ARTICLES & ESSAYS

Large-Scale Dispute Resolution in Jurisdictions without Judicial Class Actions: Learning From the Irish Experience ........................................... S.I. Strong

An Interim Essay on FIFA’s World Cup of Corruption: The Desperate Need for International Corporate Governance Standard at FIFA ......................................................... Professor Bruce W. Bean

Saving Lives and Building Society: The European Migration Agenda Kong ................................................................. Dr. Catherine Tinker

Loss and Damage and the 21st Conference of the Parties to the United Nations Framework Convention on Climate Control .................................................. Dr. Wil Burns

Emerging International Trends and Practices in Guardianship Law for People with Disabilities ................................................................. Robert Dinerstein, Esmé Grant Grewal, & Jonathan Martinis

Captivity and the Law: Hostages, Detainees and Criminal Defendants in the Fight Against Terrorism ................................................................. Adam R. Pearlman

Fact Finding and States in Emergency ................................................................. Charles Garraway

Securing Child Rights in Time of Conflict ................................................................. Diane Marie Amann

#Lawyeringpeace: The Role of Lawyers in Peacebuilding ................................................................. Paul R. Williams & Christin Coaster
GENERAL INFORMATION

CITE AS: ILSA J. INT’L & COMP. L.

The ILSA Journal of International & Comparative Law is housed at Nova Southeastern University’s Shepard Broad College of Law in Fort Lauderdale, Florida, and is an International Law Students Association (ILSA) publication. The ILSA Journal of International & Comparative Law publishes three editions every year. The first edition is a compilation of notes, comments, and essays. The second edition is the International Practitioners’ Notebook, which encompasses the presentations given at the annual International Law Weekend held in New York and sponsored by the American Branch of the International Law Association. The third edition, the Bilingual Edition, is a compilation of notes, comments, and essays which tend to focus on the Central and South American Region and is published in Spanish and English.

Opinions expressed in any part of the ILSA Journal of International & Comparative Law are those of the individual contributors and are not presented as the views of the Journal, its Editors, Nova Southeastern University Shepard Broad College of Law, or the International Law Students Association.

Submissions Policy: The ILSA Journal of International & Comparative Law welcomes unsolicited manuscripts on topics of interest to the international law community. All pieces will be evaluated as promptly as possible. The ILSA Journal of International & Comparative Law assumes no responsibility for the return of unsolicited manuscripts. Authors should submit manuscripts via email to ilsa.journal.novasoutheastern@gmail.com. Manuscripts should be double-spaced word documents. Citations should conform to The Bluebook: A Uniform System of Citation (20th ed. 2015).

Subscriptions: The subscription price is $30.00 per volume per year for domestic subscribers and $35.00 per volume per year for foreign subscribers. Subscriptions are renewed automatically unless the subscriber sends a timely notice of termination. All notifications of address changes should include the old and new addresses.

Correspondence: All correspondence, manuscripts and subscription requests should be addressed to:
Editor-in-Chief
ILSA Journal of International & Comparative Law
Nova Southeastern University, Shepard Broad College of Law
3305 College Avenue
Ft. Lauderdale, FL 33314
Telephone: (954) 262-6026 or 6005
Fax: (954) 262-3830

Back Issues: William S. Hein & Co., Inc. has purchased the entire back stock and reprint rights of the ILSA Journal of International & Comparative Law. Individual issues or entire sets are available from William S. Hein & Co., 1285 Main Street, Buffalo, New York, 15209.

The ILSA Journal of International & Comparative Law hereby grants permission for copies of all articles on which it holds copyright to be made and used by nonprofit educational institutions, provided that the copies are distributed at or below cost, the author and the Journal are identified, and proper notice is affixed to each copy. All other rights are reserved to the ILSA Journal.
### GENERAL INFORMATION

**CITE AS:** ILSA J. INT'L & COMP. L.

The *ILSA Journal of International & Comparative Law* is housed at Nova Southeastern University's Shepard Broad College of Law in Fort Lauderdale, Florida, and is an International Law Students Association (ILSA) publication. The *ILSA Journal of International & Comparative Law* publishes three editions every year. The first edition is a compilation of notes, comments, and essays. The second edition is the International Practitioners' Notebook, which encompasses the presentations given at the annual International Law Weekend held in New York and sponsored by the American Branch of the International Law Association. The third edition, the Bilingual Edition, is a compilation of notes, comments, and essays which tend to focus on the Central and South American Region and is published in Spanish and English.

Opinions expressed in any part of the *ILSA Journal of International & Comparative Law* are those of the individual contributors and are not presented as the views of the *Journal*, its Editors, Nova Southeastern University Shepard Broad College of Law, or the International Law Students Association.

**Submissions Policy:** The *ILSA Journal of International & Comparative Law* welcomes unsolicited manuscripts on topics of interest to the international law community. All pieces will be evaluated as promptly as possible. The *ILSA Journal of International & Comparative Law* assumes no responsibility for the return of unsolicited manuscripts. Authors should submit manuscripts via email to ilsa.journal.novasoutheastern@gmail.com. Manuscripts should be double-spaced word documents. Citations should conform to *The Bluebook: A Uniform System of Citation* (20th ed. 2015).

**Subscriptions:** The subscription price is $30.00 per volume per year for domestic subscribers and $35.00 per volume per year for foreign subscribers. Subscriptions are renewed automatically unless the subscriber sends a timely notice of termination. All notifications of address changes should include the old and new addresses.

**Correspondence:** All correspondence, manuscripts and subscription requests should be addressed to:

Editor-in-Chief  
ILSA Journal of International & Comparative Law  
Nova Southeastern University, Shepard Broad College of Law  
3305 College Avenue  
Fort Lauderdale, FL 33314  
Telephