange instead of a person doesn't prevent a contract from being formed. For example, the author filled out an application for an on-line stock brokerage account. In due course, a data message was received by the author giving all of the details of the account, including the account number and password. At the end of the data message appeared a line to the effect the author should not reply to the e-mail because the sender was an electronic agent (computer program). Did the author expect he was going to deal with an electronic agent? No.

Should the fact the acceptance of the author's offer was sent by an electronic agent affect the contract between the author and the stock brokerage firm? It should not, particularly since one party (the author) did not know he was dealing with an electronic agent.⁵⁹ Perhaps the author was dealing with a person masquerading as a computer program. The expectations of the parties should be enforced, meaning the law should find that there was a contract formed by this exchange of data messages.

Article 12 governs a related issue. A statement of will or other notice given by a data message cannot be invalidated solely on the ground it was given by a data message.⁶⁰ This means that notices given pursuant to contract may be given in the form of a data message, then the data message is attributed to the originator.⁶¹ This seems rather straight forward.

55. *Id.* art. 10(3).

56. Such as fax handshaking, fax training and the like.

57. Law, *supra* note 7, art. 11.

58. *Normalization: A Revolutionary Approach*, 20 JURIMETRICS J. 140 (1979).

59. Although this does raise interesting questions about proving contracts of adhesion.

60. Law, *supra* note 7, art. 12(1).

61. *Id.* art. 13(1).

If any agent with authority sends a data message, the originator of the data message is deemed to have sent it.⁶² Although the Law does not discuss such common law concepts as actual authority, apparent authority and agency by estoppel, the concept of an agent acting for a principal is common enough in all legal cultures. Perhaps it is even universal as a general concept.

The next rule is an out growth of the electronic agent concept. An originator is bound by a data message sent by the originator's electronic agent.⁶³ An electronic agent is as much an agent as a human agent. This creates another corollary; an originator is responsible for the originator's electronic agent's errors (perhaps caused by programming errors). When human agent makes a mistake or acts beyond the wishes of the agent's principal, the principal is still bound. Likewise the principal is still bound by the actions of its electronic agent when the agent "malfunctions."

The problem arises when the data message was not truly sent by the originator. If the forger sends a data message using a procedure previously agreed between the originator and the addressee (such as a data message signed by the originator's private cryptography key, - which is actually verified by the originator's related public cryptography key), then the originator is bound by the data message even if the originator did not actually send the data message.

This is slightly different, although related, the concept of a signing in Article 7. While a signature is evaluated against the parties' agreement, it is also evaluated against fourteen other factors. In the attribution context, there is no background of fourteen factors. The parties' agreement is the sole factor.

This gives rise to the interesting question of what happens when a data message is not signed within the meaning of Article 7 but can be attributed to the originator under Article 13. This question must be resolved in light of local law. If local law requires a signature on this particular type of data message, then the fact it can be attributed to the originator is meaningless.

There is another type of data message, which will be attributed to the originator. If an ex-employee or ex-agent of the originator uses the knowledge he obtained from his relationship with the originator (ie: takes a copy of the originator's private cryptography key and uses it to authenticate data messages), then the originator is bound by the data message.⁶⁴ This gives a clear message to people who use electronic commerce: change your authentication procedures as employees leave. If you do not, they can still act on your behalf.

62. *Id.* art. 13(2)(a).

63. *Id.* art. 13(2)(b).

64. *Id.* art. 13(3)(6).

There are some things the originator can do to protect itself. If the originator requires an acknowledgment by the recipient of receipt⁶⁵ and notices a falsified data message, the originator can notify the addressee. Once the addressee receives the notice and has a reasonable time to act, *future* data messages cannot be attributed to the originator. It is important to note that such notices are *not* applied retroactively. Undoubtedly only the vigilant can take advantage of such procedures. In the case of transactions where the risk of loss is great, the Law will apply an incentive for everyone to be vigilant.

Sometimes the originator requires an acknowledgment by the recipient of the receipt of the data message by the recipient.⁶⁶ If the parties have not agreed to a particular method of acknowledgment, the data message can be acknowledged in either of two different methods.

The first method allows acknowledgment by any communication by the addressee, whether or not automated.⁶⁷ The acknowledgment could be the functional equivalent of a postal return receipt.⁶⁸ The acknowledgment could range from the mere acknowledgment of an unspecified data message to a communication that refers to the content of the original data message.

The second method allows acknowledgment by conduct.⁶⁹ If the parties have agreed to a particular form of conduct as an acknowledgment, the conduct must conform to the agreement. Otherwise, the conduct must be of such a nature to notify the originator of the data that it had been received. For example, shipping the goods indicates the data message containing the order was received.

If the originator wants to get an acknowledgment before the goods are actually shipped, the originator can make the original data message conditional upon the receipt of an acknowledgment.⁷⁰ Conditions may be attached to the acknowledgment.⁷¹ For example, the originator may require an acknowledgment within a particular time.⁷² Similarly, the originator may require the acknowledgment to be done a particular way. If the two elements are combined, an acknowledgment in a particular format is required within a particular time.

If the proper acknowledgment is not given in a timely fashion, the original data message is deemed never to have been sent. If no time period for the acknowledgment is specified, a court will likely imply the acknowledgment must be given within a reasonable period of time. The

65. Law, *supra* note 7, art. 14.

66. *Id.*

67. *Id.* art. 14(2)(a).

68. Guide to Enactment, para. 99.

69. Law, *supra* note 7, art. 14(2)(b).

70. *Id.* art. 14(c).

71. *Id.*; Guide to enactment, para. 95.

72. *Id.*

difficulty will be in determining what is reasonable under the circumstances.

What happens if the originator has not specified the original data message is conditioned upon the receipt of an acknowledgment and nothing happens?⁷³ The originator may send a data message to the recipient giving a reasonable time for the acknowledgment to be received.⁷⁴ Of course, the originator must give the recipient notice of the deadline.⁷⁵

Article 15(5) creates a rebuttable presumption⁷⁶ that an acknowledgment of a data message implies the underlying data message was received. There is no presumption that the data message that was sent is the same as the data message that was received. The parties must still comply with the attribution procedure to verify the content of the data message.⁷⁷ If the acknowledgment indicates the underlying data message meets certain technical standards, it is presumed those standards have been met.⁷⁸ This seems to suggest a detailed acknowledgment will raise at least a presumption the underlying data message was in a particular format or possibly even validly signed by a recognized originator.

In commercial transactions, it is very important to determine when a data message was sent and when it was received. The Law has a number of rules relating to these issues. For example, a data message is deemed sent when it enters an information system outside of the originator's control.⁷⁹ Comparing this to the paper based postal system, the data message is deemed sent when it is placed in the postal box. This is in accord with existing commercial law in the United States.

A data message is deemed received when it enters the recipient's information system, regardless of when the data message is actually accessed.⁸⁰ This rule encourages recipients to check their electronic mailboxes frequently.

If the recipient of a data message specified the receiving computer system and the originator misdirected the data message, the data message is not deemed received until the recipient retrieves it from the information system.⁸¹ This means companies will specify what computer or computer account must receive their data messages.

73. For example, a reasonable period of time may elapse (which depends upon the circumstances) or the time specified in the original data message may expire.

74. Law, *supra* note 7, art. 14(4)(a).

75. This is similar to other international convention promulgated by UNCITRAL. See, 1980 UNCITRAL Convention on the International Sales of Goods, arts. 47, 63; for an example.

76. See generally *supra* note 7; Guide to enactment, para. 97.

77. See generally *supra* note 7; Guide to enactment, para. 97, art. 13.

78. Law, *supra* note 7, art. 14(6).

79. *Id.* art. 15(1).

80. *Id.* at 15(1)(a)(b).

81. *Id.* at 15(2)(a)(ii).

Another question arises about where the data message is received or sent. An originator can send a data message from the office, the home or on the road. The recipient has no way to determine where the originator was physically when the data message was sent (a similar problem exists on the receiving end). The Law presumes the data message was sent from the originator's place of business.⁸² If there is more than one place of business, the data message is deemed sent from the place of business with the closest relationship with the transaction.⁸³ If there is no underlying transaction, the data message is deemed to be sent from the originator's principal place of business. If the originator has no place of business, the data message is deemed to be sent from the originator's habitual residence.⁸⁴ This is similar to other international texts promulgated by UNCITRAL.⁸⁵ In many commercial cases, this rule will determine the applicable law for the underlying contract.

The balance of the Law governs the carriage of goods, including bills of lading.⁸⁶ Basically, the Law permits (but does not mandate) electronic bills of lading. It was anticipated when the Law was written that future projects relating to special cases of electronic commerce would be added here.

In summary, the Law is designed to promote, but not require, electronic commerce. This is done by removing traditional legal impediments to electronic commerce. A data message is not only a writing, but is also an original and can be signed. The law does not require any particular technology as long as the technology meets the policy objectives behind the law. There was nothing to be gained by restricting the Law to any particular technology.

As with any new law, the Law's success will depend on how judges interpret it and how they apply it. While a judge can justify any particular decision, the Law and the policies behind it will only work if the Law is sufficiently liberally construed to effectuate those policies.

82. *Id.* at (4).

83. Law, *supra* note 7, art. (4)(a).

84. *Id.* at (4)(b).

85. *See*, 1980 UNCITRAL Convention on Contracts for the International Sale of Goods, Article 10, for an example.

86. Law, *supra* note 7, art. 16, 17.

APPENDIX I

UNCITRAL Model Law on Electronic Commerce
 [Original: Arabic, Chinese, English, French, Russian, Spanish]
 Part one. Electronic commerce in general
 Chapter I. General provisions

*Article 1. Sphere of application**

This Law** applies to any kind of information in the form of a data message used in the context*** of commercial**** activities.

* The Commission suggests the following text for States that might wish to limit the applicability of this Law to international data messages:

“This Law applies to a data message as defined in paragraph (1) of article 2 where the data message relates to international commerce.”

** This Law does not override any rule of law intended for the protection of consumers.

*** The Commission suggests the following text for States that might wish to extend the applicability of this Law: “This Law applies to any kind of information in the form of a data message, except in the following situations: [...].”

**** The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

Article 2. Definitions

For the purposes of this Law:

- (a) “Data message” means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;
- (b) “Electronic data interchange” (EDI) means the electronic transfer from computer to computer of information using an agreed standard to structure the information;
- (c) “Originator” of a data message means a person by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message;

- (d) “Addressee” of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message;
- (e) “Intermediary”, with respect to a particular data message, means a person who, on behalf of another person, sends, receives or stores that data message or provides other services with respect to that data message;
- (f) “Information system” means a system for generating, sending, receiving, storing or otherwise processing data messages.

Article 3. Interpretation

- (1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
- (2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 4. Variation by agreement

- (1) As between parties involved in generating, sending, receiving, storing or otherwise processing data messages, and except as otherwise provided, the provisions of chapter III may be varied by agreement.
- (2) Paragraph (1) does not affect any right that may exist to modify by agreement any rule of law referred to in chapter II.

Chapter II. Application of legal requirements to data messages

Article 5. Legal recognition of data messages

Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.

Article 6. Writing

- (1) Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.
- (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing.
- (3) The provisions of this article do not apply to the following: ...

Article 7. Signature

- (1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:

(a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and

(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

(3) The provisions of this article do not apply to the following: [...]

Article 8. Original

(1) Where the law requires information to be presented or retained in its original form, that requirement is met by a data message if:

(a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and

(b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being presented or retained in its original form.

(3) For the purposes of subparagraph (a) of paragraph (1):

(a) the criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and

(b) the standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

(4) The provisions of this article do not apply to the following: ...

Article 9. Admissibility and evidential weight of data messages

(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence:

(a) on the sole ground that it is a data message; or

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor.

Article 10. Retention of data messages

(1) Where the law requires that certain documents, records or information be retained, that requirement is met by retaining data messages, provided that the following conditions are satisfied:

(a) the information contained therein is accessible so as to be usable for subsequent reference; and

(b) the data message is retained in the format in which it was generated, sent or received, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and

(c) such information, if any, is retained as enables the identification of the origin and destination of a data message and the date and time when it was sent or received.

(2) An obligation to retain documents, records or information in accordance with paragraph (1) does not extend to any information the sole purpose of which is to enable the message to be sent or received.

(3) A person may satisfy the requirement referred to in paragraph (1) by using the services of any other person, provided that the conditions set forth in subparagraphs (a), (b) and (c) of paragraph (1) are met.

Chapter III. Communication of data messages

Article 11. Formation and validity of contracts

(1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.

(2) The provisions of this article do not apply to the following: ...

Article 12. Recognition by parties of data messages

(1) As between the originator and the addressee of a data message, a declaration of will or other statement shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.

(2) The provisions of this article do not apply to the following: ...

Article 13. Attribution of data messages

(1) A data message is that of the originator if it was sent by the originator itself.

(2) As between the originator and the addressee, a data message is deemed to be that of the originator if it was sent:

(a) by a person who had the authority to act on behalf of the originator in respect of that data message; or

(b) by an information system programmed by, or on behalf of, the originator to operate automatically.

(3) As between the originator and the addressee, an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption, if:

(a) in order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure previously agreed to by the originator for that purpose; or

(b) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own.

(4) Paragraph (3) does not apply:

(a) as of the time when the addressee has both received notice from the originator that the data message is not that of the originator, and had reasonable time to act accordingly; or

(b) in a case within paragraph (3)(b), at any time when the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator.

(5) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the data message as received as being what the originator intended to send, and to act on that assumption. The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the data message as received.

(6) The addressee is entitled to regard each data message received as a separate data message and to act on that assumption, except to the extent that it duplicates another data message and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was a duplicate.

Article 14. Acknowledgement of receipt

(1) Paragraphs (2) to (4) of this article apply where, on or before sending a data message, or by means of that data message, the originator has requested or has agreed with the addressee that receipt of the data message be acknowledged.

(2) Where the originator has not agreed with the addressee that the acknowledgement be given in a particular form or by a particular method, an acknowledgement may be given by

(a) any communication by the addressee, automated or otherwise, or

(b) any conduct of the addressee, sufficient to indicate to the originator that the data message has been received.

(3) Where the originator has stated that the data message is conditional on receipt of the acknowledgement, the data message is treated as though it has never been sent, until the acknowledgement is received.

(4) Where the originator has not stated that the data message is conditional on receipt of the acknowledgement, and the acknowledgement has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed, within a reasonable time, the originator:

(a) may give notice to the addressee stating that no acknowledgement has been received and specifying a reasonable time by which the acknowledgement must be received; and

(b) if the acknowledgement is not received within the time specified in subparagraph (a), may, upon notice to the addressee, treat the data message as though it had never been sent, or exercise any other rights it may have.

(5) Where the originator receives the addressee's acknowledgement of receipt, it is presumed that the related data message was received by the addressee. That presumption does not imply that the data message corresponds to the message received.

(6) Where the received acknowledgement states that the related data message met technical requirements, either agreed upon or set forth in applicable standards, it is presumed that those requirements have been met.

(7) Except in so far as it relates to the sending or receipt of the data message, this article is not intended to deal with the legal consequences that may flow either from that data message or from the acknowledgement of its receipt.

Article 15. Time and place of dispatch and receipt of data messages

(1) Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.

(2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:

(a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:

(i) at the time when the data message enters the designated information system; or

(ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;

(b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

(3) Paragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph (4).

(4) Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. For the purposes of this paragraph:

(a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;

(b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence.

(5) The provisions of this article do not apply to the following:

Part two. Electronic commerce in specific areas
Chapter I. Carriage of goods

Article 16. Actions related to contracts of carriage of goods

Without derogating from the provisions of part one of this Law, this chapter applies to any action in connection with, or in pursuance of, a contract of carriage of goods, including but not limited to:

- (a) (i) furnishing the marks, number, quantity or weight of goods;
- (ii) stating or declaring the nature or value of goods;
- (iii) issuing a receipt for goods;
- (iv) confirming that goods have been loaded;
- (b) (i) notifying a person of terms and conditions of the contract;
- (ii) giving instructions to a carrier;
- (c) (i) claiming delivery of goods;
- (ii) authorizing release of goods;
- (iii) giving notice of loss of, or damage to, goods;
- (d) giving any other notice or statement in connection with the performance of the contract;
- (e) undertaking to deliver goods to a named person or a person authorized to claim delivery;
- (f) granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods;
- (g) acquiring or transferring rights and obligations under the contract.

Article 17. Transport documents

(1) Subject to paragraph (3), where the law requires that any action referred to in article 16 be carried out in writing or by using a paper document, that requirement is met if the action is carried out by using one or more data messages.

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for failing either to carry out the action in writing or to use a paper document.

(3) If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that requirement is met if the right or obligation is conveyed by using one or more data messages, provided that a reliable method is used to render such data message or messages unique.

(4) For the purposes of paragraph (3), the standard of reliability required shall be assessed in the light of the purpose for which the right or obligation was conveyed and in the light of all the circumstances, including any relevant agreement.

(5) Where one or more data messages are used to effect any action in subparagraphs (f) and (g) of article 16, no paper document used to effect any such action is valid unless the use of data messages has been terminated and replaced by the use of paper documents. A paper document issued in these circumstances shall contain a statement of such termination. The replacement of data messages by paper documents shall not affect the rights or obligations of the parties involved.

(6) If a rule of law is compulsorily applicable to a contract of carriage of goods which is in, or is evidenced by, a paper document, that rule shall not be inapplicable to such a contract of carriage of goods which is evidenced by one or more data messages by reason of the fact that the contract is evidenced by such data message or messages instead of by a paper document.

(7) The provisions of this article do not apply to the following:

PRACTICAL CAREER ADVICE FOR YOUNG INTERNATIONAL LAWYERS: HOW TO BUILD A KILLER RESUME, NETWORK EFFECTIVELY, CREATE YOUR OWN OPPORTUNITIES, AND LIVE HAPPILY EVER AFTER

*Mark E. Wojcik**

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I. INTRODUCTION

For those who are serious about careers in international law, there are probably too many applicants for too few jobs.¹ While there are certainly many volunteer opportunities available, law-related jobs that pay and offer

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1. The desire for a career in international law, for some young lawyers, is simply a desire for exotic foreign travel. Little do they know, however, that travel gets old fast if you do too much of it. Not all travel is glamorous, and some of it is even dangerous. Beyond the travel is the work itself; which will not always involve negotiating treaties. The daily work may be as mundane as determining the appropriate tariff classification for a manhole cover from India.

both international exposure and career satisfaction are in short supply.² You cannot skim the "help wanted" ads to find a job as a judge on the U.S. Court of International Trade, or as the U.S. ambassador to another country.³ For most of us, then, we will find it necessary to create our own opportunities in international law. By creating these opportunities, we can create our own destinies.

II. BACKGROUND

Every person's career track is unique, and should be. This "background" section is my personal background. Most of you should skip this part and go directly to the good stuff in the next section (you can always come back and read this part later). Some of you will be interested in reading about my own experiences, and how I turned them all into a happy career.⁴

My family came to the United States from Germany, Switzerland, and, judging from my last name, Poland. Like many of you, I was fascinated by these other places. I started learning German in high school, and found it more than doubled my understanding of the world. I started learning the history, politics, geography, literature, and art of Germany, Switzerland, Austria and even the Principality of Liechtenstein. As I learned about things hidden from classmates who could not read German, I recognized how much more there was to learn. I dabbled in Spanish and French, realizing I could "double my world" again with each additional language. With the help of my family, I took my first trip to Europe, where I took summer classes at the Schiller Academy in Strasbourg, France. This first trip gave me the bug for travel.

My first year of college was at Wartburg College in Waverly, Iowa. I chose the school in part because it had a first year foreign study program in the small Bavarian town of Passau. I lived with a German family and three wonderful roommates from Greece, Haiti, and Iran. German was our only common language, and the total language immersion was a valuable experience.

I transferred to Bradley University in my second year, to attend foreign policy classes at the International Studies Institute. I found additional off-campus study places including foreign policy classes at

2. By "pay," I mean a job salary that will cover your rent, food, credit card minimums, an occasional movie or compact disc, and student loan payments (which will likely dwarf the previous categories combined).

3. Federal judges and ambassadors must be nominated by the President and approved by the U.S. Senate. U.S. CONST. art. II, § 2. Usually new law graduates need a job faster than this Senate confirmation process will take. See, e.g., Lisa Neff, *Clinton Returns Hornel Nomination to U.S. Senate*, WINDY CITY TIMES, Jan. 21, 1999, at 7.

4. For the sake of brevity, I have eliminated all adversity and disappointment from this personal background. Only good things have happened to me in my life.

American University in Washington, D.C., Russian and Welsh at Trinity College in Carmarthen, Wales (with a trip to Russia and Ukraine), and my first classes in international law at the University of Vienna, Austria. I spent some additional time traveling wherever my Eurorail Pass could take me. When I returned to Bradley to get my diploma, they changed the off-campus study rules so that no one could duplicate my magnificent absence from the college. If they were going to grant me a degree, they should at least have gotten some tuition money out of me. I received a B.A., *cum laude*, with a double major in International Studies and German. I was completely fascinated by the world, and I was looking forward to taking my place in it. I knew, for example, that relations between nations were governed by treaties, and that lawyers were the ones who actually negotiated and reviewed the treaties. It was time to go to law school.

I applied only to The John Marshall Law School in Chicago based upon having met some John Marshall alumnus who were exceptional lawyers. Because I was still questioning whether I wanted to become a lawyer, I also applied to be a Peace Corps volunteer. German wasn't a useful language for the Peace Corps, however, as those German-speaking countries were already pretty well developed. I received a wonderful education at my law school. I took classes in international law, comparative law, and international business and trade. I participated in the Philip C. Jessup International Law Moot Court Competition in my second year, and liked it so much I participated again in my third year. I did well in my classes and even became one of the editors of the law review. I sought out teachers who would talk with me about international law issues, cultivated their friendship, and sought their advice on my hopes for a career in international law. I helped with research for their law review articles and learned to locate and use a wide variety of international research materials. Being a faculty research assistant is a wonderful job, because you learn as you earn.

My mentors convinced me -- correctly, I think -- that before I could be an effective international lawyer, I would have to have a solid domestic basis. I could not help my foreign clients if I did not know the practical aspects of the legal system in my home country. I applied to be a judicial clerk, and received a clerkship with Justice D. Nick Caporale of the Supreme Court of Nebraska. Thus, my international career began in Lincoln, Nebraska. I enjoyed being a clerk for a judge. I successfully applied for my next job, working over the next two years as a clerk for Judge Dominick L. DiCarlo on the U.S. Court of International Trade, in New York City.

There are three reasons to clerk for a judge. First, you get to learn from the mistakes of others. As you watch other attorneys mess up in the courtroom or in a brief, you can learn how to avoid making the same mistakes. Second, you get to learn how a judge thinks. If you ask your judge why he or she reached a particular decision, you will learn what facts or authorities were most persuasive. You will also learn what is less

effective, and what may even backfire and kill your case. Third, based on learning from the mistakes of others and the thought process of a decision-maker, you have a credential and experience that no one can take away from you.

My clerking experience proved to be valuable in the market place, as I obtained a good position as an associate in a leading customs and international trade firm in New York. I worked on a variety of exciting matters and made a wonderful salary.⁵ I was also inclined to write, and with two other associates I wrote an international trade chapter for a book on New York Law and Practice.

Armed with my practical experience, additional education, and a publication, I eventually entered the field of legal education.⁶ I started guest lecturing in classes on international business and trade, and later co-taught classes with Professor William Mock. With help from him and from my other mentors, I turned this into a full-time position in 1992. I was hired as a writing teacher, but I also taught or co-taught courses in international business and international human rights.

In addition to my teaching and full support for scholarship, I was able to travel internationally on programs that helped build the international reputation of my school. I spoke at conferences in Canada, China, and Japan. I co-taught a course in international commercial law at our sister school in Lithuania. While there I met U.S. Supreme Court Justice Sandra Day O'Connor as part of the regional meeting for the American Bar Association's Central and Eastern Europe Law Initiative (CEELI). I used my academic credentials to obtain permission to legally visit Cuba,⁷ where I visited places where they confined persons who tested positive for HIV (Cuba tested all persons in the country for HIV and put them in "sidatorios" when they tested positive).⁸ I also visited Haiti during the time when the military had ousted the democratically elected president. I hoped to help document some of the human rights abuses being perpetrated there. I attended an academic conference in Guyana, and explored problems of judicial administration with a Supreme Court justice (who instead wanted to discuss the widely publicized American trial of O.J. Simpson). I took a leave of absence for a year to accept a position with the

5. At night, I took classes at New York University School of Law, to deepen my knowledge about things such as the United Nations Convention on the International Sale of Goods, the various corporate structures of companies in Latin America, and international protection of intellectual property rights.

6. For more information on how to become a law professor, see Mark E. Wojcik, *Survive and Thrive in Academia*, 13 CHIC. B. REC. 36 (Feb./Mar. 1999).

7. Academics and journalists received exemptions from the U.S. ban on travel to Cuba. See 31 C.F.R. § 515.416 (1998).

8. For more information on the human rights issues involved in this public health issue, see Mark E. Wojcik, *Inside Cuba's Sidatorios*, OUTLINES (Jan. 1993) reprinted in ARTHUR S. LEONARD ET AL., AIDS LAW AND POLICY 548 (1995).

Supreme Court of the Republic of Palau, where I watched a nation gain its independence.⁹ I spent a summer teaching in China at our sister school in Hangzhou and at the Chinese Patent Office in Beijing, where our school's intellectual property program helps to train patent examiners and attorneys. I made two trips to India as a guest of the Indian Law Institute, to address international conferences dealing with the legal issues of AIDS and of narcotics trafficking. I attended other conferences in other countries, and I attended many international law conferences and seminars here in the United States.

I continued to write on international issues and I continued to teach legal writing every semester. I even started something of a specialty in teaching legal writing and research skills to attorneys and law students who did not speak English as their first language. A mentor who had been watching me build this skill put me in touch with the International Law Institute (hereinafter ILI) in Washington, D.C. ILI has a successful training program to introduce U.S. law to lawyers from other countries, and graduate students who are starting LL.M. programs in the United States.

I recognize that my experience has been exceptional and privileged. I know that many others will never have the opportunities that I have had. But I also know that when I was a first year law student, I had no idea of the adventures I would have in the ten years after my graduation. I had doubts about my "international" career when I took my first job in Nebraska, which did not seem to offer many international opportunities. I recognize the power and privilege of my present position as a law professor, and I hope to use that position to help students and young lawyers start their own careers in international law. For some, this will be a full-time quest. For others, the "international" portion of their work may comprise only a small part. For all of us, we often fail to recognize the international results of the daily work we do in helping to preserve and promote the rule of law.

The world is big enough to accommodate us all. The legal needs of the world are such that we cannot satisfy them all. The advice I offer in the next section is meant to help stimulate your own dreams of an international career and to help you convert those dreams into a prosperous reality.

9. The Islands of Palau are in the west Pacific Ocean, near Guam. When I arrived in Palau, it was a United Nations Strategic Trust Territory, administered by the United States (and using a good deal of U.S. case law in its court system). I was privileged to be there on October 1, 1994, when the Republic of Palau became an independent nation, and when the U.N. Trusteeship system came to an end. During my year in Palau, I worked on a book to document this transition and to preserve some of Palau's judicial and political history. See OFFICE OF SUPREME COURT COUNSEL, *THE QUEST FOR HARMONY: A PICTORIAL HISTORY OF LAW AND JUSTICE IN THE REPUBLIC OF PALAU* (1995).

III. USEFUL ADVICE FROM A WISE OLD MAN

I am now thirty something. For most readers of this journal, I qualify as being a wise old man. Read on and absorb my wisdom.

A. *Start at the Beginning: Write Your Resume, or Review the One You Have*

If you have not yet written a resume, make that your first task. If you need help on doing this, consult a legal resume writing guide¹⁰ or see if your Career Service Office has guidelines for your use. If you already have a resume, be sure it is up to date. Once your resume is done (or nearly done), make an appointment with the Career Service Office at your school and ask them to meet with you to discuss the strengths and weaknesses of your resume.¹¹ The services of your school's career service office will still be available to you even if you have already graduated, so do not be shy about using them. If you no longer live near your alma mater, call them anyway and arrange for a telephone consultation to discuss your resume (you may also email or fax your resume for comments) and reciprocal career service arrangements that your school may have with the career service offices of other schools near where you currently live.

When you meet with the Career Service Office, be as specific as you can about your dream job. If a listing for that job comes in later that afternoon, the persons you told will know to call you first, even before they post the job for others to see.

B. *Join a Student Group, or Start Your Own*

If you have finished your resume and it looks weak, see what you can do to build it up quickly. Have you joined the International Law Society at your school? I'm amazed at how many students seeking "international" careers will not even take this simple step. The "dues" are usually nominal, if there are any at all.

At some schools the International Law Society may be dormant, which sometimes happens after the president and other officers graduate without electing successors. Find out what you need to do to start it up again. Congratulations, you have not just become a member, but you have likely also become the new President of the International Law Society. This advice holds true for any student organization. If you are interested in international child abduction, you should join the Children's Law Society. If you are interested in the new international criminal court, you should

10. See, e.g., KIMM ALAYNE WALTON, *GUERRILLA TACTICS FOR GETTING THE LEGAL JOB OF YOUR DREAMS* (1995).

11. Before you meet with your friends at the Career Service Office, you should drop off an advance copy of the resume so that the comments you receive are more meaningful.

join the Criminal Law Society. If you are interested in international issues affecting the environment, you should join the Environmental Law Society. If no society exists directly affecting your interests, you should start a new one.

C. Invite Prospective Employers to Speak to Your Student Group

Students are often surprised at the generosity of attorneys and others who will agree to speak to their groups. Most will do it for free. If they won't do it for free, ask someone else.

If you don't know who to ask to be a speaker, ask a professor (usually your faculty advisor, but don't limit yourself) to speak on a recent international development or to give suggestions for speakers. The Career Service Office and the Alumni Office will also have names of potential speakers. Ideally, you want to invite speakers from places where you want to work. If you want to work at the largest international law firm in town, invite a partner or senior associate from that firm to speak to the student groups. Make the speaker feel important. Create a nice sign to announce the event, be sure the room is set up, and find an audience. One way to double a potential audience is to co-sponsor your event with another student group. You instantly have twice the membership base for your speaker. Be the one to greet the speaker at the door and be sure that the speaker learns your name. Gush about your speaker's accomplishments during your introduction. Have a camera to take pictures of the speaker during the talk, and later with you. Send a thank you letter after the event and include a copy of the photograph if you both look good. Put your names on the back of the photo and jot down the date and place of the event. Give a copy of the photo to the student newspaper and ask them to run it. Send a copy of the paper to your speaker, who will enjoy the unexpected additional publicity. Do not enclose a resume, the time will come for that later.

D. Network or Not Work -- The Choice Is Yours

If you simply cannot arrange for your dream employer to speak to your group, you can nonetheless ask a leading attorney for an "informational interview," one in which you simply hope to learn about the type of work that the person does and whether or not it would be something that you would also like to do. Do not drool during this interview and do not violate the ground rules by asking for a job. Use the informational interview to find out what the person does, whether it brings them job satisfaction, and what training they found most helpful to their careers. Listen more than you speak. As the Stoic philosopher Epictetus observed, nature gave us "one tongue but two ears, that we may hear from others

twice as much as we speak."¹² If you listen, you may find that the particular job is really not one in which you are interested. If you have learned that, you have likely saved yourself from much future agony about a wrong career move.

The previous paragraph assumed that you would be able to identify appropriate persons for informational interviews. That assumption may not be valid. You must learn to network as well. Network, or not work. Don't be shy about meeting people and being sure that they know your name and your interests. Start networking with people you know, such as friends of your family who may be lawyers or business executives. Network with alumni from your school. When ending an informational interview, the most important question to ask is "who else would you recommend I speak with?" Then make sure that you do speak with that person. Send a thank you note to everyone who gives you an "informational interview." Proofread it before you mail it.

Even if you are "just a student," get a business card, and learn how to use it. When you go to a bar association meeting or other function, ask the speaker for a business card. It isn't difficult to ask: "May I have your business card?" Of course, it may be better to say, "I really enjoyed your presentation, you have an interesting background/perspective/skill. May I please have your business card?" You can ask for speakers' business cards even when you know you could find their addresses in the phone book. When you ask for a business card directly, you allow the speaker to respond by saying, "Why of course, here it is. Why don't you come by my office sometime for a visit?" A range of other responses is also possible, but unless the speaker has run out of business cards, the response to you will rarely be "no."¹³

E. *Join a Bar Association Committee, or Start Your Own*

One of the most effective places to network is at your local bar association.¹⁴ If you are looking for a job in the law, you are likely to find

12. THE GOLDEN SAYINGS OF EPICETUS 183 (Charles W. Eliot, ed., Hastings Crowley, trans., 1980). "Epictetus is a main authority on Stoic morals. The points on which he laid chief stress were the importance of cultivating complete independence of external circumstances, the realization that man must find happiness within himself, and the duty of reverencing the voice of Reason in the soul." *Id.* at 116. Because he stressed the importance of complete independence of external circumstances, Epictetus would be in complete agreement with everything I say in this article.

13. In those rare cases when the answer is really "no," it is better to learn that sooner rather than later.

14. For disclosure purposes I must admit that I am a big fan of organized bar associations. I have found them to be invaluable to my professional training and career development. The individual lawyers who I meet at bar association functions are some of the finest lawyers I have ever met. I currently am a member of the Board of Managers of the Chicago Bar Association (CBA) and was a past chair of the CBA's Committee on Military Law

employers at bar association meetings. If your bar association has committees that interest you, be sure that you join them. If your bar association does not have committees that interest you, find out how to start a new one.

Assuming that the bar association has a committee of interest to you, you should attend a meeting and introduce yourself to the chair and vice chair of the committee. Offer your assistance to them they will appreciate your offer and remember your name. You can offer to help organize a single speaker for a future meeting, or, more ambitiously, offer to help organize a panel of speakers for a continuing legal education (CLE) program. You can offer to write or edit a newsletter for the committee. For some strange reason, no one else wants this job even though it gives you an opportunity to promote your name and will give you visibility within the bar association committee. Be sure that the newsletter becomes a place where committee members will post job openings. When you are the editor of the newsletter, you also will be the first person to see that new job listing.

When working on programs, remember to identify topics of concern to other committees. The criminal law committee, for example, may be interested in a program on recent developments in extradition. Whatever topic you choose for a program, be sure to focus on recent developments in that area. Audience members are more likely to come if new information is discussed rather than presenting things they can read about in hornbooks.

F. *Intern or Volunteer*

Some of the best experience you can get (and contacts that you can make) comes from jobs that don't pay (or don't pay well). Get course credit for an internship when you can. The grade you get on an internship won't usually do violence to your grade point average, and you will, by nature, focus on the academic aspects of your experience. Even if you don't get course credit, there is nothing wrong with volunteering and working in a non-legal job (note: not an illegal job) to cover your expenses while in school.

Ask professors what projects they are working on (or would like to be working on), and, if they are also of interest to you, ask if they need a competent and energetic research assistant (if you ask if they need competence and energy, the answer will be yes). You will likely get paid for your assistance, although you may also do the work as an independent study project with appropriate subjects, materials, and guidance from the

and Veterans Affairs. I also was the founding Chair of the CBA's Committee on the Legal Rights of Lesbians and Gay Men. In the American Bar Association, I am currently on the International Human Rights Steering Committee for the ABA Section of International Law and Practice.

professor. If getting paid is not a requirement, you can volunteer to help me on an upcoming law review article or book.¹⁵

Look in the law library at your school. Does it have a "Guide to International Legal Research" listing sources available in your law library? If your library doesn't have such a guide, offer to help write one with the librarian. You will gain a new friend and ally, what you write may be published somewhere, and you will become the school's leading authority on international legal research sources.

Volunteer to work on an upcoming political campaign. The candidate you help to get elected may become a United States Senator and may take you with him or her to Washington.

If you're in a city like Washington or New York, look around for volunteer opportunities. You may apply to be an intern at an organization such as the International Law Institute, for example. Even outside major centers of international activity, there are many opportunities to volunteer with private groups, such as Amnesty International, or government agencies, such as an international visitors center or a local export promotion office.

G. *Teach English to Foreign Lawyers -- Use My Book*

You may find yourself in another country where English is not spoken as the primary language or you may find yourself in the United States with lawyers or law students who speak English as a second language. Even if you have never before been an "English teacher," you can help lawyers, law students, and business executives to learn the special language of American law. If you do not speak English as your first language, it may take you two or three hours to understand the difference between "probate" and "probation," or to understand why we give "consideration" to the concept of "consideration" in a contract. Fortunately, there is a wonderful new book that you can use to start teaching English.¹⁶ As you teach this class, you may also find opportunities to increase your own foreign language abilities.

H. *Have Something to Say (in French, or even just English)*

If you hope to work in international law, you must be informed about current events. You may find yourself at a cocktail party or a seminar needing to say something meaningful about the state of the world. You should read a newspaper with good coverage of international issues. The

15. Send resumes to: Prof. Mark E. Wojcik, The John Marshall Law School, 315 S. Plymouth Court, Chicago, IL 60604 USA.

16. MARK E. WOJCIK, INTRODUCTION TO LEGAL ENGLISH (International Law Institute 1998). Further information about the book is available on amazon.com. You can use this book to teach a single person, a small group, or a small class of lawyers from other countries who want to improve their English.

New York Times and the *Christian Science Monitor* are good choices. You should also read a newspaper or news magazine from outside the United States, to give you differing perspectives on the issues (and, more than likely, news other than the current Presidential scandal). Choices here include the *Financial Times* (aptly described by one Italian man as “The London version of the *Wall Street Journal*”), the *Economist*, and *World Press Review*. Check your law school’s library for these journals, or see if you can remember where the public library is (remember that place?). If you do not have easy access to foreign news sources in print (not all of us live in New York or Los Angeles), learn how to get these foreign news sources off the internet. Be careful how you use your “surf” time, however, and stay focused on news that will benefit your career search.

You cannot limit yourself to newspapers and the Internet. You must also tackle more complex readings on international developments. *Foreign Affairs* and *Foreign Policy* are two well-known journals that will give you the depth of analysis that you need to cultivate. International law journals are an obvious choice as well.

I. *Write Something. Before You Publish It, Ask An Expert to Read It.*

You need to have a writing sample, no matter what. You may as well have a writing sample that has been published somewhere. As you read articles from law journals and bar association magazines on a regular basis, you will realize that writing an article is also something that you can do. Pick a topic about which you already know something, or pick a topic about which you would like to learn something and write it up. Do not be afraid of making mistakes in what you write. Mistakes happen. Even the current edition of the venerable *Black’s Law Dictionary* states that “[i]n order to be valid . . . treaties [*sic*] must be approved by two-thirds of the Senate.”¹⁷ Wouldn’t Williston and Prosser be surprised to learn that their books are not valid because they were never subjected to United States Senate confirmation? The definition should read “treaties,” of course. In reviewing student papers, I often must read about violations “of the statue [*sic*],” and I wonder what piece of art has been vandalized. I read about the decision of the “trail court,” and wonder if it meant deciding whether to camp for the night. You must proofread your drafts carefully to avoid these errors; do not rely solely on spell check or on the skills of your editors.¹⁸ While you may be able to survive these errors at a later stage of your career (say, for example, post tenure), you cannot afford to make such mistakes when you are building your reputation.

Beyond simple proofreading, however, is the need for serious substantive analysis of what you have written. You should not hesitate to

17. BLACK’S LAW DICTIONARY 298 (6th ed. 1990).

18. An exception to this advice may be made when writing for the *ILSA Journal of International and Comparative Law*, a journal with a top-rate editorial staff.

send drafts of your articles to leading authorities in the field and to ask them to look at your work before it is published. If they agree, you will have the benefit of their expertise. Remember to thank them appropriately and to credit them for their assistance. After they have reviewed your article, you can also ask them to have a look at your resume. Your resume may be perfect by this point, but ask them anyway for their advice about it. If you haven't landed a job by now, there may be a way to re-craft your resume or to deliver it to an appropriate hiring partner or agency.

IV. CONCLUSION

Follow the advice here, and live happily ever after. Pay off your school loans as quickly as you can so that your future job decisions may be made on the basis of the personal enjoyment that the job will give you rather than on your "need" for a certain salary. You can only live happily ever after when you are not worrying about your wallet. Some people have a way of spending just a little bit more than they have, and it is a hard habit to break. Keep your eyes on your ultimate goals, and be sure that you have those goals down in writing along with a reasonable time frame for each of your goals. As you achieve success, take notes along the way so that you can better share your secret with others. Take this article and improve upon it. Send a copy to me. You will make an old man smile.

HUMAN RIGHTS AND SOVEREIGN AND INDIVIDUAL IMMUNITIES (SOVEREIGN IMMUNITY, ACT OF STATE, HEAD OF STATE IMMUNITY AND DIPLOMATIC IMMUNITY) – SOME REFLECTIONS

*Ved P. Nanda**

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I. INTRODUCTION

Reflections on the application of sovereign and individual immunities law are especially pertinent in light of the controversy surrounding the arrest and trial of General Augusto Pinochet in Britain, at the request of a Spanish magistrate on charges of murder, hostage-taking, and torture during his seventeen year rule in Chile. This commentary will briefly review the controversy in the next section. The following sections will discuss sovereign immunity, act of state, head of state immunity and diplomatic immunity in connection with human rights violations. In the final section, I will offer my recommendations.

II. THE PINOCHET CONTROVERSY

At the Spanish request and pursuant to British procedures the Lord Chief Justice of the High Court, Queen’s Bench, interpreted the applicable United Kingdom statutes, including the United Kingdom Extradition Act of 1989, the State Immunity Act of 1978 and the Diplomatic Privileges Act of 1964. The Court held that the former dictator was “entitled to immunity as a former sovereign from the criminal and civil process of the English courts.”¹ The court stated that “a former head of state is clearly entitled to

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1. *In re Augusto Pinochet Ugarte*, CO/4074/98, CO/4083/98 (October 28, 1998), para. 74, cited in ASIL, *International Law in Brief*, Vol. I, No. 4, Dec. 1998, at 2.

immunity in relation to criminal acts performed in the course of exercising public functions."² In response to the argument that the crimes allegedly committed by Pinochet were so serious that no one in the exercise of his functions as head of state could commit such crimes, Justice Collins stated in a separate opinion; "[T]here is in my judgment no justification for reading any limitation based on the nature of the crimes committed into the immunity which exists."³

On appeal to Britain's highest court, the Juridical Committee of the House of Lords held in a three-to-two decision that Pinochet did not enjoy immunity as a former head of state for internationally recognized crimes.⁴ Lord Nicholls said; "[I]nternational law recognizes, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states."

International law has made plain, however, that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law."⁵ Lord Steyn stated:

The development of international law since the second world war justifies the conclusion that by the time of the 1973 coup d'etat, and certainly ever since, international law condemned genocide[,] torture, hostage-taking and crimes against humanity (during an armed conflict or in peace time) as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a head of state.⁶

Lord Hoffmann⁷ concurred with the reasoning of Lord Nicholls and Lord Steyn, while Lord Slynn⁸ and Lord Lloyd,⁹ in separate opinions, found that Pinochet should be granted immunity as a former head of state. Subsequently, the United Kingdom Home Secretary, Jack Straw, who had the last word with discretion to intervene and block the Spanish extradition

2. *Id.* paras. 58, 63.

3. *Id.* para. 80.

4. For the statements of the five Law Lords, see *The Guardian Home Page* (London), Nov. 26, 1998, GRDN 004, 1998 WL 18679498, at 1-7.

5. *Id.* at 5.

6. *Id.* at 6.

7. *Id.* at 7.

8. *Id.* at 1-2.

9. *The Guardian Home Page* (London), Nov. 26, 1998, GRDN 004, 1998 WL 18679498, at 2-4.

request, decided to allow the extradition proceedings against Pinochet to proceed.¹⁰ Ironically, after complaints from Pinochet's lawyers that one of the Law Lords, Lord Hoffmann, had not disclosed his chairmanship of an Amnesty International charity, a second panel of five Law Lords set aside the first ruling, for Amnesty International had been allowed to present arguments in the case. The reason for Pinochet's petition for reconsideration was that Lord Hoffmann's links with Amnesty International gave the appearance of possible bias. As Lord Browne-Wilkinson said in his opinion:

If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, in promoting the same causes in the same organization as is a party to the suit. There is no room for fine distinctions if Lord Hewart's famous dictum is to be observed: it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'¹¹

Thus, a third panel of seven Law Lords reheard the Pinochet case from scratch starting in late January and continuing for three weeks.¹² Regardless of the panel's decision, the controversy created by the Pinochet case on the scope of the immunity and the political fallout of the decision are likely to be far-reaching, with respect to foreign policy issues between Britain, Chile and Spain.

III. SOVEREIGN IMMUNITY

Since its promulgation in 1976, the Foreign Sovereign Immunities Act (FSIA)¹³ provides the sole statutory basis for United States courts to exercise subject matter jurisdiction over any action brought against a foreign state defendant, its political subdivision, or its "agency or instrumentality."¹⁴ Only under its enumerated exceptions will a foreign state defendant lose its immunity granted under the Act. The Act is, however, silent regarding its application to defendants who are natural

10. For an explanation of the Home Secretary's decision, see <<http://news.bbc.co.uk/hi/english/uk/newsid31000/231438.-stm>>.

11. House of Lords *In re Pinochet*, Opinions of the Lords of Appeal for Judgment in the Case, Opinion of Lord Browne-Wilkinson, <<http://www.parliament.the-stationery-office.co.uk/pa/ld1999899/ldjudgmt/-jd990115/pino01.htm>>, at 10.

12. See Pinochet hearings expected to wrap up, Agence France-Presse, Feb. 4, 1999, available in 1999 WL 540071.

13. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11 (1976) and amendments.

14. *Id.* § 1603(a) and (b).

persons. In the context of the present discussion, therefore, could a natural person who has allegedly committed a human rights violation and is being sued in a United States court claim that he/she falls within the scope of the term "agency or instrumentality of a foreign state?"

As defined in the FSIA, the term *agency or instrumentality of a foreign state* means any entity,

1. Which is a separate legal person, corporate or otherwise;
2. Which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof; and
3. Which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.¹⁵

As to the legislative history of the section defining this expression, the House Report explains:

As a general matter, entities which meet the definition of an *agency or instrumentality of a foreign state* could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry¹⁶

This language shows that Congress' primary concern was with organizations acting for the foreign state. Cases of individuals acting as sovereign agencies or instrumentalities were not intended to fall within the scope of the section. As early as 1987 a federal court accepted this reading of section 1603(b),¹⁷ and there is further merit to the argument that, section 1603(b) should be interpreted narrowly so as to exclude individuals' claims to sovereign immunity for human rights violations. Immunities of a diplomat or a head of state, which I will discuss later, remain, of course, unaffected under this interpretation. However, several courts, including the Ninth Circuit and the D.C. Circuit,¹⁸ have instead construed the section

15. *Id.* § 1603(b).

16. H.R. Rep. No. 94-1487, 94th Cong. 2d Sess., reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6614.

17. Republic of the Philippines v. Marcos, 665 F.Supp. 793, 797 (N.D. Cal. 1987).

18. See, e.g., El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996), citing Chuidian v. Philippine Nat'l Bank, 19 F.2d 1095, 1099-1103 (9th Cir. 1990); In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493, 496-97 (9th Cir. 1992); Kline v.

broadly, thus applying the FSIA to individuals for acts performed in their official capacity on behalf of a foreign state or its *agency or instrumentality*.

The enumerated exceptions to the FSIA, including *implied waiver* by the foreign sovereign,¹⁹ are seemingly unavailing to victims of human rights violations seeking judicial remedy under the FSIA. Despite merit to the argument that there could be no immunity under any statute for gross violations of human rights, an argument rejected by courts,²⁰ these victims are limited to finding redress under other statutes. Until 1992 the only available remedy was under the Alien Tort Claims Act (ATCA), a 1789 statute under which “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²¹

I will not discuss the developments under this statute, for they have been the subject of extensive treatment ever since the landmark case in 1980 of *Filartiga v. Pena-Irala*.²² Suffice it here to note that, while the United States Supreme Court held in 1989 that the FSIA jurisdictional criteria apply to suits brought against governments under the ATCA,²³ the Court also said that there are no limits that FSIA imposes on lawsuits under the ATCA.²⁴

Nor will I discuss the developments under the 1992 Torture Victim Protection Act (TVPA).²⁵ I would like to note, however, that in contrast to the ATCA, under which actions are permitted only by aliens, the TVPA

Kaneko, 685 F.Supp. 386 (S.D.N.Y. 1988); *Rios v. Marshall*, 530 F.Supp. 351, 371-72 (S.D.N.Y. 1981), cases cited in *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 11 n.3. (D.C. 1998).

19. Section 1605 of the FSIA enumerates seven exceptions. Section 1605(a)(1) provides that a foreign state shall not be immune from jurisdiction in a U.S. court in any case “in which the foreign state has waived its immunity either explicitly or by implication” The argument is that by ratifying or acceding to an international human rights treaty, a state impliedly waives its sovereign immunity. The courts have, however, rejected this argument. See *Furlova v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992).

20. See *Siderman*, *supra* note 20; *Princz v. Federal Republic of Germany*, 813 F.Supp. 22 (D.D.C. 1992); 26 F.3d 1166 (D.C. Cir. 1994).

21. 28 U.S.C. § 1350.

22. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In a 1995 decision, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 2524 (1996), the Second Circuit extended the reach of the ATCA to non-state actors for the commission of certain tortious actions by stating that it does not agree that “the law of nations, as understood in the modern era, confines its reach to state action.” *Id.* at 239.

23. *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989).

24. *Id.* at 438 (noting that the ATCA “of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states”).

25. Pub. L. No. 102-256, 106 stat. 78 (1992).

allows United States citizens as well to bring lawsuits in United States courts. Also, the TVPA allows lawsuits against individual defendants, contrary to the ATCA which permits suits against individuals as well as sovereigns, pertaining to a limited number of violations including torture and extra-judicial killings, subject to the FSIA's jurisdictional requirements.

Rather, I will confine my comments here to the developments under the 1996 Anti-Terrorism and Effective Death Penalty Act (Anti-Terrorism Act),²⁶ under which Congress lifted the immunity of foreign states for terrorism. United States courts may exercise subject matter jurisdiction under the Anti-Terrorism Act when the personal injury or death to a U.S. national has resulted from an act of torture, extra-judicial killing, aircraft sabotage, or hostage-taking. The harm must have been perpetrated either directly by the foreign state or by a non-state actor receiving material support or resources from the foreign state defendant. Also, the foreign state must be designated by the executive branch as a state sponsor of terrorism, thus limiting such remedy to a few select states, which currently include Iran, Cuba, Syria, Iraq, Libya, Sudan and North Korea.²⁷

Another limitation under the Anti-Terrorism Act is that if the incident occurred within the foreign state defendant's territory, the plaintiff must afford the terrorist state "a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration."²⁸ In addition, the plaintiff or the victim must be a United States national at the time of the incident.

Subsequently, an amendment to the Antiterrorism Act aimed at substantially increasing the potential civil liability of state sponsors of acts of terrorism was adopted. The amendment titled Civil Liability for Acts of State Sponsored Terrorism, was enacted on September 30, 1996. Known as the Flatow Amendment, it was part of the 1997 Omnibus Consolidated Appropriations Act.²⁹ This amendment specifically provided for the availability of punitive damages in actions brought under the Anti-Terrorism Act.

The Federal District Court for the District of Columbia applied the Anti-Terrorism Act in *Flatow v. Islamic Republic of Iran*.³⁰ The plaintiff in *Flatow*, was the father of a United States national who died when the bus on which she was traveling in the Gaza Strip was destroyed by a suicide bomber. A faction of the Palestine Islamic Jihad, a terrorist organization

26. Pub. L. No. 104-132, Title II, § 221(a)(Apr. 24 1996), 110 Stat. 1241, (codified at 28 U.S.C. § 1605).

27. 22 C.F.R. § 126.1(d).

28. 28 U.S.C. § 1605(a)(7).

29. Pub. L. 104-208, Div. A, Title I § 101 [Title V § 589] (Sept. 30, 1996), 110 Stat. 3009-172, *reprinted in* 28 U.S.C. § 1605 note.

30. 999 F. Supp. 1 (1998).

financed by the Islamic Republic of Iran, claimed responsibility for the bombing. Since the Islamic Republic of Iran has been designated by the Department of State as a state sponsor of terrorism, the court found the defendant Islamic Republic of Iran liable. The court interpreted the Anti-Terrorism Act retroactively³¹ providing the court with subject matter jurisdiction. The court held that the suicide bombing was an act of extrajudicial killing.³² It also found the Act's extraterritorial application proper.³³ The court said that:

[W]hile the Flatow Amendment is apparently an independent pronouncement of law, yet it has been published as a note to 28 U.S.C. §1605, and requires several references to 28 U.S.C. § 1605(a)(7) *et seq.* to reach even a preliminary interpretation. As it also effects a substantial change to [the Antiterrorism Act], it appears to be an implied amendment.³⁴

It further added that, [I]nterpretation of 28 U.S.C. § 1605(a)(7) and the Flatow Amendment in *pari materia* demonstrates the coherent legislative intent behind the two enactments.³⁵

The court held that foreign state sponsors of terrorism were subject to punitive damages³⁶ and awarded \$225 million in addition to several millions in damages for pain and suffering and for solatium.³⁷ The court did not consider the acts of the terrorist to be valid acts of the state and thereby exempted from liability under the act of state doctrine,³⁸ nor was the defense of head of state immunity found to be available in such actions brought pursuant to the Anti-Terrorism Act.³⁹

IV. ACT OF STATE

The act of state doctrine, a judge-made corollary to sovereign immunity, was enunciated by the United States Supreme Court in 1897 in *Underhill v. Hernandez*, "[T]he courts of one country will not sit in judgment on the acts of the government of another, done within its own

31. *Id.* at 12-14.

32. *Id.* at 16-19.

33. *Id.* at 15-16.

34. *Id.* at 12.

35. 999 F. Supp. 1 at 13 (1998).

36. *Id.* at 25-27.

37. *Id.* at 5.

38. *Id.* at 24.

39. *Id.* at 24-25.

territory."⁴⁰ The Restatement (Third) of the Foreign Relations Law of the United States describes the doctrine as follows:

1. In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from . . . sitting in judgment on . . . acts of a governmental character done by a foreign state within its own territory and applicable there.
2. The doctrine set forth in Subsection (1) is subject to modification by act of Congress.⁴¹

Thus, under this doctrine, United States courts generally exercise judicial constraint by declining to review official acts of foreign states.

Individual defendants charged with human rights violations before United States courts are, however, not likely to succeed in invoking this doctrine to claim immunity from suit. Courts have generally held that human rights violations such as torture, assassinations, and summary executions, do not constitute acts of state, for such acts cannot be considered public, official acts.⁴² In *Flatow*, the court held that the defense of the act of state is not available in the case of suicide bus bombings and other acts of international terrorism since they are not "valid acts of state of the type which [under the act of state doctrine would] bar consideration of this case."⁴³

The legislative history of the 1992 Torture Victim Protection Act⁴⁴ (TVPA) also sheds light on the inapplicability of the act of state doctrine to human rights violations. In March 1992, Senator Arlen Specter, sponsor of the TVPA legislation in the Senate, said:

The act of state doctrine does not provide a shield from liability under the [TVPA]. This doctrine precludes United States courts from sitting in judgment on the official public acts of a sovereign government Because this doctrine applies only to public acts, and no foreign government commits torture as a matter of

40. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

41. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 (1987).

42. *See, e.g., Liu v. Republic of China*, 642 F.Supp. 297, 301 (N.D. Cal. 1986), 892 F.2d 1419, 1432-34 (9th Cir. 1989), *cert. dismissed*, 497 U.S. 1058 (1990); *Paul v. Averil*, 812 F.Supp. 207, 212 (S.D. Fla. 1993); *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1546 (N.D. Cal. 1987); *Letelier v. Republic of Chile*, 488 F.Supp. 665, 673-74 (D.D.C. 1980).

43. *Id.* at 24.

44. *See supra* note 24.

official policy, this doctrine cannot be violated by allowing a cause of action for torture.⁴⁵

The Senate Judiciary Committee's Report on the legislation echoes Senator Specter's views:

[T]he committee does not intend the *act of state* doctrine to provide a shield from lawsuit for [individuals]. In [Sabbatino], the Supreme Court held that the *act of state* doctrine is meant to prevent United States courts from sitting in judgment of the official public acts of a sovereign foreign government. Since this doctrine applies only to "public" acts, and no state commits torture as a matter of public policy, this doctrine cannot shield [individuals] from liability under this legislation.⁴⁶

V. HEAD OF STATE IMMUNITY

The FSIA fails to provide guidance regarding head of state immunity, which is not considered to be a matter of right but rather "a matter of grace and comity" in United States courts.⁴⁷ Since such immunity is recognized as a principle of customary international law,⁴⁸ and the FSIA remains silent regarding this immunity, courts have generally deferred to the State Department's suggestion of immunity. This was done earlier in sovereign immunity cases prior to the FSIA in deciding whether to grant a foreign head of state defendant immunity.⁴⁹ The rationale, of course, is the primacy of the executive branch regarding foreign affairs.

As noted earlier, some courts including the Ninth and D.C. Circuits, however, have applied the FSIA to individuals for acts performed in their official capacity on behalf of a foreign state defendant.⁵⁰ Furthermore, how are the courts to resolve the controversy when the executive branch has offered no suggestion at all? To illustrate the unsettled nature of the scope of head of state immunity, I will refer to three cases: (1) *Lafontat v. Aristide*,⁵¹ decided in 1994 by the Federal District Court of the Eastern

45. 138 CONG. REC. S2668 (daily ed. Mar. 3, 1992).

46. S. REP. NO. 249 102d Cong., 1st Sess. 8 (1991).

47. *Flatow v. Islamic Republic of Iran*, 999 F. Supp 1, 24 (D.C. 1998).

48. *See U.S. v. Noriega*, 746 F.Supp. 1506, 1519 (S.D. Fla. 1990) [hereinafter *Noriega*].

49. *Id.*

50. *See supra* note 17 and the accompanying text.

51. 844 F.Supp. 128 (E.D.N.Y. 1984).

District of New York; (2) *Hilao v. Marcos*,⁵² from the Ninth Circuit in 1994; and (3) *United States v. Noriega*,⁵³ a 1997 Eleventh Circuit case.

In *Aristide*, the plaintiff sought money damages, alleging that Haitian soldiers who killed her husband acted on behalf of the President of Haiti, Jean-Bertrand Aristide.⁵⁴ At the defendant's request, the State Department suggested immunity because of his status as the President of Haiti and the court, accepting the suggestion, dismissed the action.⁵⁵ It is noteworthy that Aristide was in exile in the United States at the time of the suit.

In *Hilao*, the allegations by the families of the deceased who brought suit against the former president of the Philippines were that, under Marcos' authority, the victims had been tortured and executed in the Philippines.⁵⁶ The Ninth Circuit held that Marcos was not immune because the acts alleged were not official acts, which would be considered exempt under head of state immunity. In the court's words "Ferdinand Marcos was not the state, but the head of the state, bound by the laws that applied to him."⁵⁷ The court added that a "lawsuit against a foreign official acting outside the scope of his authority does not implicate any of the foreign diplomatic concerns involved in bringing suit against another government in United States courts."⁵⁸

In the *Noriega* case, the defendant sought dismissal of his charges of participation in a drug trafficking conspiracy, claiming Head of State and diplomatic immunity.⁵⁹ Subsequently, *Noriega* was forcibly brought to the United States and the court denied his claim of Head of State immunity because the United States had not recognized him as the head of state of Panama.⁶⁰ He was found guilty by a jury and was sentenced to forty years in prison.⁶¹ On appeal, the court rejected Noriega's claim of immunity since the executive branch had "manifested its clear sentiment that Noriega should be denied head-of-state immunity."⁶²

It should be noted that the circuits had earlier construed the absence of a formal suggestion of immunity from the Department of State differently. The Second Circuit decided in *In Re Doe*,⁶³ that "absent a formal

52. *Hilao*, 25 F.3d 1467 (9th Cir. 1994), cert. denied, 115 S.Ct. 934 (1995).

53. 117 F.3d 1206 (11th Cir. 1997).

54. *Aristide*, 844 F.Supp. at 130.

55. *Id.*

56. *Hilao*, 25 F.3d at 1469.

57. *Id.* at 1471 (footnotes omitted).

58. *Id.* at 1472.

59. *United States v. Noriega*, 746 F.Supp. 1506, 1510 (S.D. Fla. 1990).

60. *Id.* at 1519-20.

61. See *Noriega*, 117 F.3d 1206, 1210 (11th Cir. 1997).

62. *Id.* at 1212.

63. 860 F.2d 40 (2d Cir. 1988).

suggestion of immunity, a putative head of state should receive no immunity,"⁶⁴ while the Fifth Circuit held in *Spacil v. Crowe*,⁶⁵ that the judiciary "should make an independent determination regarding immunity when the Executive Branch neglects to convey clearly its position on a particular immunity request."⁶⁶

The Eleventh Circuit has arguably further added to the confusion by interpreting the executive branch's foreign policy by imputing to it an intent it had not explicitly expressed. Since the court did not identify standards to determine the executive's intent, *this implicit intent* approach does not to clarify the existing uncertainty in this area.

As a promising new development, however, the Flatow Amendment provides for the application of the Anti-Terrorism Act's exception of immunity to "[a]n official, employee, or agent of a foreign state . . . acting within the scope of his or her office, employment, or agency." As the court said in *Flatow*:

This provision was directed at those individuals who facilitate terrorist acts which cause the injury or death of American citizens. The provision does not qualify or in any way limit its application only to non-heads of state. Given that state sponsorship of terrorism is a decision made at the highest levels of government, unless the Flatow Amendment is interpreted as abrogating head of state immunity in the limited circumstances of [the Antiterrorism Act], the provisions cannot give full effect to Congressional intent, and the federal cause of action created by the two amendments would be irreparably and unreasonably hobbled. This Court therefore concludes that the defense of head of state immunity is not available in actions brought pursuant to [the Anti-Terrorist Act and the Flatow Amendment].⁶⁷

VI. DIPLOMATIC IMMUNITY

One of the most ancient principles of customary international law, diplomatic immunity, is now enshrined in the 1961 Vienna Convention on Diplomatic Relations,⁶⁸ which was codified in 1978 in the United States in

64. *Id.* at 45, *cited in* *Noriega*, 117 F.3d at 1212.

65. 489 F.2d 614 (5th Cir. 1974).

66. *Id.* at 618-19, *cited in* *Noriega*, 117 F.3d at 1212.

67. *Flatow, V. Islamic Republic of Iran*, 999 F. Supp. 1, 24-25 (D.C. 1998).

68. 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter the Vienna Convention].

the Diplomatic Relations Act.⁶⁹ The Convention regulates the conduct of diplomats within the receiving state. Article 41 provides:

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the Receiving State. . .
2. All official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the Receiving State or such other ministry as may be agreed.
3. The premises of the mission must not be used in any manner incompatible with the functions of the mission . . .

Diplomatic privileges and immunities are justified under the *functional necessity* theory so as to enable the mission to perform its functions. However, instances of abuse by diplomats asserting immunity, ranging from violation of traffic laws to serious human rights abuses, are commonplace. There have been several proposals and some attempts to curb those abuses by amending the Vienna Convention.⁷⁰ However, for present purposes, diplomatic immunity does not raise any special problems that have not already been subsumed under the prior discussion.

VII. CONCLUSION

Immunities law still shields perpetrators of human rights abuses from lawsuits in United States courts to an unacceptable extent. The law remains uncertain and, as the *Pinochet* case demonstrates, a similar situation prevails in Britain and presumably in other countries as well. Starting with the dusting off of the 200-year-old ATCA and its application in *Filartiga* and the subsequent expansion through the TVPA and the Anti-Terrorism Act and Flatow Amendment, as discussed earlier, victims are able to seek redress in limited circumstances.

Thus, the need remains to provide a human rights exception in the FSIA to allow the law to catch up with the monumental progress of international human rights law. The attempts thus far have not succeeded in taking this next step forward, but the opportunity and the demand are both present for doing so.⁷¹

69. Diplomatic Relations Act of 1978, 22 U.S.C. §§ 251-59, Pub. L. 95-393, 92 Stat. 808, codified in 22 U.S.C. sec. 254a-e and 28 U.S.C. § 1364.

70. See generally Michael B. McDonough, *Privileged Outlaws: Diplomats, Crime and Immunity*, 20 SUFFOLK TRANS-NAT'L L. REV. 475 (1997).

71. There is voluminous literature addressing the shortcomings and recommending specific action. For several such proposals, see, e.g., Jeffrey Jacobson, *Trying to Fit a Square Peg Into a Round Hole: The Foreign Sovereign Immunities Act and Human Rights Violations*, 19

WHITTIER L. REV. 757 (1998); Jack Alan Levy, *As Between Princz and King: Reassessing the Law of Foreign Sovereign Immunity as Applied to Jus Cogens Violators*, 86 GEO. L.J. 2703 (1998); Hari Osafsky, *Foreign Sovereign Immunity from Severe Human Rights Violations: New directions for Common Law Based Approaches*, 11 N.Y. INT'L L. REV. 35 (1998); *Separation of Powers -- Head-of-State Immunity -- Eleventh Circuit Holds that the Executive Branch's Capture of Noriega Exempts Him from Head of State Immunity*, 111 HARV. L. REV. 849 (1998); Scott Bucci, *Breaking Through the Immunity Wall? Implications of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 3 J. INT'L LEGAL STUD. 293 (1997); Alan Enslen, *Filatiga's Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claim Act With Its Decision in Kadic v. Karadzic*, 48 ALA. L. REV. 695 (1997); Jennifer Gergen, *Human Rights and the Foreign Sovereign Immunities Act*, 36 VA. J. INT'L L. 765 (1996); David Mackusick, *Human Rights vs. Sovereign Rights: The State Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act*, 10 EMORY INT'L L. REV. 741 (1996); Shobha George, *Head-of-State Immunity in the United States Courts: Still Confused After All These Years*, 64 FORDHAM L. REV. 1051 (1995); Joan Fitzpatrick, *The Claim to Foreign Sovereign Immunity by Individuals Sued for International Human Rights Violations*, 15 WHITTIER L. REV. 465 (1994); Tom Lininger, *Recent Development, Overcoming Immunity Defenses to Human Rights Suits in U.S. Courts*, 7 HARV. HUM. RTS. J. 177 (1994).

JUDICIAL APPLICATION OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

*Howard M. Holtzmann**

When we look at the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, we must ask ourselves, who recognizes foreign arbitral awards and who enforces them. The answer is, of course, judges of national courts -- judges who have a variety of legal backgrounds and who work in different political, social, and economic systems. Just think of it, there is one Convention, but there are hundreds of judges of national courts scattered around the world who interpret it, without a single supreme court to assure that their decisions are consistent and form a coherent system. Yet, as one looks at the judicial decisions relating to the Convention, we find a remarkable degree of consistency. Were that not so, the Convention would be like the tower of babel in *The Bible*; a tower that would collapse because every court spoke in a different legal tongue and issued a different message.

I would emphasize that achieving consistency among national courts is not a matter of theoretical jurisprudence; it is a practical necessity in facilitating international trade. For a variety of reasons, business people choose arbitration to resolve disputes that might arise in their transactions. To conduct their business, they must be able to rely on the effectiveness of arbitral awards, and that is only possible when decisions of national courts are predictable. Judicial unpredictability breeds commercial uncertainty and uncertainty hampers the free flow of trade. Moreover, we must remember that the role of courts is particularly significant because international trade is one of the building blocks of world peace.

In this context, the United Nations Commission on International Trade Law ("UNCITRAL") convened a symposium at United Nations Headquarters in New York to celebrate the fortieth Anniversary of the Convention. The meeting was held on June 10, 1998, the exact anniversary of the day when the Convention had, forty years earlier, been opened for signature by states. During the Symposium, a panel of judges of national courts were asked to share their views on how to achieve predictability in judicial application of the Convention.

The U.N. planners of the program rightly considered it important that the speakers on the panel include judges from a variety of regions and legal cultures. The judges spoke in the alphabetical order of their names, rather

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than the alphabetical order of the countries, because each spoke in his or her personal capacity, not as a national representative. I will take a moment to describe each of these judges so that you will be able to appreciate the diversity and depth of experience of the panel members. They included:

Judge Mohamed Aboul Enien, who has been a member of the Egyptian judiciary for more than forty years and is presently Senior Vice President of the Supreme Constitutional Court of Egypt. He has also been a moving force in international commercial arbitration as the Director of the Cairo Center for Commercial Arbitration and as Secretary-General of the Union of Arab Arbitration Centers.

Justice Michael Goldie, who has been a Justice of Appeal of British Columbia in Canada, since 1991. You will recall that British Columbia was the first jurisdiction to enact the UNCITRAL Model Arbitration Law.

Judge Supradit Hutasingh, who joined the judiciary in Thailand in 1970 and became a Justice of the Supreme Court in 1994.

Judge Jon Newman, who was Chief Judge of the United States Court of Appeals for the Second Circuit from 1993 to 1997 and now serves as a Senior Judge on that court.

Judge Ana Isabel Piaggi, who brought to the panel the perspective of Latin America and the viewpoint of the civil law. In Argentina, she is a judge and an honorary President of the National Commercial Court of Appeals. She has been active in law reform in her country and has been a member of its delegation to UNCITRAL.

The Chairman was from the United States.

Each of the judges was asked to focus on the following questions:

1) When a national court is seized of a case concerning the Convention, is it useful and appropriate to look at decisions of courts in other countries? Are uniform interpretations of such terms as "agreement in writing" desirable? When enforcing awards, should courts apply international public policy rather than national public policy?

2) If a national court considers decisions of foreign courts relating to the Convention, what weight should the national court give to foreign decisions? For example, should foreign decisions be used for information or guidance only, or should greater weight be given in the interest of a public policy of promoting harmonization and predictability in order to facilitate international commerce?

All of the judges agreed that it is useful and appropriate to look at decisions of courts in other countries and to seek to promote uniformity in applying the Convention. A very useful comment was made by Judge Newman, which I would like to quote extensively because of the valuable insights that he contributed. Judge Newman said:

I think it unlikely that the courts of any jurisdiction will take the decisions of other jurisdictions as binding authority, even on matters where uniformity of interpretation of international

documents is highly desirable. Nevertheless, it should be expected that courts will look to the decisions of foreign jurisdictions interpreting such documents and take significant guidance from such decisions.

In assessing the force of such guidance, I think a distinction will often be appropriate depending on the number of times the interpretive issue has arisen. If, for example, there exists one, or even two, decisions of another jurisdiction construing a term or phrase of an international document a certain way, a court of the next jurisdiction to consider the matter might well feel free to make a different interpretation. Otherwise, the meaning of documents would depend on the fortuity of which jurisdiction was first to encounter the issue. The second jurisdiction might well provide a better reasoned basis for reaching its differing conclusion.

On the other hand, if a consistent interpretation has been reached by four or five jurisdictions, then a court of the next jurisdiction to face the issue should normally follow what has by then become the settled interpretation, unless some especially compelling aspect of domestic law, such as a conflict with internal public policy, requires otherwise. In the absence of such a special circumstance, it is more important that uniformity of interpretation be achieved as to the understanding and application of documents that govern international commercial transactions than that the court of any one jurisdiction reach its preferred interpretation.

Finally, the use of decisions from various jurisdictions in achieving more uniformity of interpretation will be significantly aided by timely dissemination of pertinent decisions and their availability through on-line services. Some of this now exists, but it needs to be made far more timely and more frequent.

Judge Newman's emphasis on the importance of wide dissemination of information concerning court decisions on the application of the Convention was also a topic of discussion by the panel. The judges were asked whether they thought it was desirable to encourage programs for further familiarizing national court judges with issues related to application and interpretation of the Convention. All answered "Yes." But when asked if there are programs in their respective countries to accomplish this, most responded that no such organized educational efforts exist. Moreover, the judges were asked whether they thought it would be useful to encourage such programs on an international level, and if so, would they favor having

such programs conducted by: i) international organizations of judges; ii) the UNCITRAL Secretariat; iii) international organizations for promoting arbitration, such as the International Council for Commercial Arbitration (ICCA); and iv) international bar associations? While the judges spoke favorably of the international organizations mentioned in the question, most seemed to feel that educational efforts would be most effective, and most economical, if conducted on a national level.

Sometimes lawyers hesitate to cite decisions of foreign courts to national judges. On the basis of the comments of the judges on the panel, my distinct impression was that courts considering issues relating to the New York Convention would be receptive to being informed how other courts have decided similar issues. In that connection, the cooperative project of UNCITRAL and the International Bar Association to collect and disseminate decisions relating to the Convention should be most useful.

Finally, I suggest that arbitral institutions and government agencies can play a useful role in assisting courts. For example, the American Arbitration Association has, over the years, helped mold United States arbitration law by acting as *amicus curiae* in key cases. My impression is that this has not been widely done elsewhere. Organizations such as UNCITRAL and the International Council for Commercial Arbitration (ICCA) might well promote that idea to arbitral institutions and Chambers of Commerce. To the same end, it might be useful to study the extent to which various national procedural systems permit government agencies to submit to their courts statements of interest or briefs supporting uniform application of the Convention for the purpose of promoting international commerce that is important to their countries.

Looking back on the panel discussion during New York Convention Day, I am encouraged that the bench and bar, working together with imagination and energy, could make major contributions toward applying the New York Convention to achieve effective arbitration worldwide, and by doing so can facilitate international commerce that is vital to each country and to world peace.

INTERNATIONAL TERRORISM UNDER THE LAW

*Yassin El-Ayouty**

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I. INTRODUCTION

Terror has been generally defined as “the threat or use of violence in order to create extreme fear and anxiety in a target group so as to coerce them to meet political (or quasi-political) objectives of the perpetrators. Such terrorist acts have an international character when they are carried out across national lines or directed against nationals of a foreign State or instrumentality of that State.”¹ The attacks of August 7, 1998 on the United States’ embassies in Nairobi, Kenya, and Dar-es-Salaam, Tanzania, signaled graphically how terror has mutated. In the 1970’s and the 1980’s, terrorism consisted largely of the taking of hostages, plane hijacking and destruction, attacks by bombs or car bombs on market places or diplomatic premises. It was engaged in by small bands whose goals were identifiable, were national, and had largely to do with some form or another of the denial of the right to self-determination and the resistance to physical and oppressive foreign occupation.² The face of the old terror was primarily secular, even if it adopted a religious name like Hezbollah, the Party of God, of southern Lebanon. It has leaders with whom one can negotiate or from whom one can accept a cease-fire, or an exchange of hostages, or the return of the remains of dead soldiers for the freedom of terrorist prisoners.

Under the old terror, there was almost a quid pro quo relationship between a State and the terrorist group, which is a non-state actor. Because the old terrorist cause was identifiable, there was almost an

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1. Oscar Schachter, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 163 (1991).
2. John Deutch, *When to Strike Back*, *THE NEW YORK TIMES*, Aug. 22, 1998.

implied contract relationship between the terrorist group and the State. Under such relationship, there could be offers or counter offers, acceptance or rejection, and of course, there was always some form of consideration. Agents of that form of terror were perceived as freedom-fighters, and at times their leaders were even elevated to diplomatic posts and other lofty political positions whenever peace returned.

Now terror has mutated. The new terror has no borders, no front, no clear ideology, no state, no government, and no physical structure. It has become globalized, has no organizational chart, no fixed bases. The new terror is not interested in Katysha rockets; it is interested in chemical, biological, and nuclear weapons which are weapons of mass terror and indiscriminate destruction. It is also interested in what John Deutch, former Director of the CIA, describes as the possibility of cyber attack against computers and telecommunication networks. The objectives of the new terror are pseudo-religious and are transcontinental. The Osama Bin Laden's of the newly mutated terror call for a universalistic achievement, namely "the Islamic Revolution,"³ which has neither a definition nor clear objectives.

Ironically the new terrorists, from Saddam Hussein to Bin Laden, were green-housed or cocooned by the United States and/or by allies of the United States, such as Pakistan, Saudi Arabia, Egypt and Afghanistan under Soviet occupation. The goal of United States support was to assist in the achievement of an objective, namely the defeat of communism in Afghanistan in order to deny the Soviets any fresh expansion beyond their imperial borders of 1945. The Taliban movement, which now controls ninety percent of Afghanistan, and shelters the advocates of the Islamic Revolution, was spawned in Pakistani refugee camps. Osama Bin Laden is a prime example of the leadership of this new terror. It is therefore necessary to provide the reader with a brief background on that enigmatic figure who has been described in the European press as United States' Number One Enemy.

II. WHO IS OSAMA BIN LADEN?

Osama Bin Laden⁴ scion of an Yemeni family (from the Hadramout region) became Saudi by naturalization. His carpenter father first worked in residential construction in Jedda and at the urging of the Saudi Government, got involved in road construction in the 1950's. The Bin Laden Construction Company grew immensely wealthy and its fame spread throughout the Gulf region especially in port construction. Osama was two years old at the time his father was killed when his private plane crashed over a Bin Laden work site in Saudi Arabia. Since dynamite was used in road construction, it is to be presumed that Osama had developed respect

3. LE MONDE, Aug. 28, 1998, at 5.

4. This background was orally provided to the author by several Saudi Arabian sources.

for dynamite from an early age. After the father's death, the family, following the traditions of Hadramout, stayed together, and with a view to growing the business further, no distribution was made of the estate's assets. Today, the Bin Laden Construction remains one of the biggest of its kind in the Middle East.

The Soviet invasion of Afghanistan jolted both the West, especially the U.S. and the Muslim world. The Afghani resistance of the 1980's represented to the Muslim world what the Algerian resistance represented in the 1950's - true Mujahedeen, fighters for the cause of God. The ranks of the Afghani resistance were gradually joined by volunteers from all over the Muslim world, including Pakistan, Egypt and Saudi Arabia. The United States' CIA became deeply involved in financing, arming and training the Mujahedeen. When Osama Bin Laden decided to join that Jihad, the Saudi Government and media were full of praise for the young, Saudi-millionaire who chose the path of God rather than the path of pleasure in Nice and Costa del Sol. Osama poured into Afghanistan millions of dollars (his share of the Bin Laden construction empire) to help destroy the Soviets in Afghanistan. His purchases of stinger missiles, which are shoulder-held, were only a part of his Jihad arsenal. In the end, Afghanistan was liberated, signaling the beginning of the end of the Soviet Union. By the time that war came to an end, Bin Laden had become captive to the ideology of Muslim extremism, which began to take shape in the late 1970's and throughout the 1980's. The Mujahedeen returned to their various countries as unsung heroes. Rampant government corruption and widening chasms between the rich and the poor compounded their feelings of frustration at the economic and social hardships that awaited them. For them, the Jihad in Afghanistan continued to be a memorable ideal of what Muslim society should be. Gradually, the Mujahedeen provided the core of the new terrorism.

Unbeknownst to the Saudi Government, Bin Laden had begun to fund Al-Jamaa Al-Islamia in Egypt and other terrorist groups elsewhere. The son of the great builder had become a pillar in destructive terrorism, all in a misguided notion of what Muslim society should be. Thus was borne "Al-Qaeda" of Bin Laden in Afghanistan together with the incoherent precepts of "The Islamic Revolution."

Eventually, the Saudi Arabia government expelled Osama Bin Laden and his clan publicly disowned him. Osama had already transferred his wealth abroad. His assets were dispersed in various parts of the world through complicated interlocking directories. After his expulsion from Saudi Arabia, Bin Laden together with his three wives moved to Yemen. Again he was expelled from the land of his ancestors. His destination was now Afghanistan, where he was to be reunited with his old comrades, the present Taliban leadership, which today controls ninety percent of Afghani territory. His heroism and generosity during the Afghani war of liberation bestowed on him the status of an exalted Mujahed, especially a Sunni Mujahed in a Sunni Muslim country.

Although Bin Laden is not an Islamic scholar, his ideology of terrorism is punctuated by Islamic Fatwas - decisions of points of Islamic law. He has thus arrogated for himself the position of an expounder of Islamic jurisprudence. As will be seen below, these Bin Laden's Fatwas, including his declaration of a war of genocide against all Americans, has absolutely no legal weight and are devoid of any legitimacy in the context of Islamic law. Herein lies one aspect of the importance of marshalling Islamic law (the Sharia) in the global confrontation of the new terrorism.

III. THE FRAMEWORK OF ISLAMIC JURISPRUDENCE

Islamic law (the Sharia) is based on *The Koran* and the practice of the Prophet Muhammad (the Sunna). Islam's holy book, *The Koran*, does not contain within itself a system of doctrines, but it does tell the faithful what God wishes them to do. *The Koran* is a revelation of His Will.⁵

As to specific commands, *The Koran* contains some. But for the most part, God's Will is expressed in terms of general principles. The Sunna is how the Prophet had acted, i.e. Muhammad's habitual behaviour. It is the second pillar on which Islamic law rests. Any law or practice in Islam also takes into account the opinions of the scholars (Ulama). This is akin to what Article 38(d) of the Statute of the International Court of Justice calls "judicial decisions and the teachings of the most highly qualified publicists."⁶ It also takes into account the practice of the local community, the equivalent of customary law. If confronted with a new situation, those qualified should proceed by analogy (qiyas) - stare decisis in common law. The Ulama are those who taught Sharia and administered it. They and they alone, are, to quote Khadduri in his seminal *Islamic Jurisprudence* "the heirs of the prophets."⁷

So in general, the framework of Islamic jurisprudence consists of *The Koran*, the Sunna, and the teachings of the Ulama, the analogy, and the practice of the community. *The Koran* and the Sunna always control and none of the other elements can contradict their teachings. This is the jurisprudential basis of Islamic fundamentalism, which goes back to the birth of Islam and has nothing to do with what is erroneously termed today "Islamic fundamentalism."

IV. RESPONSES TO TERRORISM UNDER ISLAMIC LAW

First, there is no Islamic fundamentalism in the advocacy or the practise of terrorism. The new terrorism, one of whose gurus is Osama Bin Laden, hides behind the misnomer of Islamic fundamentalism. The co-

5. Albert Hourani, *A HISTORY OF THE ARAB PEOPLES* 65 (1992).

6. Statute of the International Court of Justice, June 29, 1945, art. 38(d), 59 Stat. 1055, T.S. No. 993.

7. M. Khadduri, *ISLAMIC JURISPRUDENCE* (1961), *quoted in* Hourani, *supra* note 5, at 68.

optation of the term "Islamic fundamentalism" is akin to the cooptation by communism of the term "people's democracy." In Muslim parlance, that cooptation is aptly described as, "a speech about goodness whose intent is evil."

Second, Jihad and terrorism are dramatically opposed to one another. In Islam, Jihad is a war intended to defend Islam against armed aggression by non-Muslims. In that context, *The Koran* says, "wage Jihad in the way of God" - i.e. in defense of the faith and of the territorial integrity of the Muslim State. Such was the case of Algeria under French occupation and Afghanistan under Soviet occupation. These were wars of national liberation which Islamic law makes legitimate but under very strict conditions intended to protect non-combatants. But for the Bin Laden terrorists, Jihad is a continuous and world-wide campaign which primarily targets the United States interests and United States citizens without justification and without discrimination between civilian and military targets. The goal of this terror is purportedly to rid Saudi Arabia, the custodian of the Holiest Muslim Places, from United States military presence. But that presence, although coincidentally aiding United States regional interests, has originally been requested and later consented to by the Government of Saudi Arabia (as well as by Kuwait and other Arab Gulf States) to defend that region from aggression by Saddam Hussein. In this situation, there is no armed aggression by the U.S. against those Muslim States, no forcible territorial occupation, no colonial oppression of the Saudi people, no subversion of the Saudi national will and no derogation of territorial integrity. In short, the premise of Jihad under Islamic law does not exist at all.

Third, genocide is anathema to Islam. Bin Laden had declared a genocidal war against all Americans. He is said to have issued a so-called Fatwa on this. But genocide is totally prohibited under Islamic law. Its perpetrators become subject to capital punishment. *The Koran* says "and that ye slay not the life which Allah has made sacred, save in the course of justice."⁸ In Islam, "the course of justice" is the application of the judicial system as established by the State to civil and criminal offences. The monopoly of force and the means of law enforcement lie entirely in the hands of the State. In this regard, the terrorists are mere usurpers of power. In addition, under the Sharia they are considered the instigators of division, insurrection, and anarchy, which Islam calls "fitna" - a grave societal transgression under Islam.

In another verse, *The Koran* says "whosoever killeth a human being for other than manslaughter or corruption in the earth, it shall be as if he

8. *The Koran*, XVII/33 (the cites to *The Koran* are from an Arabic version, which list the chapters in the Traditional Sequence. The Arabic version does not convert exactly in the English translation).

had killed all mankind, and whosoever saveth the life of one, it shall be as if he had saved the life of all mankind."⁹

So the slaughter at the U.S. embassies in Kenya and Tanzania of innocent people who had perpetrated neither manslaughter nor corruption which means here subversion of the morality and institutions of the community, crimes which can only be punished by Islamic courts, is a grave criminal act under Islamic law.

Fourth, self-sacrificing is a crime under Islamic law. The terrorists claim that Muslims who sacrifice themselves in car bombings and other acts of terror are martyrs and such martyrdom is a sure way to heaven. Islamic jurisprudence, as based on *The Koran*, says something completely different. Unless a Muslim is engaged in Jihad, as defined above, self-sacrifice is anti-Islamic. *The Koran* says "be not cast by your own hands to ruin."¹⁰ Here ruin means oblivious death. In the eyes of Islam, a Muslim killing himself, except in Jihad, dies an apostate or Kafir (non-believer).

Fifth, cooperation in terrorism is anti-Islamic. The likes of Bin Laden believe that financing terror activities is a worthy contribution to the cause of Islam. But *The Koran* says "spend your wealth for the cause of Allah." The terrorists also claim that pan-Islamic cooperation in terrorist activities accords with Islam. It is not so at all, as Islam specifically prohibits conspiring for criminal activities. *The Koran* says, "help ye one another unto righteousness and pious duty. Help not one another unto sin and transgression..."¹¹ The objective of cooperation between Muslims is to attain the common good and to ward off injustice. In this regard, the United States and NATO forces which may become involved militarily in saving the Muslims in Kosovo from genocide inflicted upon them by the Serbs are, under Islamic law, fighters for the cause of Allah, in effect, close allies of the Mujahedeen.

Sixth, Islam puts a high premium on the cause of peace. The terrorists look upon perpetual conflict across frontiers as an endeavor for the sake of God and for the glory of Islam. This view is held by "Al-Qaeda" of Bin Laden, and by other terrorist groups confederated with Bin Laden. Islamic jurisprudence delegitimizes such activities, and criminalizes individuals, groups, and government authorities involved in anti-peace actions. *The Koran* says "as often as they light a fire for war, Allah extinguishth it. Their effort is for corruption in the land and Allah loveth not corrupters."¹² In another verse, it states "and Allah summoneth to the abode of Peace and leadeth whom He will to a straight path."¹³

9. *Id.* At V/32.

10. *Id.* at II/195.

11. *Id.* at V/2.

12. *Id.* at V/65.

13. *The Koran*, *supra* note 8, at X/25.

Seventh, under Islamic law, contracts should always be respected. *The Koran* states, "O ye who believe! Fulfil your undertakings."¹⁴ In Islam, an undertaking is a contract, and the parties must respect a contract thereto, and nobody should interfere with or impede the fulfillment of contracts. The Vienna Convention on Diplomatic and Consular Privileges and Immunities is a treaty (i.e. a contract) which protects the persons in and the premises of all diplomatic and consular missions including the U.S. embassies in Kenya and Tanzania. The terror which was perpetrated against those embassies, and the harm done to the people and properties in those attacks are grave violations of the Kuranic injunction against international violations of and other interferences with contracts. In this regard, the intent to be bound is very important in Islamic law. The Prophet Muhammad said "Deeds are to be judged by intentions, and to everyone should be attributed what he intended to do."

Bin Laden is reported to be implicated in numerous attacks on United Nations peacekeepers in Somalia, namely those who were feeding and protecting Muslims. These peace-keepers were acting within the purview of a United Nations mandate flowing from the U.N. Charter which is another treaty - another contract.

Thus, it should be concluded that all forms of terrorism are, under Islamic law capital offences and their perpetrators are renegades or heretics. The charges against such persons would be based not only on acts of terror, but also on the invocation of God's name for criminal purposes, the deliberate spread of lies or untruths about Islam, and the usurpation of authority to decide and interpret Islamic law. The invocation of Islamic law would constitute a powerful tool in the delegitimization of the Islamic framework within which Muslim terrorists operate and raise funds. It also denies them the competitive advantage in the recruitment of new adherents. The invocation of Islamic law would be of considerable help in the areas of extradition, prosecution and punishment of Muslim terrorists. However, its most immediate effect would be to peel the label of "Muslim" off the perpetrators of this new type of war which goes on under the name of Islam.

V. RESPONSES TO TERRORISM UNDER INTERNATIONAL LAW

Within the general definition of terrorism provided above, international law has dealt with this phenomenon through a variety of instruments. Aside from the U.N. Charter, and resolutions by the United Nations General Assembly and the Security Council, we have numerous multilateral conventions, which specifically prohibit and punish terrorism. Following the hijacking and destruction by the Palestinian Liberation Organization [hereinafter PLO] in the late 1960's and in 1970 of various western airlines, (which prompted King Hussein of Jordan to expel the

14. *Id.* at V/1.

PLO leadership from Jordan in September 1970) a series of international conventions were adopted. Using shorthand for the long titles of these conventions, the following should be cited, The Hijacking Convention (1971), The Sabotage Convention (1971), The Internationally Protected Persons Convention (1973), The Hostage Convention (1979), and The Maritime Terrorism Convention (1988).¹⁵

The acts of retaliation against terrorism are deeply anchored in Article 51 of the U.N. Charter, which *inter alia* states, "nothing in the present Charter shall impair the inherent right of individual or collective self-defense."¹⁶ This article also covers pre-emptive strikes against terrorism which come under the theory of "anticipatory self-defense", although it is not specifically mentioned in it. Nor does this article stipulate either what should a State regard as a threat justifying a response, nor the proportionality of that response. I fully agree with Mr. John Deutch that in the case of universal and catastrophic terrorism which aims at our ability to govern and at the destruction of essential infrastructure, striking at the terrorists does not wait until a definite nexus is established between the terrorists and their actions. In an article in The New York Times, Deutch rightly points out that we do not require a standard of proof as in Oklahoma; only an opportunity for the President and his senior team to weigh the information presented to him.¹⁷

As was stated above, Bin Laden has declared a war of genocide against all Americans. The U.N. Convention on the Prevention and the Punishment of the Crime of Genocide, which Afghanistan had signed, states, "the contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law, which they undertake to prevent and to punish."¹⁸ Taliban in Afghanistan has not shown respect for its international obligations under this and other international instruments. This is an abdication of sovereign responsibility, and Afghanistan, under the Taliban who have recently executed nine Iranian diplomats and an Iranian journalist when they captured Mazar-i-Sharif, should be treated as a Barbary State. Under these conditions, law and order should be imposed upon it from the outside until it co-operates internationally the extradition, or the apprehension in prosecution and punishment of all those implicated in this genocidal war against the American people.

The United Nations General Assembly has characterized terrorism as international crime. Following the Achille Lauro Seizure in 1985, the

15. Malvina Halberstam, *How Serious Are We About Prohibiting International Terrorism and Punishing Terrorists*, THE JEWISH LAW. at 1-12 (1996).

16. U.N. CHARTER art. 51.

17. Deutch, *supra* note 2, at A15.

18. U.N. Convention On The Prevention and Punishment Of The Crime Of Genocide, Dec. 9, 1948, art. 1, 78 U.N.I.S. 277 (1948).

General Assembly unanimously adopted resolution No. 40/61 also in 1985. After labelling terrorism an international crime, the resolution, in its paragraph 6, called on all States "...to fulfill their obligations under international law to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed toward the commission of such acts."¹⁹ This led Professor Oscar Schachter to conclude that, "the condemnation of international terrorism thus imposes an obligation on all States to take appropriate measures to prevent acts of international terrorism. When suspected terrorists are apprehended the State must either extradite or try and punish them. This obligation, I believe, is now general customary international law."²⁰ It should be noted here that none of the anti-terrorist conventions provide for economic or other sanctions against States assisting terrorism. It was only in 1992 that the Security Council, acting on Libya's refusal to either extradite or effectively prosecute two of its citizens suspected of being the perpetrators of the Lockerbie tragedy in 1987 that sanctions were imposed on Libya, thanks to China's non-use of its veto power. We are now entering upon the era of the International Criminal Court, (ICC), which is a natural progression from the period of ad hoc criminal tribunals in ex-Yugoslavia and Rwanda.

The ICC, whose statute was enacted in Rome on July 17, 1998, promises to be an effective institution in the global confrontation of terrorism under international law. Article I of that Statute provides, inter alia, that "the ICC" shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern and shall be complimentary to national criminal jurisdiction."²¹ This new and permanent institution, which will be linked to the United Nations through a special agreement, and which complements national criminal jurisdictions, will not be a strong court until the United States has signed its Statute.

Pending the coming into force of the Rome Statute of the International Court which was adopted on July 17, 1998, and keeping in mind the requirements of the issues of compulsory jurisdiction, the International Court of Justice, (ICJ) should consider instituting some sort of ICJ jurisdiction for the rendering of preliminary rulings (opinions delivered to other courts to help them decide issues of international law) which have to do with combating terrorism. The non-existence of extradition treaties between the United States and certain powers could be overcome through inter-State agreements to try terrorists before especially-established tribunals such as the ad hoc tribunal envisaged for the trial of the two Libyans suspected of the destruction of PAN AM flight 103 over

19. G. A. Res., 40/61 (Dec. 9, 1985), *reprinted in* 80 ASIL 435 (1986).

20. *See supra* note 1.

21. Rome Statute Of The International Criminal Court, U.N. Doc. No. A/Conf. 183/9, Art.1, (1998), 37 I.L.M. 999 (1998).

Lockerbie, Scotland. When convened, this ad hoc tribunal will be presided over by Scottish judges who will sit in The Hague and try those Libyan suspects under Scottish law.

VI. CONTAINMENT OF TERRORISM THROUGH GLOBALIZATION

Despite the chaotic international environment such as the one we are witnessing now in the post-cold war, terrorism can be contained through globalizing the campaign against it. None of the world's major religions, Islam included, condone terrorism which is one of the most heinous crimes against humanity and human rights. Laws, whether Islamic or international, are but one tool in combating the scourge of terrorism. In his report to the 53rd session of the General Assembly, U.N. Secretary-General referred to the global environment of lawlessness in which terrorism thrives as "the global culture of impunity."²² He added, "individuals everywhere have a responsibility to help defend the ideals of human rights."

At present, the new terrorism feeds on and is fed by this international chaotic environment which manifests a host of ominous characteristics. From Algeria to the Philippines, governments are either quietly appeasing terrorism, are desperately trying to contain it, or have become its havens. Algeria is reported to be only two years away from producing weapon-grade plutonium. Commenting on the Clinton trip to Russia, United States Representative, Lee Hamilton, spoke recently of the "sour mood about Russia in Congress today because of their missile and nuclear help to Iran." This typifies the new international chaotic environment, where one's friends can also be supporters of one's enemies.

As the United States prepared to wage war by proxy against the Soviets in Afghanistan, it undertook to train the likes of Bin Laden. *Le Monde* of August 28, reported on its interview with Bin Laden in 1995, which was released only on August 27, 1998. In that interview, Bin Laden is reported to have said that during the struggle for the liberation of Afghanistan from the ex-Soviet Union, the Saudis chose him as their representative in Afghanistan. He also said the volunteers fighting the Red Army were trained by Pakistani and United States officers, the arms were furnished by the United States and the money came from the Saudis. So the emirs of the Islamic Revolution had a prolonged period of internship with the United States during which they were introduced to United States military counter-insurgency doctrine, weaponry, tactics, and prototypes of command structure.

Pakistan represents another facet of the new chaotic environment. After the euphoria of its nuclear blasts in response to India's blasts, Pakistan is now facing economic bankruptcy and political collapse. Its

22. *Report of the Secretary-General in the Work of the Organization*, U.N. GAOR, 53rd Sess. Supp. No.1, at 24, U.N. Doc. A/53/1 (1998).

Prime Minister, Mr. Nawaz Sharif, who is facing corruption charges, is also facing the dire consequences of the armed forces' Islamization policy of the 1980's. It is no surprise that Mr. Sharif has now called for the establishment of a strictly Islamic State in Pakistan. Commented the *Frontline Post* of Karachi, "Whenever a government finds itself in a pickle, it invariably talks about the Islamization of society." Pakistan, a close ally of the United States and a potential base of United States attacks on the new terror, could become another Afghanistan.

How is Uncle Sam perceived abroad? For the purpose of this topic, the term "abroad" has to be largely confined to the Third World, especially its Islamic area. The September 1998 issue of the *World Press Review* summed up the answer to this question in these words, "Not only is the U.S. the 800-pound gorilla in the neighborhood, it is arguably smug, arrogant, self-centered, unpredictable, and occasionally just plain wrong."

Such a negative assessment is perhaps unavoidable. In the post-cold war period, the United States has become the only super-power, but has not yet adjusted to its proper role in a unipolar world. Its foreign policy is largely reactive not creative. In the Third World, friends of the United States are not only under pressure internally because of that friendship; internal pressures are also generated by corruption at the highest level of government and by the systematic denial of human rights. The United States seems to put more premium on the stability of regimes than on ethics and the application of due process abroad. The phenomenon of the Shah of Iran, Marcos of the Philippines, and Suharto of Indonesia is plain for all to see. No wonder that the slogan of "Islam is the Answer," which, among other things, is an anti-corruption slogan for millions, causes deep apprehension in Washington, D.C. and in the west in general.

When the United States acted in self-defense in response to the attacks on the embassies in Africa, there was not much elation in either Kenya or Tanzania. The reasons are rather complex. But the most obvious of these is the anger of the Kenyans and the Tanzanians for what they perceived as United States callousness during the rescue operations. The Kenyans witnessed United States concentration on America's dead and wounded. The United States Marines are reported by the *Economist* of August 22, 1998 to have prevented Kenyans from entering the Nairobi embassy compound "to reach victims buried in the rubble of the collapsed building next door." In a non-diplomatic and insensitive response, United States Ambassador Prudence Bushnell justified that Marine action as an act of guarding the embassy against looters. The populace took that as a collective insult. It was too late for Secretary Albright to repair the damage even when she acknowledged in Nairobi that the American personnel "had mishandled things."²³

23. *The Economist*, August 22, 1998, at 36.

As could be expected, the United States retaliatory strikes were greeted derisively by both Khartoum and Kabul. That reaction was obviously motivated by nationalistic fervor. But it also had a substantive international reason. The United States has so far refused to endorse the call by Khartoum for an international inquiry into the veracity of the Sudanese claim that the factory, which was hit, was a medicine factory with a United Nations contract. This was seized upon as proof of United States arrogance and deception. Hassan Al-Turabi, the Islamic Guide of the Sudanese government, appeared on CNN on August 25, 1998, and referred to President Clinton's problems in the Lewinsky affair as follows, "a President who lied to his wife, could lie to the entire world." Since perception and reality sometimes merge, we have to take it into account in preparing for a global effort directed against terrorism.

Opening the 53rd Session of the United Nations General Assembly on September 21, 1998, Secretary-General Kofi Annan said, "Terrorism is a global menace which clearly calls for global action. Individual actions by Member states, whether aimed at State or non-State actors, cannot in themselves provide a solution. We must meet this threat together."²⁴ Nearly all the Islamic States were vociferous before the same General Assembly session in condemnation of terrorism. The Foreign Minister of Egypt, a country, which lost Sadat and nearly lost his successor Mubarak as well to terrorism, described it as an "international crime against all societies."²⁵ And President Clinton stated before the same session of the United Nations General Assembly that "it is a grave misconception to see terrorism as only, or even mostly, an American problem."²⁶ Then he went on to say: "Some may have the world believe that Almighty God Himself, the merciful, grants a license to kill; but that is not our understanding of Islam."²⁷

Islamic law, although based on general principles, punishes terrorism severely and maximally. In the global combat against terrorism, it is important to note that Muslim perpetrators of terror regard international law, including the United States Charter, as a Western invention and a colonial device. Therefore they should be always be confronted with Islamic law which regards terrorism as a crime and views terrorists as apostates. Under Sharia, the punishment of apostasy is death.

In globalizing our efforts to confront terrorism, we should bear in mind that terror has an address; - namely the Host State. In the case of Al-Qaeda of Bin Laden, the Taliban of Afghanistan, which misguidedly prides itself on practicing strict Islam, should be made to bear the full responsibility for the Bin Laden actions. To seize and hold a border

24. U.N. Doc., A/53/PV. 007, (1998).

25. U.N. Doc., A/53/PV. 015, (1998).

26. See *supra* note 24.

27. *Id.*

province of Afghanistan by a pan-Islamic military force made up, for example of Saudi, Turkish, Egyptian and Pakistani contingents, supported by the United States and NATO, would represent a continuous humiliation of the Taliban until the Bin Laden problem is solved through extradition or effective and internationally-supervised prosecution. Intelligence coordination, especially with the participation of the recently established Pan-Arab Conference of Ministers of the Interior, should be embarked upon as an important element of globalizing the anti-terror campaign. The launching of media campaigns and international seminars in which Muslim scholars from prestigious institutions such as Al-Azhar University of Cairo, Egypt, (the oldest Islamic University in the world), as well as leaders of regional organizations such as the Conference of the Islamic Organization would expound on the apostasy of the so-called Muslim terrorists, would be a powerful mechanism. The eventual success of peace between the Palestinians and the Israelis would constitute an immense boost in the global campaign against terror.

The world confrontation against terrorism should also take into account the socio-economic causes of terrorism where poverty, hopelessness, and the non-observance of human rights drive young people in the arms of terrorism where they find communal support, an identity and a cause through which they vent their anger through the heinous crime of terror.

References have been made to the general debate with which the United Nations General Assembly began its 53rd session in September 1998 at United Nations Headquarters, New York. The relevance of the statements made by the foreign ministers of Arab and Muslim Member States to this topic is that they are a barometer of the readiness of those States to act in concert with the United States and other regions of the world to combat terrorism globally. From those statements, it appears that the time is ripe for the United Nations to act positively on the call by Egypt to convene a world summit on terrorism with a view to globalizing the campaign against terrorism. A few examples of these statements should suffice to convey the sense of readiness of members of the League of Arab States, the region most directly at present involved in and impacted by the terror phenomenon. Kuwait declared that it supports "all collective international efforts to confront this phenomenon."²⁸ The United Arab Emirates pointed out "combating this dangerous phenomenon should not be carried out on a unilateral basis,"²⁹ and Yemen stressed that terrorism "has become an international phenomenon. It concerns all nations and peoples, and there is a pressing need for the international community to respond immediately."³⁰ The Chief Delegate of Saudi Arabia condemned

28. U.N. Doc. A/53/PV.016 (1998).

29. *Id.*

30. *Id.*

globalized terror in these words, "Violence and terrorism are universal phenomena rather than the characteristics of a certain people, race or religion. Precisely because of the comprehensiveness and universality of terrorism, the only way to combat it is through a unified and collective international action, within the framework of the United Nations."³¹

With the backing of the Non-Aligned Movement summit in South Africa in September 1998, President Mubarak of Egypt issued a call for a summit on terrorism under the auspices of the United Nations was very specific. Amre Moussa, Egypt's foreign minister told the United Nations General Assembly later that month, "I find it important also in this connection to put before the Assembly the call of President Hosni Mubarak to convene an international summit under the auspices of the United Nations. The summit should direct the international community to deal with terrorism legally, politically, economically, and technologically. This call was supported in the final communiqué of the recent non-aligned summit. I suggest that the General Assembly consider the Egyptian call to the proposed summit. I also call upon the Secretary-General to start working towards its convening."³²

Simultaneous with the urgent need to convene such a summit whose anticipated declaration would add immeasurably to the growing body of international conventions on terror, the United States with a view to a successful globalization of the fight against terrorism through, among other mechanisms, regional coalitions, should respond to the call of the Sudan for an international inquiry into the United States attack on the Al-Shifa pharmaceutical factory on August 20, 1998. That call for an inquiry has been supported by broad sectors of the international community.³³

Undoubtedly, self-defense actions violate the national sovereignty, and, at times, the territorial integrity of the State targeted for such action.³⁴ Self-defense has a legal dimension, which, in my advocacy of globalizing the response to terrorism, cannot be lost sight of. However, global terror must be viewed as a global emergency under the threat of such an emergency, nationally and internationally, the requirements of necessity, especially in the context of an alliance, a concert of nations or a resolution of either the United Nations Security Council or General Assembly criminalizing the action or non-action of the targeted State, should prevail.

31. U.N. Doc. A/53/PV.020 (1998).

32. See *supra* note 25.

33. U.N. Doc. A/53/PV.019 (1998).

34. A lively discussion of the issues of "necessity" and sovereignty took place on October 6, 1998 at the Columbia University Seminar on the problem of peace where I was the presenter under the Seminar leadership of Professor Oscar Schachter. I would like to acknowledge with gratitude the contribution made to the final draft of this article by those comments as well as by questions raised at an earlier presentation which I made on September 4, 1998 at the Nova Southeastern University Shepard Broad Law Center, Fort Lauderdale, Florida, at a faculty and students meeting convened by Professor James Wilets.

With these considerations in mind, self-defense in international law as applicable to the globalized war on terrorism approximates the same right in municipal law. The ultimate message of the evolving rules of international law, in response to this new threat to global law and order which terrorism represents, is as Professor Malvina Halberstam states "that terrorism is a crime and that those responsible will be tried and punished."³⁵

In this context, and taking into account both the havoc caused by terrorism across frontiers, and the chaotic international environment which prevails at present, I am inclined to accept the premise of what a former Secretary of State of the United States Dean Acheson, is reported to have said, "The survival of States is not a matter of law."³⁶

35. *See supra* note 15.

36. *See supra* note 1, at 136.

UNDERSTANDING THE NICARAGUAN ADJUSTMENT AND CENTRAL AMERICAN RELIEF ACT

*Lourdes A. Rodriguez**

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I. INTRODUCTION

On November 19, 1997, President Clinton signed into law the Nicaraguan Adjustment and Central American Relief Act¹ (NACARA).

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NACARA, which is part of the District of Columbia Appropriations Bill for the fiscal year 1998 (H.R. 2607), has been one of the most significant pieces of immigration legislation favoring aliens to be enacted in this country in years. After years of hopelessness and frustration, hundreds of thousands of immigrants from Central America, Cuba, and former Soviet bloc countries will have the opportunity to present either applications for adjustment of status or applications for suspension of deportation or cancellation of removal under the old suspension of deportation standards. This will be done before the Immigration and Naturalization Service (INS) or the Executive Office for Immigration Review (EOIR), in the hopes of remaining in the United States in lawful status.

NACARA was a political response to the concern that many individuals had spent years in the United States, complying with the immigration laws and establishing countless equities. These individuals would be adversely affected by the harsh changes in the immigration law as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).² The Congressional Record is replete with explanations for the enactment of this law. However, special reference should be made to the statements of Senator Spencer Abraham of Michigan, on the Senate Floor November 9, 1997:

Title II incorporates an agreement reached between the House and Senate negotiators to correct provisions in last years immigration law. These provisions as they were being interpreted by the Board of Immigration Appeals and others, would have had the effect of changing the rules in the middle of the game for thousands of Central Americans and others who came to the United States because their lives had been torn apart by war and oppression and are seeking permanent residency here. That violates the sense of fairness that is so much a part of the American character.³

The law provides that eligible Nicaraguans or Cubans can apply for adjustment of status to that of permanent resident aliens. Nationals of El Salvador, Guatemala and any of the republics of the former Soviet Union, the former Czechoslovakia, Poland, Romania, Hungary, Bulgaria, Albania, East Germany, or any state of the former Yugoslavia who entered the United States on or before specifically stated dates are eligible to apply for

1. Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160, Tit. II, Div. A (1997) as amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997) [hereinafter NACARA].

2. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) [hereinafter IIRIRA].

3. CONG. REC. 12, 261 (1997).

suspension of deportation or special cancellation of removal under the preexisting deportation standards.⁴

Although this new law alleviates the immigration situation for many, NACARA fell short. The law fails to amend certain sections of IIRIRA, which detrimentally affect immigrants placed in proceedings before the Executive Office for Immigration Review prior to reaching their seventh anniversary in this country. The law codifies the Board of Immigration Appeals (BIA) decision in *Matter of N-J-B*⁵ and states: (A) Subparagraph (B) and (C) of section 240(d) of IIRIRA shall apply to orders to show cause...issued before, on, or after the date of enactment of this Act.⁶ In *Matter of N-J-B*, the Board held that IIRIRA could be applied retroactively to suspension cases, thus preventing individuals from counting time spent in the United States after being served with an order to show cause towards the seven or ten year physical presence requirement. Although many members of Congress objected to the unfairness of this provision, it remains part of the law.

The purpose of this article is to provide an overview of the two sections of NACARA as they apply to adjustment of status and to suspension of deportation or special cancellation of removal and to give some practice pointers and suggestions to the reader to assist him or her with a better understanding of this law and its implementation.

II. ADJUSTMENT OF STATUS UNDER NACARA

NACARA provides an amnesty for nationals of Nicaragua and Cuba. Adjustment of status for nationals of Nicaragua or Cuba requires that eligible individuals be admissible to the United States and be physically present in the United States for a continuous period beginning on or before December 1, 1995 and ending not earlier than the date the adjustment status application is filed. The applications for adjustment of status must be filed before April 1, 2000.⁷ The law permits these individuals to adjust status even if they have been ordered excluded, deported, removed or have failed to depart voluntarily after an order of voluntary departure.⁸ Absences from the United States are permitted, but these cannot exceed 180 days.

A. *Benefits for Adjustment of Status Applicants under NACARA*

The requirements for adjustment of status under NACARA do not require that the applicant be admitted, inspected or paroled into the United

4. NACARA, *supra* note 1.

5. Int. Dec. 3309 (BIA 1997).

6. IIRIRA § 309(c)(s) amended by NACARA § 203(a)(2).

7. NACARA §§ 202(a)(1)(A), 202(b)(1).

8. *Id.*

States as required under the Cuban Adjustment Act.⁹ In addition, NACARA applicants are not subject to any of the barriers for adjustment of status provided in the Immigration and Nationality Act [hereinafter INA] § 245(c).¹⁰ Therefore, aliens who have accepted or continued in unauthorized employment, who have remained in the United States longer than authorized, or were admitted as crewmen, in transit or under the visa waiver pilot program, will be eligible to seek NACARA benefits.¹¹

NACARA requires that the applicant be admissible to the United States under all provisions of Section 212(a) of the INA with the exception of certain sections. Specifically, NACARA permits individuals who would otherwise be considered unqualified applicants because of status as public charge (INA § 212(a)(4)), for failure to obtain a labor certification (INA § 212(a)(5)), for violating documentary requirements relating to entry as an immigrant (INA §(a)(7)(A)), or, for accruing more than 180 days of unlawful presence prior to last departure or removal (INA § 212(a)(9)(B)) to adjust status.¹²

The applicant must establish that he or she has been physically present in the United States continuously since December 1, 1995.¹³ The 180-day period will be tolled during an absence from the country authorized by INS. Authorization to travel is obtained only through the grant of an advanced parole (Form I-131) by the Service.

The INS issued a policy memorandum on advance parole for NACARA beneficiaries dated December 24, 1997. The memorandum stated that these travel documents would be approved to applicants who establish eligibility for adjustment under NACARA and who seek to depart temporarily for legitimate business or personal reasons. Ineligible aliens will not be issued travel authorization.¹⁴ The memo further states that along with the advanced parole, the alien should submit supporting documentation to establish NACARA eligibility. Spouse and children of eligible NACARA applicants can also obtain this benefit and without

9. Cuban Adjustment Act, (1966), Pub.L. 89-732, 80 Stat. 1161, (as amended by Pub.L. 94-571, 90 Stat. 2706, (1976), and by Pub.L. 96-212, 94 Stat. 108, (1980)). See also Cuban-Haitian Adjustment, § 202 of the Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359 (1986).

10. INA § 245(c) provides for limitations for adjustment of status, specifically excluding alien crewmen, aliens continuing or accepting unauthorized employment, and aliens admitted in transit without a visa. 8 U.S.C § 1254(a) (1994) [hereinafter INA].

11. INS, Interim Rule with request for comments, 63 Fed. Reg. 98 (1998) (as reproduced in 75 INTERPRETER RELEASE 735 (1998)).

12. NACARA § 202(d)(1)(D).

13. *Id.* § 202(b)(1), (d)(2).

14. Advance Parole for NACARA, INS Office of Programs, at 2 (Dec. 24, 1997).

having to show the same amount of documentation as required of the NACARA principal alien.¹⁵

A word of caution should be given regarding travel outside the United States during the NACARA adjustment period. Any absences with or without advanced parole before the filing for NACARA adjustment will be added to the time spent outside of the country. An applicant accumulating more than 180 days outside of the United States will automatically lose eligibility for adjustment.¹⁶ Another point of concern for individuals traveling with advanced paroles under NACARA is whether they have a deportation order. Individuals with deportation orders are self-deporting themselves if they leave United States with or without permission to return.¹⁷ Furthermore, individuals who have been physically present in the United States after April 1, 1997 and who are out of status or have been out of status since that date will face the ten year bar. It is not recommended that any individual in these circumstances leave the United States.

NACARA also benefits the spouses, children and unmarried sons and daughters of qualifying aliens and permits these individuals to adjust status so long as they meet certain criteria. The family members must be nationals of Nicaragua or Cuba.¹⁸ The individual must be the spouse, child, or unmarried son or daughter of a NACARA principal and be admissible to the United States. NACARA dependents must be physically present in the United States at the time that they apply for benefits some time before the April 1, 2000 deadline. Unmarried sons or daughters over age twenty-one need to establish that they have been residing in the United States continuously since December 1, 1995 and meet the same requirements as the NACARA principal.¹⁹

Nationality is usually established with the presentation of an original birth certificate or passport. However, the Nicaraguan Constitution acknowledges that children and spouses of nationals of that country are entitled to acquire citizenship no matter where they were born if certain criteria are met.²⁰ Therefore, in cases of Nicaraguan NACARA applicants, the individual can show a birth certificate from that country, or documentation from the government of that country that he or she has been granted Nicaraguan nationality as permitted by the constitution.

15. *Id.*

16. *Id.*

17. Executive Office for Immigration Review, Adjustment of Status for Certain Nationals of Nicaragua and Cuba, 63 Fed. Reg. 27,823, 27,827 (1998) [hereinafter Executive Office for Immigration Review].

18. NACARA § 202(d)(1)(A).

19. *Id.* § 202(d)(1)(B)-(E).

20. Ley de Nacionalidad [Nationality Law], Ley No.149 [Law No. 149], chapt. II, art. 3(2) and 6.

Cuba does not have a provision in its constitution allowing for the acquisition of status through marriage or parentage. As such, the dependants of Cuban principals who are not natives of Cuba or Nicaragua cannot apply for adjustment of status under this law. These individuals will have to adjust status either through a family petition or other means, which may be available by law.

Thousands of NACARA beneficiaries have been without employment authorization for quite some time. Upon the submission of the adjustment application, employment authorization will be issued by INS, for individuals who have previously applied for immigration benefits or have been issued OSC's before December 1, 1995. The INS has 180 days to issue the employment authorization for all others. The applicant must ensure that the application for employment authorization accompanies the adjustment application.²¹

B. *Establishing Physical Presence in the U.S. for NACARA*

Continuous physical presence is one of the basic requirements for adjustment of status under NACARA. The alien is required to be physically present continuously since December 1, 1995.²² To establish physical presence, the applicant should attach to the application for adjustment, any and all INS issued documents placing him or her in deportation or exclusion proceedings, such as an Order or Show Cause or a Form I-122. In many cases, extensive documentation already exists in the applicant's INS file. References to these documents should be made in the application package to ensure that the examining official refers to them in the course of the case determination.²³

Documentation such as income tax returns, social security records, public assistance records, should follow any INS documentation. Evidence such as lease agreements, pay stubs, birth and marriage certificates as well as bills for utilities, etc. should also comprise the record. Since one of the fundamental requirements of NACARA is that the applicant be an individual of good moral character, a police clearance report from all cities where the person has lived should form an integral part of the package.²⁴

C. *Procedures for Adjustment of Status*

Adjustment of status under NACARA can be accomplished either through the Immigration and Naturalization Service or through the

21. Executive Office for Immigration Review, *supra* note 17, at 27,826.

22. NACARA § 202(b)(1).

23. Executive Office for Immigration Review, *supra* note 17, at 27,824.

24. NACARA § 202(2)(b)(A). *See also* Executive Office for Immigration Review, *supra* note 17.

Executive Office for Immigration Review, depending on the particular circumstances of the case.

Adjustment of status applications for individuals who are in proceedings before the Immigration Judge or the Board of Immigration Appeals, or who have a pending motion to reopen or reconsider which has been filed before May 21, 1998, remain within the jurisdiction of the Executive Office for Immigration Review.²⁵

The Immigration Judge is required to reopen an alien's proceedings if that alien is eligible for adjustment of status under NACARA and the alien has a pending motion to reopen or motion to reconsider. If the case is pending before the Board of Immigration Appeals, the Board is required to remand the case regardless of whether the applicant has filed an application for adjustment of status under NACARA.²⁶ If the applicant has filed a motion to reopen or reconsider with the Board prior to May 21, 1998, the Board must remand the case to the Immigration Judge for the sole purpose of adjudicating the application for adjustment. If the Immigration Judge denies the application or the alien fails to file the application by the required date, the case will be returned to the Board for adjudication of other pending issues and for consideration of the denial.²⁷

If the applicant is in proceedings before the Executive Office of Immigration Review or the Board of Immigration Appeals, no deportation or removal order can be issued if he or she is eligible to apply for adjustment of status under NACARA and there has been no administrative final decision denying the application.²⁸

An applicant before the Immigration Court has another alternative available. The applicant may move to have the proceedings administratively closed for the purposes of filing the NACARA adjustment application with the INS. The INS must concur with this motion.²⁹ This option gives the alien two shots at NACARA adjustment, and may be a wise move for the applicant whose case has complications. Should the case be administratively closed, and transferred to the INS, if it were denied, the INS will move to re-calendar the proceedings with the Executive Office for Immigration Review.³⁰

If the alien has been ordered deported or removed from the United States, he or she simply files the application for adjustment of status with the Immigration and Naturalization Service with an application for stay of removal.³¹ The law states that the Attorney General shall provide by

25. *Id.* at 27,825.

26. *Id.*

27. *Id.*

28. Nov. 24, 1997 Memorandum, Office of the Chief Immigration Judge, page 5.

29. Executive Office for Immigration Review, *supra* note 17, at 27,825.

30. *Id.* at 27,828.

31. *Id.*

regulation for the stay of any final order of deportation or removal of individuals filing for adjustment under the new law.³² Applicants who have never applied for any form of relief before the INS, follow these same procedures, but are not required to file the additional stay of deportation form.

D. *Required Forms for Adjustment of Status under NACARA*

The period of time to file for adjustment of status under NACARA began on June 22, 1998 and ends on March 31, 2000. Eligible Cubans and Nicaraguans must file an application to register permanent residence or adjust status (Form I-485) and the NACARA Supplement to Form I-485 (Form I-485 Supplement B). Attached to these forms, the applicant must also enclose a Biographic Information (Form G-325 A). The applicant must include his or her birth certificate and four photographs (two for Form I-485 and two for Form I-765) along with a report of medical examination. The documentation discussed in subsection B above should also be a part of the package. Fingerprints are required for all qualifying aliens over the age of fourteen years. There are specific procedures for obtaining fingerprints through one of the INS' Application Support Centers or authorized Designated Law Enforcement Agencies.³³

Cases presently before the Executive Office for Immigration Review are filed with the court clerk's office. All others are filed with the appropriate fees at the INS service center in their region. The application package to be filed with the Immigration Court is paid at the INS local office before filing. If the alien is filing as a NACARA beneficiary, the applicant must submit evidence of the relationship. Stays of Deportation (Form I-246) must be paid at the INS local office cashier and submitted to the district deportation office with a copy of the adjustment package in duplicate.³⁴

If the NACARA beneficiary resides outside of the United States, the INS interim rules provide special procedures for these individuals. These persons must file a request for parole authorization accompanied by photocopies of the documents that the alien intends to file with the application for adjustment. The interim rule states as follows: Parole authorization may be granted as a matter of discretion, if upon review of the application for parole authorization and related documents it is determined that the application for adjustment of status is likely to be approved once it has been properly filed. The alien would be allowed to file the application after being paroled into the United States. Accordingly,

32. NACARA § 202(a)(2).

33. INS Sets Application Procedures for Nicaraguans and Cubans under NACARA, 75 INT. REL. 724, 726 (May 22, 1998); Executive Office for Immigration Review, *supra* note 17, at 27,826.

34. *Id.*

the alien must remain outside of the United States until the request for parole is approved.³⁵

III. SUSPENSION OF DEPORTATION/CANCELLATION OF REMOVAL PROVISIONS FOR OTHER NATIONALITIES INCLUDED IN NACARA

In addition to adjustment of status for Nicaraguans and Cubans, NACARA permits certain nationals from Guatemala, El Salvador, the former Soviet Union, and certain Eastern European countries the opportunity to apply for suspension of deportation or special cancellation of removal. The Act provides that qualifying individuals from these nations can apply for these forms of relief under the standards that existed for suspension of deportation prior to the enactment of IIRIRA.³⁶ Specifically, aliens served with OSC's before being physically present in the U.S. for seven years may now be eligible for suspension of deportation, and aliens within the six groups who were ineligible for cancellation of removal under the heightened standard of exceptional and extremely unusual hardship may now be eligible under the special cancellation of removal.³⁷ The 4,000 visa limit for approvals does not apply.³⁸

Why these groups were treated differently from Nicaraguans and Cubans was not explained in the law or in the Congressional Record. Senator Ted Kennedy from Massachusetts questioned the lack of uniformity when enacting the legislation and said:

This legislation is a frank admission by the Senate that last year's immigration law treated these families unfairly, and that something must be done to correct it. But instead of correcting the injustice for all refugees, Republicans now pick and choose among their favorite Latino groups...Republicans want a blanket amnesty for Nicaraguans and Cubans, but far less for Salvadorans and Guatemalans who also faced oppression and civil war.³⁹

The Senator goes on to say: "The Republican bill provides for case-by-case consideration of the applications of refugees from El Salvador or Guatemala. Under current INS practices, less than half of those eligible to apply are expected to get their green cards."⁴⁰

35. Executive Office for Immigration Review, *supra* note 17, at 27,827.

36. Executive Office for Immigration Review; Motion to Reopen; Suspension of Deportation and Cancellation of Removal, Interim rule with request for comments, 63 Fed. Reg. 31,890 (June 11, 1998).

37. *EOIR Sets Procedures for NACARA Aliens to File Motions to Reopen*, 75 INT. REL. 832, 833 (June 15, 1998).

38. IIRIRA § 309(c), as amended by NACARA § 203(b).

39. CONG. REC. at 12,264 (1997).

40. *Id.*

Although the inequities are evident, no one can deny that all of the nationalities included in the Act are benefiting to some degree from this current legislation and every qualifying applicant should act swiftly to receive its benefits. Since these types of cases are going to be reviewed with great scrutiny, the immigration practitioner is encouraged to work with his or her client very closely to prepare the most complete applications possible to ensure that the client has the best opportunity to receive the benefits of this law.

A. Beneficiaries of NACARA Suspension of Deportation and Special Rule Cancellation of Removal

There are four groups, which are eligible to apply for suspension of deportation/cancellation of removal benefits. Salvadoran nationals who first entered the United States on or before September 19, 1990 and who registered for benefits under the *American Baptist Church v. Thornburgh*⁴¹ [hereinafter ABC] settlement agreement on or before October 31, 1991 (either by submitting an ABC registration or by applying for temporary protected status (TPS)),⁴² are eligible, unless apprehended at the time of entry after December 19, 1990.⁴³ They are also eligible if they filed an application for political asylum with the INS on or before April 1, 1990.⁴⁴ ABC Salvadorans and Guatemalans apprehended at time of entry after December 19, 1990 are not eligible to apply for benefits under NACARA.⁴⁵

Guatemalan nationals who first entered the United States on or before October 1, 1990 and registered for ABC benefits on or before December 31, 1991,⁴⁶ unless apprehended at the time of entry after December 19, 1990,⁴⁷ or who filed an application for political asylum with the INS on or before April 1, 1990 are also eligible.⁴⁸

Spouses and children of Salvadorans and Guatemalans granted NACARA suspension of deportation or special cancellation of removal who are in the above classes. Unmarried sons and daughters of the above classes are also eligible, so long as the unmarried son or daughter entered the United States on or before October 1, 1990 and the legal relationship existed at the time that the parent was granted the benefit.⁴⁹

41. 760 F. Supp. 796 (N.D. Cal. 1991).

42. IIRIRA § 309(c)(5)(C)(i)(I)(aa), as amended by NACARA § 203(a)(1).

43. *Id.*

44. *Id.* § 309(c)(5)(C)(i)(II).

45. *Id.*

46. *Id.* § 309(c)(5)(C)(i)(I)(bb).

47. IIRIRA § 309(c)(5)(C)(i)(I).

48. *Id.* § 309(c)(5)(C)(i)(II).

49. *Id.* § 309(c)(5)(C)(i)(I)(aa).

Nationals of any republic of the former Soviet Union, Poland, Romania, the former Czechoslovakia, Hungary, Bulgaria, Albania, East Germany, or any state of the former Yugoslavia, who entered the United States on or before December 31, 1990 and applied for political asylum before December 31, 1991.⁵⁰

B. *Definition of Suspension of Deportation and Special Cancellation of Removal*

Both suspension of deportation and special cancellation of removal are forms of discretionary relief which, if granted, permit an individual subject to deportation or removal to remain in the United States. Suspension of deportation is available to individuals who have been placed in deportation proceedings through the issuance of an order to show cause (OSC) prior to April 1, 1997. Special cancellation of removal is available to individuals in the protected groups who are inadmissible or deportable and who have been placed in removal proceedings through the issuance of a Notice to Appear (NTA) after April 1, 1997.⁵¹ A person granted either one of these forms of relief will be able to adjust their status to that of lawful permanent resident.

To be eligible for suspension of deportation or special cancellation of removal, the applicant must not be inadmissible or deportable under the criminal or security grounds. The INS has stated that persons convicted of certain crimes may still be eligible to apply under a heightened standard, but anyone convicted at any time of an aggravated felony will be unable to apply for these benefits.⁵² The specific grounds of inadmissibility and deportability are: (1) convictions for two crimes involving moral turpitude;⁵³ (2) two or more convictions with aggregate sentences of five years or more (whether or not for crimes of moral turpitude);⁵⁴ (3) a drug trafficking offense, or a drug conviction or a conviction for being a drug addict or abuser;⁵⁵ (4) convictions for a crime relating to prostitution;⁵⁶ (5) deportability as an aggravated felon;⁵⁷ (6) conviction for a firearms offense;⁵⁸ (7) deportability or inadmissibility as a terrorist or other security-

50. *Id.* § 309(c)(5)(C)(i)(V).

51. Questions and Answers, Nicaraguan Adjustment and Central American Relief Act, Immigration and Naturalization Service (Apr. 1, 1998).

52. *Id.*

53. INA, *supra* note 10, §§ 212(a)(2)(A)(I), 237(a)(2)(A).

54. *Id.* § 212(a)(2)(B).

55. *Id.* § 212(a)(2)(C).

56. *Id.* § 212(a)(2)(D).

57. *Id.* § 212(a)(2)(A)(iii).

58. INA, *supra* note 10, § 237(a)(2)(C).

related grounds;⁵⁹ and (8) deportability for a domestic violence conviction or for falsification of United States citizenship to obtain benefits in this country, as stipulated in the INA.⁶⁰

Some grounds of inadmissibility may have a waiver available if the applicant can meet the statutory requirements.⁶¹ Another way of overcoming these bars may be through post-conviction relief if the requisite family relationship does not exist or if the practitioner determines that a waiver is unavailable. The problems with post-conviction relief are that it is sometimes very costly and may take years to resolve. With the time limitations for NACARA, this may not be a viable option for the applicant.

Should the alien not be barred by one of the criminal or security grounds listed above, he or she must establish the following: (1) continuous physical presence in the United States for seven years; (2) good moral character; (3) extreme hardship to herself or himself and to a spouse, child or parent who is a United States citizen or lawful permanent resident; and, (4) merits the exercise of discretion.⁶² The reader should refer to the many Board of Immigration Appeal cases regarding suspension of deportation as a guide in preparing the supporting documentation for the NACARA application. Of particular interest would be the holdings in *Matter of Anderson*,⁶³ *Matter of O-J-O*,⁶⁴ *Matter of Ige*,⁶⁵ and *Matter of Pilch*.⁶⁶

C. *Continuous Physical Presence and Stop-Time Rules*

Continuous physical presence for NACARA suspension of deportation or cancellation of removal is met even if the applicant has been absent from the United States. These absences cannot exceed more than 90 days during a single period or a total of more than 180 days.⁶⁷ It is recommended that the applicant should not travel outside of the United States during the pending NACARA application.

The Service is unlikely to grant advance parole to individuals in deportation or removal proceedings as well as individuals with asylum applications pending at the asylum office. The ten-year bar will apply to these individuals. In addition, anyone with an asylum application returning

59. *Id.* § 212(a)(3).

60. *Id.* § 237(a)(3), 237(2)(E)(I), (ii).

61. *Id.* § 212(h), 212(i).

62. IIRIRA § 309(f), created by NACARA § 203(b).

63. 16 I & N Dec. 596 (BIA 1978).

64. Int. Dec. 3280 (BIA 1994).

65. 20 I & N Dec. 880 (BIA 1994).

66. Int. Dec. 3298 (BIA 1996).

67. IIRIRA § 309(f)(1)(B) (as amended by NACARA § 203(b)(iii) which incorporates the term continuous physical presence).

to their home country must show a compelling reason for their return or their claim will be dismissed.

NACARA abolished the stop-time rules relating to continuous physical presence as created by IIRIRA with regards to the protected groups. These stop-time rules terminate continuous physical presence when triggered by a certain act, such as the service of a notice to appear or the commission of certain offenses.⁶⁸ Time also stops if the alien exceeds the period of time required by law to be outside of the United States. These stop-time rules were interpreted to apply to the service of orders to show cause by the INS.⁶⁹

The interim rules provide that an alien covered by the NACARA amendments is exempted from the stop-time rules and can apply for either suspension of deportation or cancellation of removal so long as all the other requirements of the Act are met. Furthermore, the new heightened standards for cancellation of removal will not be applied in these cases, and the aliens need only meet the less stringent standards of suspension of deportation in all of these cases.⁷⁰

D. *Applying for Suspension of Deportation/Cancellation of Removal under NACARA*

If an individual has been placed in deportation or removal proceedings and is eligible for NACARA benefits, he or she should request the opportunity to apply for suspension of deportation or cancellation of removal in those proceedings and the matter will be adjudicated by an Immigration Judge.⁷¹

If an applicant has been ordered deported or removed and becomes eligible for this form of relief, the applicant is entitled to file one motion to reopen to apply for NACARA benefits.⁷² NACARA requires that a time period be designated for filing these motions to reopen beginning no later than sixty days after the enactment of NACARA and extending for a period not to exceed 240 days.⁷³ The Executive Office for Immigration Review (EOIR) designated the period from January 16, 1998 through September 11, 1998 for the filing of motions to reopen by eligible aliens for NACARA.⁷⁴ The initial notice published by EOIR dated January 21, 1998,

68. INA §§ 239 (a), 212(a)(2), (4).

69. See *Matter of N-J-B*, Int. Dec. 3309 (BIA 1997).

70. Motion to Reopen; Suspension of Deportation and Cancellation of Removal, 63 Fed. Reg. 31,890-95 (June 11, 1998).

71. Questions and Answers, Nicaraguan Adjustment and Central American Relief Act, Immigration and Naturalization Service, p.6 (Apr. 1, 1998).

72. IIRIRA § 309(c)(5), amended by NACARA § 203(c).

73. *Id.* § 309(c)(5), amended by NACARA § 203(b) as further amended by § 203(g).

74. Executive Office for Immigration Review; Motion to Reopen; Suspension of Deportation and Cancellation of Removal, Notices, 63 Fed. Reg. 3154 (Jan. 21, 1998).

required that the alien file the motion to reopen and clearly state Special NACARA Motion on the motion and on any envelope containing the motion.⁷⁵

In its January notice, EOIR also required that the application for relief be attached to the motion if one had never been filed or, if an application for suspension of deportation or cancellation of removal had been filed with the Immigration Judge, a copy of said application should be attached to the motion along with the \$110.00 motion to reopen fee.⁷⁶ However, these rules have been modified, and pursuant to the June 11, 1998, EOIR interim rules on NACARA motions to reopen and applications for suspension of deportation and special cancellation of removal, the applications do not have to be attached and the \$110.00 fee is waived.⁷⁷ Aliens will have until February 8, 1999 to file the application for suspension of deportation or cancellation of removal with all supporting evidence.⁷⁸

At the time that the motion is being filed, the alien should inform the court that a completed application is forthcoming.⁷⁹ The interim rules clearly specify who is eligible to file a motion to reopen under NACARA and what is the specific requirement for these motions to reopen. Should the alien fail to file the application by February 8, 1999, the motion will be deemed abandoned and the alien will have lost his or her only opportunity to seek this form of relief before the Immigration Judge.⁸⁰ These motions to reopen should be filed with the Office of the Immigration Judge having had the last jurisdiction over the case.⁸¹ If they are not, the office receiving them will forward the same to the court having correct jurisdiction.⁸² The Service will have forty-five days from the date of service of the completed motion to respond to the motion.⁸³

75. *Id.*

76. *Id.*

77. Executive Office for Immigration Review; Motion to Reopen, *supra* note 36, at 31,893.

78. *Id.*

79. *Id.* at 31,893.

80. *Id.* at 31,894. On January 14, 1999, EOIR published a News Release extending the deadlines for supplementing NACARA Motions to Reopen beyond the February 8, 1999 deadline previously set. The new deadline has not yet been set. See News Release, Dept. of Justice, Jan. 14, 1999; see also Addendum to Operating Policy and Procedures Memorandum 98-3 (June 25, 1998); Regulation Implementing Motions to Reopen for Suspension of Deportation/Cancellation of Removal under NACARA and other NACARA cases, Memorandum, EOIR (Jan. 21, 1999).

81. *Id.*

82. *EOIR Sets Procedures for NACARA aliens to File Motions to Reopen*, 75 INT. REL. 832 (June 15, 1998).

83. Executive Office for Immigration Review; Motion to Reopen, *supra* note 36, at 31,893.

Although the EOIR has always had jurisdiction over suspension of deportation cases, it is understood that with regards to NACARA, its jurisdiction is not exclusive. According to the interim rule, the Attorney General has delegated authority to INS asylum officers to adjudicate certain NACARA beneficiaries for suspension of deportation and cancellation of removal.⁸⁴ Those who will be processed through the Asylum Office are aliens who have a pending asylum application with that office including all persons who submitted an ABC asylum application even if they have never been interviewed or contacted by the asylum office. These rules also provide that ABC class members who have a final order of deportation, must also file a motion to reopen and have their suspension applications reviewed by asylum officers.⁸⁵ If class members had their cases administratively closed at a prior date, no motion to reopen is required, because no final order exists in their case.⁸⁶

If ABC class members are currently in proceedings before the Immigration Judge, they may request administrative closure at the time that the motion to reopen is filed or after the motion has been granted. These cases may be closed pending the promulgation of the regulations regarding the adjudication of suspension of deportation or special cancellation of removal before the INS.⁸⁷ It is also assumed from a reading of the interim rules that qualifying applicants who registered for ABC or TPS and who have never filed applications for political asylum will have their applications for relief decided by the Asylum office as well.

NACARA beneficiaries who currently have asylum applications pending with the Asylum Unit may also apply for suspension of deportation with that office. The concern with beneficiary NACARA applications is that the present interim rules require that the principal be granted relief first before the beneficiary can file his or her application. The asylum office is not expected to begin processing these applications until some time in 1999 after the regulations have been issued. It has been recommended that practitioners file motions to reopen for these beneficiaries, try to push these applications before the beneficiaries twenty-first birthday where-ever possible.⁸⁸

84. Proposed Regulation, §§ 103(g)(3)(ii), 103.7(b)(1), 208.14, 240.58 - 240.70, 274a.12, 299, for INA § 203, as published by the Department of Justice on November 24, 1998. The public comment period closed January 24, 1999.

85. Executive Office for Immigration Review; Motion to Reopen, *supra* note 36, at 31,893; Prop. Reg. Sec. 240.67.

86. *Id.*

87. Asylum officers have been given this authority as provided in Prop. Reg. 240.62 and 240.67.

88. *Id.*

E. *Required Forms for Suspension of Deportation/Cancellation of Removal under NACARA*

To apply for NACARA suspension of deportation or special rule cancellation of removal, an application Form I-881 must be completed. This document has yet to be published in its final form. A draft has been sent to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1995.⁸⁹ The same form will be used before the INS and the EOIR. It has been estimated that approximately 300,000 applicants will use this form.⁹⁰ In addition, the application for employment authorization (I-765) should also be submitted. Currently the Immigration Court is processing these cases using a Form EOIR 42-B for those in removal proceedings and EOIR 40 for those in deportation proceedings.

F. *Evidentiary Requirements for NACARA Applicants*

In order to properly document a suspension of deportation or cancellation of removal case, the alien must gather a series of documents to prove nationality, continuous physical presence, good moral character, family ties and extreme hardship. The most difficult factor to overcome is extreme hardship. It is recommended that the applicant sit down with the person who prepared the application and review his or her personal immigration history and discuss the equities he or she has. This writer refers the reader to the documentation suggestions in Part I, Subsections A and B of this article and to the BIA cases cited in this section as a starting point. The person that prepared the document will do well to study suspension of deportation case law to guide his or her client in this process.

It is highly recommended that the application packages include current country condition reports from the alien's native country. These reports go directly to the issue of extreme hardship to the applicant as well as to any family member who is a lawful permanent resident or United States citizen. One must keep in mind that not all NACARA beneficiaries may appear to be eligible candidate for suspension of deportation or special cancellation of removal at the onset. The interim rules are very specific. The applicant must establish prima facie eligibility.⁹¹ As such, good planning and organization is imperative.

G. *Other Options for NACARA Applicants*

Not all of these beneficiaries may be able to meet the requirements for a grant of suspension of deportation and special cancellation of removal.

89. Mark Silverman, et al., *NACARA'S Provision for Guatemalans and Salvadorans: An Update*, 75 INT. REL. 865, 870 (June 19, 1998).

90. *INS sends NACARA Form to OMB*, 75 INT. REL. 701 (May 18, 1998). See also Prop. Reg. Sec. 103.7 for INS application fees.

91. *Id.*

In the alternative, practitioners should not waive the possibility of a pursuing the request for political asylum in some cases. An analysis of the strength of the political asylum claim in contrast to the equities of the suspension of deportation/cancellation claims should be conducted to ensure that the best choices are made on behalf of the clients. These individuals fled their countries at a time of political turmoil. A great many of these people suffered tremendously as a result of the political strife in their countries. One must question these persons in detail to ensure that the complete history has been presented.⁹²

Furthermore, asylum has certain benefits that other forms of relief may not offer. If the applicant is granted asylum and his spouse and children have remained in their native country, the applicant can file a Form I-730 to apply for his or her family as derivative asylees. If the asylee needs public benefits, under this status, he or she may qualify for these benefits, which as an LPR they are not entitled to.⁹³

IV. CONCLUSION

NACARA was a response to the unfair immigration bill enacted last year, which threatened to uproot hundreds of thousands of people who came to this country in search of freedom. It is certainly far from perfect. It failed to treat similarly situated groups the same. The President stated as such.⁹⁴ Although not a perfect bill, it will make a dramatic difference in the lives of many and will hopefully lead to further corrections to the 1997 Immigration Act.

92. Prop. Reg. Sec. 240.64.

93. See, e.g., Silverman et al., *supra* note 889, at 871.

94. *Statement on Congressional Action on Immigration Legislation*, Monthly Compilation on Presidential Documents (Nov. 17, 1997).

ENVIRONMENTAL LAW IN THIRD WORLD COUNTRIES: CAN IT BE ENFORCED BY OTHER COUNTRIES?

*Pam Slater**

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I. INTRODUCTION

As Third World countries¹ develop into more industrialized countries, they face numerous problems relating to their social, economic and political development.² Many Third World countries have incorporated the ideas of state sovereignty, state equality, and the principles of non-aggression and non-intervention, in their search for their place in the framework of international law.³ However, many Third World countries are still searching for their respective places in the global economy.

Many developing countries⁴ tend to follow development patterns that depend heavily on the use of their natural resources, to the detriment of the environment.⁵ As a result, some countries have caused irreparable damage

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1. There are two broad categories of Third World countries. The low income developing countries consisting of the African countries, some Latin American countries, and middle to high income Third World countries consisting of high performing Asian countries. See Yemi Osinbajo & Olukonyisola Ajayi, *Human Rights and Economic Development in Developing Countries*, 28 INT'L LAW 727, 730 (1994).

2. BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW*, 46 (2d ed. 1995).

3. *Id.*

4. For purposes of this paper, *developing countries* is used as another word for Third World countries.

5. Yemi Osinbajo & Olukonyisola Ajayi, *Human Rights and Economic Development in Developing Countries*, 28 INT'L LAW 727, 730 (1994). See also Harmful Wastes Decree No.42

to their ecosystems. At one time a great number of Third World countries regarded environmental concerns as problems for rich countries and environmental regulation as another impediment to their economic development.⁶ Other Third World countries believe that economic growth and development cannot be attained without damaging the environment.⁷ A few of the poorer Third World countries have chosen economic development over environmental protection, even though they have agreed to many of the treaties and conventions on environmental protection and have created many modern environmental laws.⁸ As a result enforcement of environmental laws was not a priority for these countries, however this sentiment is changing.

The enforcement of environmental laws is not a new problem. Many countries and numerous organizations, both domestic and international, have been debating this problem for years. However, with the continued growth of economies all over the world, environmental protection has been pushed to the forefront of international affairs. Since Third World countries are experiencing the largest amount of growth, they are particularly scrutinized over their respective environmental laws and the frequency with which they are enforced.⁹

In order to determine if a Third World country's environmental laws can be enforced by other countries, this article will first explore the process by which international law is created as well as the role each type of international law plays in shaping environmental law. The issue of whether a Third World country's environmental laws can be enforced by other countries will be analyzed. Furthermore, this article will briefly look at how some of the environmental problems in Third World countries started and how some countries are dealing with the problem of environmental degradation. Finally, an analysis of how Third World countries can enforce their own laws with the help of other countries and international organizations will be addressed.

II. CREATION AND EFFECTIVENESS OF INTERNATIONAL LAW

The international treaties and other agreements in force today are insufficient to manage the environmental crises within the current

of 1988 (Nig.); Federal Environmental Protection Agency Decree No. 58 of 1988 (Nig.). See generally Yemi Osinbajo, *Some Public Law Considerations in Environmental Protection, in Environmental Laws Including Compensation* 128 (J. Omotola ed., 1990).

6. *Id.* at 740.

7. Osinbajo & Ajayi, *supra* note 5, at 739.

8. *Id.* at 741.

9. See generally Osinbajo & Ajayi, *Human Rights and Economic Development in Developing Countries*, 28 INT'L LAW 727 (1994).

framework of international law.¹⁰ The treaty making process is inadequate as an effective remedy for the world's accelerating environmental problems because treaties take a very long time to implement.¹¹ This is the case of the 1992 Rio Declaration.¹² Overall the treaty seems to move the world's environmental and developmental systems forward, but analysis of the treaty reveals that there are some vague principles and the regulations of the treaty are not accepted by all states. For example, the United States has taken reservations concerning principles 3, 7, 12 and 23.¹³

After an agreement is signed, states must then proceed with the process of ratification by its own government.¹⁴ Furthermore, the treaty does not become legally binding until a specified number of states complete their national ratification processes and formally agree to be bound by the conditions and obligations of the treaty.¹⁵ This process can take months or even years.

Custom also seems inadequate to deal with the intensifying demands upon the earth's environment.¹⁶ "International legal customs take decades, and sometimes centuries, to evolve into common and accepted practice."¹⁷ Even though most states realize that the global environmental structure is diminishing, there is no clear environmental custom that exists within the realm of international law.¹⁸ No custom exists because no established pattern of dealing with environmental problems has been determined from state interactions with each other.¹⁹ The current state of the earth's environment, shows that a majority of states do not regard themselves as

10. Krista Singleton-Cabbage, *International Legal Sources & Custom*, 2 ILSA J. INT'L. & COMP. L. 171, 180 (1995). See also Max Valverde Soto, *General Principles of International Environmental Law*, 3 ILSA J. INT'L & COMP. L. 194 (1996).

11. Singleton-Cabbage, *supra* note 10, at 180.

12. See United Nations Convention on the Rio Declaration of Environment and Development, June 16, 1992, 31 I.L.M. 876 [hereinafter Rio Declaration].

13. Rio Declaration principle 3 (opposition to the right to development; principle 7 (rejection of any interpretation that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution in the responsibilities of developing countries; principle 12 (insistence that in certain situations, trade measures may provide an effective and appropriate means of addressing environmental concerns; and principle 23 (insistence that nothing in the Declaration prejudices or predetermines the status of any territories under occupation or the national resources that pertain to such territories). Fletcher, Rio-Decl.txt, <<http://www.tufts.edu/fletcher/multi/texts/RIO-DECL.txt>>, <<http://www.iisd.ca/linkages/vol102/0213032e.html>>.

14. Singleton-Cabbage, *supra* note 10, at 180.

15. *Id.*

16. *Id.* at 183.

17. *Id.*

18. *Id.*

19. Singleton-Cabbage, *supra* note 10, at 184.

being bound by established *opinio juris*²⁰ or by the mandatory regulation of national action by *jus cogens* norms.²¹

Since there is no international instrument of global application that defines the rights and duties of states in environmental matters, many agreements and treaties are in effect and more continue to be created and ratified.²²

International law has developed between two opposing concepts.²³ The first principle declares that states have sovereign rights over their natural resources.²⁴ The second principle declares that states should not cause damage to the environment.²⁵ Under the first principle, it can be inferred that the states alone have the right to create and regulate their own environmental laws, within their respective borders, to the exclusion of other states. If this inference holds true then only the respective state can enforce its own environmental laws.

However, the second principle suggests that the concept of sovereignty is not absolute, and is subject to a general duty not to cause environmental damage to the environment of other states, or to areas beyond a state's national jurisdiction.²⁶ If sovereignty is not absolute then it appears that any state can enforce the environmental laws of another state in order to protect the world environment.

These contradicting principles may confuse some states, such as Third World countries, that are attempting to create environmental laws for the first time or attempting to enforce already existing environmental laws. Another complication in the creation and implementation of environmental law is the fact that some of the rules have no definite meaning and there is no common agreement among the states on the legal consequences of these rules.²⁷ However, states are not relieved of their duty to protect the environment because current principles are confusing because "the rules of permanent sovereignty over natural resources, the responsibility to prevent environmental damage, good neighborliness, and cooperation in relation to environmental protection are well established and rooted in state practice

20. *Opinio juris* is defined as widespread consistent practice by states done from a sense of legal obligation. See CARTER & TRIMBLE, *supra* note 2, at 143-6.

21. *Jus cogens* comes from moral law. It is a peremptory norm, which means that all states must follow the rule whether they agree with it or not. See CARTER & TRIMBLE, *supra* note 2, at 130.

22. Max Valverde Soto, *General Principles of International Environmental Law*, 3 ILSA J. INT'L & COMP. L. 193, 194 (1996).

23. *Id.* at 194.

24. *Id.*

25. *Id.*

26. Soto, *supra* note 22, at 195.

27. *Id.* at 208.

and in international instruments."²⁸ These concepts may provide the basis upon which Third World countries can build or expand their environmental rules and regulations.

III. ENVIRONMENTAL LAW REGULATION IN THIRD WORLD COUNTRIES

The problem of environmental degradation concerns both industrialized countries as well as Third World countries. Therefore, environmental protection is a challenge shared by all countries. In order to establish some semblance of an agreement concerning environment protection, the policies of states should advance and not affect the present and future development of Third World countries.²⁹ No treaty or agreement has been enacted that gives one country the authority to enforce the laws of another country.

Natural resources are being depleted and many regions of the world are faced with the possibility of irreversible, physical, social and economic destruction.³⁰ This is especially true in Third World countries. Third World countries are in varying stages of development, ranging from the poorest of the poor to other countries, such as China, India, South Korea and Mexico, who are on the verge of breaking into the industrialized world, with many degrees and combinations of circumstances in between.³¹ As a result, many of these countries seem more concerned with continued economic growth than with global climate changes.³²

Furthermore, as these countries move toward sustainable economic development pressure is placed on each country's environment as well as the global environment. It has been determined that to bring all Third World countries to the consumption level of the United States by the year 2060 would require four percent economic growth per year.³³ The yearly impact of economic activities on the environment would be sixteen times what it is today - which is not even remotely conceivable.³⁴

Continued development in Third World countries has caused these countries to exhaust their natural resources. As a result, each country's environment has suffered irreparable harm. For example, as a result of rapid economic development in Taiwan and South Korea, terrible environmental destruction has occurred, yet these countries are currently held up as models for all Third World countries to follow.³⁵

28. *Id.*

29. *Id.* at 205.

30. Soto, *supra* note 22, at 205.

31. *Global Warming Talks to Begin*, THE NEWS & OBSERVER, Nov. 30, 1997, at 1.

32. *Id.*

33. Edward Goldsmith, *Can The Environment Survive The Global Economy?*, THE ECOLOGIST, Nov. 21, 1997, at 1.

34. *Id.*

35. *Id.*

Many Third World countries are dumping grounds for industrialized nations as well as multinational corporations because some countries have no environmental laws or their laws are rarely enforced.³⁶ By taking advantage of the ignorance of local people and corrupt government officials, developing countries, at times, have paid many Third World countries money in order to dump toxic wastes.³⁷

Many transnational corporations³⁸ are major investors in Third World countries.³⁹ As a result of their abundant financial resources, these corporations play a decisive role in both the economic development as well as the political development of the countries where they do business.⁴⁰ Therefore, Third World countries are placed in an awkward position because in the global economy no country can strengthen environmental laws that would increase corporate costs without putting itself at a competitive disadvantage with its competitors.⁴¹

Deregulation has also meant problems for Third World countries playing host to transnational corporations. Many Third World countries have set up "free-trade zones" where many corporations have established themselves, thereby eliminating any regulations on labor or the environment.⁴² Wherever these "free-trade zones" are established there is massive environmental destruction.⁴³ However, international law has yet to clearly state whether a corporation operating abroad can or should be forced to follow the environmental laws of its home country.⁴⁴ Until this question is clearly answered transnational corporations will be allowed to continue their exploitation of Third World countries.

However, many Third World countries are starting to realize the adverse effect their economic activities are having on their respective environments and the whole world. Many Third World countries have begun the process of creating environmental laws and agencies to assure enforcement of these laws.

36. See Yemi Osinbajo and Olukonyisola Ajayi, *Human Rights and Economic Development in Developing Countries*, 28 INT'L LAW 727, 740 (1994).

37. *Id.*

38. Transnational corporations are enterprises owning or controlling production of service facilities outside the countries in which they are based. Osinbajo and Ajayi, *supra* note 4, at 730.

39. Osinbajo and Ajayi, *supra* note 36, at 730

40. *Id.*

41. Goldsmith, *supra* note 35, at 8,9.

42. *Id.* at 10.

43. *Id.*

44. *Australians Push For More Rules on Companies Working Abroad*, WORLD ENVIRONMENT REPORT, Jan. 17, 1996, at 2.

One such country is Brazil. Brazil has had a comprehensive set of environmental laws for years, but the country did not seem willing to enforce them.⁴⁵

In February 1989, the various environmental agencies, in Brazil, united to form the Brazilian Institute of Environmental and Renewable Natural Resources (IBAMA), Brazil's environmental protection agency.⁴⁶ However, critics described the organization as "disorganized and so poorly funded that it cannot do its job."⁴⁷ Economics have played an important part in Brazil's unwillingness to enforce its environmental laws.⁴⁸ According to Sao Paulo's environmental secretary, Alair Caffé Alves, "if environmental laws were applied vigorously, many industries would have to close. This would result in more unemployment which could be worse for the environment in the long run."⁴⁹ However, observers think that Brazil's environmental enforcement record will improve.⁵⁰ An example of this anticipated improvement came in late 1996 when IBAMA took a two year moratorium on mahogany and some other hardwood extractions-the kind that often wastes other trees and requires destructive road building.⁵¹ It also cancelled some 65% of logging licenses.⁵²

Another Third World country that has enacted new environmental ethics and laws is China. China has shown its commitment to environmental protection by increasing investment in environmental protection by 1.2 percent of its gross domestic product.⁵³ China has also held to a policy of sustained development based upon comprehensive utilization of natural resources and protecting and improving the environment while making sure that its economic and social development benefit future generations.⁵⁴ In addition, China has promoted different environmental protection programs, however, more efforts should be made to tighten law enforcement and set up effective public supervision systems.⁵⁵ Even though many Third World countries are still trying to bring their environmental regulations up to world standards, they have

45. *Brazil's Environmental Legislation is Complete, But Not Enforced*, ENVIRONMENT WATCH LATIN AMERICA, May 1, 1992, at 1.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Brazil's Environmental Legislation is Complete, But Not Enforced*, ENVIRONMENT WATCH LATIN AMERICA, May 1, 1992, at 1.

50. *Id.*

51. Mary Jo McConahay, *Amazonian Futures*, CHOICES-THE DEVELOPMENT MAGAZINE, April 1997, at 19.

52. *Id.*

53. *China: Making A Cleaner World*, CHINA DAILY, June 5, 1998, at 1.

54. *Id.*

55. *Id.*

made strides to deal with the problem of environmental degradation that comes with economic development.

IV. ANALYSIS: CAN THE ENVIRONMENTAL LAWS OF THIRD WORLD COUNTRIES BE ENFORCED BY OTHER COUNTRIES

Environmental protection is the responsibility of all states. However, the responsibility for environmental degradation does not fall equally on each state because each state has taken a different development path causing some states to carry more of the burden of environmental protection.⁵⁶

States cannot legally intervene in the internal functioning of other states.⁵⁷ Sovereign states have the legal right to further development and to pursue policies that are perceived to be in their national interest, despite environmental consequences that may extend beyond political boundaries.⁵⁸

As stated earlier, states have sovereign rights over their natural resources. As such, each state controls how its laws are enforced. Even though many governments of Third World countries are still in the developing stages, other states must respect each country's national sovereignty and its capacity to enforce its own environmental laws. If industrialized countries are allowed to enter a Third World country in order to enforce that country's environmental laws, then state sovereignty will be destroyed. If state sovereignty is destroyed, years of international customs, treaties and general principles will be seen as invalid.

Since environmental damage in one state can damage the environment of another state, some kind of enforcement must be established. Instead of trying to enforce the environmental laws of Third World countries, efforts should be made to help these countries set up agencies within their own borders to create and enforce environmental regulations.

Many Third World countries are making a conscious effort to enforce their own environmental regulations. For some countries environmental enforcement is a new concept because they are used to massive deregulation or no laws at all. This is how most Third World countries get most of their corporate business. Many corporations set up their business operations in Third World countries because there is little or no enforcement of environmental regulations. However, some Third World countries have decided that corporate dollars are not worth losing their natural resources.⁵⁹

Even though the problem of environmental degradation is immediate allowing industrialized countries to enforce the environmental laws of Third World countries will not alleviate the problem. Furthermore many

56. Soto, *supra* note 22, at 205.

57. *Id.*; See also Singleton-Cabbage, *supra* note 10, at 178.

58. *Id.*

59. McConahay, *supra* note 51, at 1.

Third World countries certainly will not allow another country to enforce their environmental laws. An act of this magnitude may be seen as an attempt to take over the government of the country, especially in Third World countries with unstable governments.

Although many international treaties, customs and general principles are not adequate to handle the world's environmental problems⁶⁰, they may offer hope to some Third World countries.⁶¹ Since many Third World countries are in the initial stages of creating and enforcing their own environmental regulations, international agreements offer a framework for these countries to imitate. Furthermore, many international agreements, such as treaties, also offer Third World countries the ability to enforce environmental laws against countries that violate international environmental laws. This power further eliminates the need for other countries to come into Third World countries and attempt to enforce their environmental laws.

Instead of trying to enforce the environmental laws of Third World countries, developed countries should create new ways of ensuring that the developmental problems attributed to Third World countries, such as poverty, are not allowed to cause irreparable damage to the earth's natural resources.⁶²

Another reason that the environmental laws of Third World countries cannot be enforced by other countries is because the government of each country should be respected and allowed to deal with its country's problems within its own borders. Many of these countries have science and technological skills that are equal to those of more industrialized countries.⁶³ Furthermore, if industrialized countries are allowed to go into Third World countries and enforce those countries environmental laws, does that mean Third World countries will be allowed to go enforce the industrialized countries environmental laws. For many years and even today, industrialized countries have caused many of the world's environmental problems, yet no Third World country has been allowed to go into these countries to enforce their environmental laws.

Many of the environmental problems in Third World countries come from their ties with industrialized countries. Industrialized countries and many multinational corporations have been dumping toxic wastes in Third World countries, yet on numerous occasions they have blamed Third World countries for polluting the environment. Before the world's

60. Singleton-Cabbage, *supra* note 10, at 171-72.

61. Under principle six of the Rio Declaration on Environment and Development developing countries are given distinct priority in the field of environmental protection. See <<http://www.iisd.ca/linkages/vol102/0213032e.html>>.

62. Osinbajo & Ayaji, *supra* note 4, at 741.

63. Vandona Shiva, *Voices From the South: The Environmental Agenda*, Choices, July 1992, at 16.

environmental problems can be addressed industrialized countries must take responsibility for their part in causing the world's environmental problems instead of blaming the Third World countries. One way industrialized countries can take responsibility is to lead by example. As many industrialized countries make efforts to slow environmental degradation within their borders, Third World countries may be compelled to do the same.⁶⁴

In many parts of the world Third World countries are seen as poor little countries stricken by poverty, illiteracy and corrupt government officials. In many Third World countries this is true, but many countries have stable governments and are developing at a rapid pace.⁶⁵ Moreover, there are some industrialized countries where poverty, illiteracy and corrupt government officials are also a problem.

Furthermore, industrialized countries should not be allowed to enforce the environmental laws of Third World countries because Third World countries are capable of enforcing their own environmental laws with the help of industrialized countries and international organizations, such as the World Bank.⁶⁶ One way that industrialized countries can help Third World countries to enforce their environmental laws is through investing in environmental protection projects, such as helping the Chinese build energy efficient electric generating stations with smokestack controls, in order to prevent acid rain.⁶⁷ Some observers think that the World Bank's main goal should be underwriting the prevention and control of global pollution.⁶⁸ If Third World countries can attract foreign investment to help fund their environmental projects, it would be easier to enforce environmental laws as well as curb further environmental problems. However, many of the answers sought by Third World countries may well come from their own citizens who live with these problems on a daily basis.

V. CONCLUSION

The economic development of Third World countries depends on the manner in which these countries utilize their resources, both human and environmental. In order to assure that these countries continue to develop without totally depleting their natural resources and causing greater pressure on the global environment, there must be cooperation and help from all parties involved, including industrialized countries, international organizations and transnational corporations.

64. Daniel C. Esty, *U.S. Must Lead on the Environment*, *NEWSDAY*, June 25, 1997, at 2.

65. Osinbajo & Ayaji, *supra* note 4, at 740.

66. Esty, *supra* note 64, at 2.

67. *Id.* at 3.

68. *Id.*

There has to be more involvement by all the parties who have an interest in the global environment, which is every country in the world.⁶⁹ Some observers suggest that transnational corporations and non-governmental organizations should be given more responsibility in legal negotiations since they have contributed to the environmental problems and solutions in the Third World.⁷⁰ This suggestion is a good starting point but until international organizations, such as the United Nations, are given more teeth to police environmental activities, pollution and other forms of environmental degradation will persist.

As more Third World countries receive the financial help and technological support needed to curb the problems inherent in economic development, more countries will enact environmental regulations. There is no need for other countries to come into Third World countries to enforce environmental laws because many of these countries will continue to enact and enforce their own laws, it will just take time.

69. Soto, *supra* note 22, at 186.

70. *Id.* at 187.

CHANGES IN INTERNATIONAL AIR CARGO: MONTREAL PROTOCOL NO. 4 ATTAINS FORCE OF LAW

*Carl W. Christy, Jr.**

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I. INTRODUCTION

On March 4, 1999¹, the handling of many international air cargo claims arising within the United States changed.² International air cargo claims are now governed by the provisions of Additional Protocol No. 4 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed At Warsaw, signed at Montreal on September 25, 1975 [hereinafter Montreal Protocol No. 4]. Montreal Protocol No. 4 attained force of law on June 14, 1998 following

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1. Additional Protocol No. 4 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed At Warsaw, signed at Montreal on September 25, 1975 [hereinafter Montreal Protocol No. 4]. The United States ratified Montreal Protocol No. 4 on Sept. 28, 1998, and the instrument of ratification was deposited at the Ministry for Foreign Affairs of the Polish People's Republic on Dec. 4, 1998. Art. XVIII, § 1 of Montreal Protocol No. 4 permits an instrument of ratification to come into force on the ninetieth day following deposit with the Government of the Polish People's Republic.

2. Providing the country of origin has ratified Montreal Protocol No. 4 and it has come into force.

ratification by thirty countries as required by the Treaty.³ Since then, eight additional countries besides the United States have ratified the Treaty.⁴ Notably absent, however, are twelve of the United States' twenty-five largest trading partners.⁵

The terms of Montreal Protocol No. 4 remove the requirement that documentation accompany cargo, alter defenses formerly available to an air carrier, and among countries subject to the Treaty, provide a uniform method of determining the limit of liability when cargo is lost, damaged or destroyed.

This article will examine the scope and distinguishing features of Montreal Protocol No. 4, discuss time limitations for notice of claim that are operative as a result of Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Hague on September 28, 1955 [hereinafter The Hague Protocol],⁶ and the surviving provisions of the original Warsaw Convention.

II. SCOPE OF MONTREAL PROTOCOL NO. 4

The Warsaw Convention, as amended by Montreal Protocol No. 4, continues to apply to all international carriage of persons, luggage or goods

3. Montreal Protocol No. 4, *supra* note 1, art. XVIII, § 1 (requires that at least thirty signatory States deposit their instruments of ratification with the Polish government before the Protocol comes into force). The first thirty countries to ratify in alphabetical order are: Argentina, Australia, Bosnia & Herzegovina, Brazil, Columbia, Croatia, Cyprus, Denmark, Egypt, Estonia, Ethiopia, Federal Republic of Yugoslavia, Finland, Ghana, Greece, Guatemala, Hungary, Ireland, Israel, Italy, Kuwait, Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Togo, and the United Kingdom, from the web site of the International Air Transportation Association, IATA "Delighted" at US Ratification of Montreal Protocol No. 4 (visited Feb. 12, 1999), <<http://www.iata.org/cargo/protocol4.htm>>.

4. Honduras, Mauritius, Nauru, Niger, Oman, Singapore, Turkey and Uzbekistan (Pakistan) all ratified on June 14, 1998 and the Protocol became effective Sept. 12. International Air Transportation Association, IATA "Delighted" at US Ratification of Montreal Protocol No. 4, (visited Feb. 12, 1999) <<http://www.iata.org/cargo/protocol4.htm>>.

5. The Federal Interagency Council on Statistical Policy maintains a web site located at <<http://www.fedstats.gov/>> to provide consumers with access to information produced by more than seventy agencies of the United States Federal Government. These statistics, located at <<http://webcentral.bts.gov/oai/international/table9.txt>>, reveal the top twenty-five countries ranked by total number of freight tons as of 1994 and an (N) after the name of the country signifies that it has not yet ratified Montreal Protocol No. 4: Japan (N), United Kingdom, Germany (N), South Korea (N), Columbia, France, Netherlands, Taiwan (N), Brazil, Hong Kong-UK (N), Canada, Italy, Mexico (N), Chile, Switzerland, Belgium, Dominican Republic (N), Costa Rica (N), Guatemala, Luxembourg (N), Ecuador (N), Singapore, Australia, Peru (N), and El Salvador (N).

6. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371[hereinafter The Hague Protocol].

performed by aircraft gratuitously or for a fee.⁷ International carriage may take place between the territories of two countries or the place of departure and destination may be in the same country with an agreed stopping place in another country.⁸ For example, cargo loaded on board an aircraft in New York, which makes a stop in Montreal and is offloaded in Los Angeles is international cargo. Similarly, cargo moving from one international destination to another may be carried by several air carriers and one leg may be entirely within one country. The *domestic* leg does not destroy the international nature of the air carriage and the terms of the Convention still apply.⁹

Montreal Protocol No. 4 excludes postal items from its scope instructing that the contractual relationship between air carriers and the relevant postal administration controls.¹⁰ This prohibits an air carrier from asserting a limit of liability that is inconsistent with policy of the postal administration.

A ratifying country may opt out of Montreal Protocol No. 4, upon written notice to the Polish Government, when chartering an entire aircraft to carry military cargo, baggage, or personnel.¹¹ This provision becomes useful when large quantities of military equipment are quickly transported near an area of open hostility and the government calls upon commercial air carriers to assist.

Presently,¹² thirty-eight countries have deposited instruments of ratification with the Government of the Polish People's Republic signifying intent to abide by Montreal Protocol No. 4 and its force of law flows only between them.

III. DISTINGUISHING FEATURES OF MONTREAL PROTOCOL NO. 4

The provisions of Montreal Protocol No.4 significantly alter the terms of the original Warsaw Convention and The Hague Protocol. First, changes in the documentation accompanying cargo will reduce expenses for air carriers, freight forwarders, and consolidators. Second, the valuation of lost, damaged, or destroyed freight will be expressed in units of Special

7. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 (1988) [hereinafter Warsaw Convention], art. 1, § 1.

8. The Hague Protocol, *supra* note 6, art. I(a).

9. *Id.* art. I(b).

10. Montreal Protocol No. 4, *supra* note 1, art. II.

11. *Id.* art. XXI, § 1(a).

12. The effective date of this information is Dec. 31, 1998. The International Air Transport Association updated the list of ratifying countries on Sept. 29, 1998 and Dec. 31, 1998. The organization's web site has a search engine and the homepage is located at <<http://www.iata.org/>>.

Drawing Rights calculated regularly by the International Monetary Fund.¹³ Finally, defenses formerly available to air carriers have been restricted or eliminated.

A. *Changes in Documentation Accompanying Cargo*

In the spirit of advancing technology, the crafters of Montreal Protocol No. 4 renamed the section¹⁴ addressing air waybills from Air Consignment Note to Documentation relating to cargo, inferring that it was no longer imperative that consignment documents travel with the cargo.¹⁵ Consistent with this change, the air carrier is no longer required to sign the air waybill upon acceptance of the goods.¹⁶

This departure from tradition, as a cost saving measure,¹⁷ permits the air carrier to agree in advance with its customer that an electronic method which preserves a record of the cargo will suffice for purposes of shipment.¹⁸ Instead of the traditional air waybill, the customer may request, and be issued, a receipt from the carrier identifying the cargo, place of departure and destination, weight, and express permission to access the electronic air waybill.¹⁹ At the time of delivery, a similar receipt may be printed for the consignee to indicate acceptance. If cargo is traveling across country with a stop in a foreign country, the location of the stop must be indicated on the receipt if the cargo is to retain international character. Montreal Protocol No. 4, like The Hague Protocol, requires a lot less information on the air waybill than required under the original 1929

13. By linking valuation to Special Drawing Rights, the framers of the Treaty attempted to eliminate controversy that arose over the unit of account in which a limit of liability is expressed when the world shifted from the gold standard in 1978.

14. Warsaw Convention, *supra* note 7, ch. II, § III is entitled "Air Consignment Note" and Montreal Protocol No. 4, *supra* note 1, art. III, deletes that title and replaces it with "Documentation relating to cargo."

15. Warsaw Convention, *supra* note 7, art. 6, para. 1, required that the air consignment note be handed over with the goods.

16. The Hague Protocol, *supra* note 6, art. V, shifted the signature requirement for the air carrier from the time the cargo was accepted, *Id.* § III, art. 6, para. 3, to anytime before the cargo was loaded on board the aircraft. Montreal Protocol No. 4, *supra* note 1, removes the air carrier signature requirement completely.

17. *Testimony of Assistant Secretary of State for Economic and Business Alan P. Larson on the Issue of Affairs Pending Treaties and Protocols before the Senate Committee on Foreign Affairs Wednesday, May 13, 1998*, at 2, para. 5 (visited Nov. 24, 1998), <<http://www.senate.gov/~foreign/larson.htm>>.

18. Montreal Protocol No. 4, *supra* note 1, art. 5, para 2.

19. *Id.* art. 8, which requires that the air waybill and receipt for cargo contain the point of departure and destination and the weight of the shipment. *Id.* art. 5, para. 2, permits a receipt providing identification of the cargo and access to the electronic record.

Warsaw Convention.²⁰ Practitioners will observe that ratification of Montreal Protocol No. 4 results in the removal of Article 9 of the Warsaw Convention.²¹ This is expected to eliminate litigation over incomplete air waybills. Also notable among the changes is the lack of a statement that the air carriage is subject to the rules relating to liability established by the Warsaw Convention.²² Customer refusal to abide by this cost saving measure does not permit the carrier to refuse the shipment.²³

B. *Limitation of Liability Expressed in Special Drawing Rights*

In the event of loss or damage, carrier liability is limited to seventeen Special Drawing Rights, as defined by the International Monetary Fund, per kilogram.²⁴ The valuation date for any conversion from Special Drawing Rights to the local currency is the date of judgment by any competent court.²⁵ This limitation applies unless the customer has declared a specific interest in delivery at destination and paid additional freight, if required. The consignor may also have the option to insure the goods under a policy of insurance²⁶ issued to the carrier by requesting the coverage and paying the carrier the required charges. If cargo is damaged but not destroyed, the carriers' liability is the smaller value comparing the cost to repair against the limitation expressed in Montreal Protocol No. 4. This amount is determined by multiplying the weight of the damaged cargo in kilograms times seventeen Special Drawing Rights.²⁷ The Special Drawing Rights are then converted into local currency.²⁸ A sample

20. Warsaw Convention, *supra* note 7, art. 8 contained seventeen items to be included on the Air Consignment Note. This quantity of information was reduced to only four by Art. VI of The Hague Protocol, *supra* note 6. However, The Hague Protocol to the Warsaw Convention 1955 was not adopted by the United States until it ratified Montreal Protocol No. 4.

21. Warsaw Convention, *supra* note 7, art. 9 prohibited a carrier from asserting limitations of liability or exclusions afforded it by the Treaty if it accepted cargo without a complete air waybill.

22. Warsaw Convention, *supra* note 7, art. 8(q) has been deleted by The Hague Protocol. However, the United States failed to ratify this Treaty and chose instead to continue to observe the terms of the original Warsaw Convention.

23. Montreal Protocol No. 4, *supra* note 1, art. 5, para. 3.

24. *Id.* art. VII (b, d).

25. *Id.* art. VII (d).

26. *Id.* art. VII (b).

27. The Hague Protocol, *supra* note 6, art. XI, rewrites the Warsaw Convention, *supra* note 7, art. 22, para. 2(b).

28. International Monetary Fund Treasurer Department (visited Jan. 4, 1999)

< <http://www.imf.org/external/np/tre/sdr/brates/0701.htm> >; this website is where currency values are expressed in terms of Special Drawing Rights each day.

calculation is presented in the footnotes below.²⁹ Presently one hundred eighty two countries³⁰ are members of the International Monetary Fund including thirty-six of thirty-eight countries that have ratified Montreal Protocol No. 4.³¹ Cargo claims arising in countries that have ratified the treaty but are not members of the International Monetary Fund are resolved in a judicial proceeding prescribed by the Treaty.³² The court converts the carrier's liability per kilogram into local currency equivalent to 250 Poincaré gold francs per kilogram, a fictitious unit of account defined as the value of sixty-five and a half milligrams of gold of nine hundred millesimal fineness.

C. *Changes in Defenses Available to the Air Carrier*

Changes in documentation relating to cargo have led to the first defense surrendered by the air carrier. Historically, the consignor was responsible for the preparation of the air waybill as well as any irregularity, incorrectness, or lack of required information.³³ The carrier lost the ability to raise the limitations contained in the Treaty if it accepted an incomplete air waybill.³⁴ With preparation of the cargo receipt shifting to the air carrier, any irregularity resulting in loss or damage becomes its responsibility and it must indemnify the consignor reversing the historical trend.³⁵

Before Montreal Protocol No. 4 attained force of law, many international air carriers excluded liability arising from four sources over which they had no control. In order to accomplish this, they published the exclusions on their air waybill and in their tariff which was filed with

29. For example, ten pallets of computer components are shipped from Argentina (has also ratified Montreal Protocol No.4) to the United States. Each pallet weighs four hundred kilograms and one pallet is destroyed during the loading of the aircraft. The carrier's liability on Dec. 31, 1998 would be the lesser of the cost to replace the destroyed merchandise or \$9,574.60. The calculation for this value is 400 (kilograms) x 17 (Special Drawing Rights per kilogram) x 1.408030 (Currency units per Special Drawing Right on the date specified) = \$9,574.60. If the consignee (recipient of the cargo) can replace the freight contained on the pallet for \$7,500, the carrier owes the lesser amount.

30. Member countries of the International Monetary Fund may be located at <<http://www.imf.org.external/np/sec/memdir/members.htm>> and the home site is located at <<http://www.imf.org/>>.

31. A comparison of countries that are members of The International Monetary Fund to countries that have ratified Montreal Protocol No. 4 reveals that only Nauru and Zaire are not members of the International Monetary Fund.

32. Montreal Protocol No. 4, *supra* note 1, art. VII(d).

33. Warsaw Convention, *supra* note 7, art. 10, para. 1.

34. *Id.* art. 9.

35. Montreal Protocol No. 4, *supra* note 1, art. 10, para. 3.

government authorities. The four categories were: inherent defect of the cargo, improper packing, an act of war or armed conflict, or an act of a public authority. All are now included as defenses in Montreal Protocol No. 4 and the Treaty places the burden of proof on the carrier.³⁶

Under Article 20 of the Warsaw Convention, liability may be avoided if the carrier can prove that it and its agents took all necessary measures to avoid damage or demonstrate that it was impossible for such measures to be taken.³⁷ Under Montreal Protocol No. 4, this defense is now limited to instances where delay results in loss or damage to the cargo.³⁸ The Warsaw Convention imposed liability on the carrier for damage occasioned by delay in the carriage of goods.³⁹

D. *Time Limitations for Notice of Claim*

When the United States ratified Montreal Protocol No. 4, a provision of the treaty⁴⁰ gave force to all the surviving provisions of The Hague Protocol. One significant cargo provision of this treaty amendment has survived and will affect the handling of international air cargo claims now that Montreal Protocol No. 4 has taken effect.

Under the Warsaw Convention, damage complaints had to be made in writing within seven days of receipt of the cargo if it was damaged and within fourteen days of notice that the cargo was available for pickup if the air carriage was delayed.⁴¹ Failure to notify the carrier of intent to make a claim in a timely manner resulted in a time bar and claim prohibition.⁴² The provisions of The Hague Protocol expand these time limits. A written complaint must now be made within fourteen days of cargo receipt in the case of damage and within twenty-one days of notice that the cargo is available for pickup in the case of delay.⁴³ Article 35 of the Warsaw Convention defines *days* as current days and not working days. This provision remains effective.

IV. SURVIVING PROVISIONS OF THE 1929 WARSAW CONVENTION

Many provisions of the 1929 Warsaw Convention have survived the amendments of The Hague Protocol 1955 and Montreal Protocol No. 4 in

36. *Id.* art. IV, which rewrites Warsaw Convention, art. 18 by adding these defenses in para. 3 (a - d).

37. Warsaw Convention, *supra* note 7, art. 20, para. 1.

38. Montreal Protocol No. 4, *supra* note 1, art. V, which rewrites Warsaw Convention, *supra* note 7, art. 20.

39. Warsaw Convention, *supra* note 7, art. 19.

40. Montreal Protocol No. 4, *supra* note 1, art. XV.

41. Warsaw Convention, *supra* note 7, art. 26, § 2.

42. *Id.* art. 26, paras. 2, 4.

43. The Hague Protocol, *supra* note 6, art. XV.

1975. These provisions fall generally into two categories: application of the treaty and liability of the air carrier.

A. *Application of the Treaty*

The supremacy clause of the 1929 Warsaw Convention remains in force.⁴⁴ It holds that with one exception, any contractual provision between an air carrier and other parties, which attempts to relieve the carrier of liability otherwise imposed by the Treaty, or fix a lower monetary limitation per unit of freight is null and void.⁴⁵ The exception applies to an arbitration clause for cargo claims which is permitted as long as the arbitration takes place within the territory of a ratifying state and in which a court may obtain jurisdiction over the air carrier.⁴⁶ When a provision of a contract between the air carrier and another party is declared void, the contract becomes divisible and surviving provisions remain enforceable.⁴⁷

A potential conflict exists when a cargo claim arises in a country that has not yet ratified Montreal Protocol No. 4 but has ratified the original Warsaw Convention or any of its amendments. These include The Hague Protocol, Additional Protocol No. 1 signed at Warsaw to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed on September 25, 1975 [hereinafter Montreal Protocol No. 1], and Additional Protocol No. 2 to Amend Convention for the Unification of Certain Rules Relating to International Carriage By Air Signed At Warsaw Signed on September 25, 1975 [hereinafter Montreal Protocol No. 2]. Both Montreal Protocols No. 1 and No. 2 limit the liability of the air carrier to 17 Special Drawing Rights per kilogram of cargo.⁴⁸ The Hague Protocol to the Warsaw Convention 1955 limits carrier liability to two hundred fifty francs per kilogram and converting currencies has been the subject of much controversy.⁴⁹

44. Warsaw Convention, *supra* note 7, art. 32.

45. *Id.*

46. *Id.* arts. 32, 28.

47. *Id.* art. 23.

48. Additional Protocol No. 1 To Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw, on Oct. 12, 1929, Signed at Montreal Sept. 25, 1975 [hereinafter Montreal Protocol No. 1], art. II rewrites Warsaw Convention, *supra* note 7, art. 22 introducing Special Drawing Rights. Additional Protocol No. 2 To Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw, Oct. 29, 1929, as Amended by the Protocol done at The Hague on Sept. 28, 1955, Signed at Montreal, Sept. 25, 1975 [hereinafter Montreal Protocol No. 2], art. II also rewrites Warsaw Convention, *supra* note 7, art. 22, and includes an additional provision in para. 2(b) specifying that only the weight of the damaged package is used in calculating the liability of the carrier.

49. In *SS Pharmaceuticals Co. Ltd. v. Qantas Airways Ltd.*, 22 NSWLR 734 (1988), an Australian court determined that carrier liability was based upon the market value of gold.

Presently, 113 countries have ratified the Warsaw Convention and 103 countries have ratified The Hague Protocol.⁵⁰ Forty-one countries⁵¹ have ratified Montreal Protocol No. 1 and forty-three⁵² countries have ratified Montreal Protocol No. 2, both of which came into force in 1997.⁵³ When cargo claims arise and the countries of origin and destination have ratified different Amendments to the Treaty, the version (be it original Warsaw Convention, The Hague Protocol, or any of the Montreal Protocols) that both countries have ratified will be the law that is applied.⁵⁴

B. *Liability of the Air Carrier*

Traditionally, receipt of the cargo without complaint, by the party entitled to delivery has exonerated the carrier from any liability.⁵⁵ Prior to ratification of Montreal Protocol No. 4, a clean air waybill signed by the consignee without comment created the presumption of a successful air carriage and delivery.⁵⁶ Now, a clean cargo receipt or lack of notice of claim will serve to establish that the cargo was delivered in satisfactory condition.⁵⁷

There continues to be a requirement of written notice of intent to file a claim and it may be noted on the air waybill or cargo receipt, or if the cargo transaction was paperless, on a separate writing.⁵⁸

50. International Air Transp. Ass'n, Principal Instruments of the Warsaw System, (1991).

51. The International Civil Aviation Organization, [hereinafter ICAO] monitors signatories to Montreal Protocol No.1 and Montreal Protocol No. 2. As of Dec. 31, 1998, the Depository for the Government of the Republic of Poland advised ICAO that Montreal Protocol No. 1 had attained force of law between forty-one signatory countries. A comparison of those countries that have ratified Montreal Protocol No. 1 and those that have ratified Montreal Protocol No. 4 reveals only nine that have not ratified Montreal Protocol No. 4. The nine countries are Bahrain, Canada, Chile, Cuba, France, Mexico, Peru, Tunisia, and Venezuela.

52. As of Dec. 31, 1998, the Depository for the Government of the Republic of Poland advised ICAO that Montreal Protocol No. 2 had attained force of law between forty-three ratifying countries. A comparison of those countries that have ratified Montreal Protocol No. 2 and those that have ratified Montreal Protocol No. 4 reveals that only nine countries have not ratified Montreal Protocol No. 4. The nine countries are Bahrain, Canada, Chile, Cuba, France, Mexico, Peru, Tunisia, and Venezuela.

53. Montreal Protocol No.1, *supra* note 48; Montreal Protocol No.2, *supra* note 48, *Status as of Dec. 31, 1998*, Depository, the Government of the Republic of Poland, *reprinted by* ICAO.

54. If, for example, cargo travels from the United States to Germany, where The Hague Protocol has been ratified but not Montreal Protocol No. 4, the carrier limitation of two hundred fifty francs per kilogram will be applied instead of seventeen Special Drawing Rights.

55. Warsaw Convention, *supra* note 7, art. 26, para. 1.

56. *Id.* art. 26, para. 1.

57. Montreal Protocol No. 4, *supra* note 1, art. 11, para. 1.

58. Warsaw Convention, *supra* note 7, art. 26, para. 3.

Legal action to resolve cargo claims within the Treaty are subject to a two year Statute of Limitations⁵⁹ and must be brought within the boundaries of a country that has ratified the Treaty and in a court that can obtain jurisdiction over the air carrier.⁶⁰

For purposes of making a claim when the cargo was handled by several air carriers, the consignor retains the right to claim against the first air carrier, the consignee retains the right to proceed against the last air carrier and either party may proceed against the air carrier in whose possession the damage or loss took place.⁶¹

V. CONCLUSION

At the time of this writing, Montreal Protocol No. 4 has been in force in the United States for less than one month and no litigation has arisen to begin judicial interpretation of the new Treaty. The economic benefits and competitive advantage anticipated by United States air cargo carriers will not be quantified for some time. However, the potential savings and change in business practices associated with the Treaty will serve to urge air carriers of major trading partners of the United States such as Japan, Germany, and Korea⁶² to lobby their governments for similar ratification.

59. *Id.* art. 29, para. 1.

60. *Id.* art. 28, para. 1.

61. *Id.* art. 30, para. 3.

62. Japan is the number one country with which the United States exchanges air freight according to 1994 U.S. Government statistics. Germany is number three and Korea is number four. The website was visited on Jan. 5, 1999 and is verifiable at <<http://webcentral.bts.gov/oai/international/table9.txt>> .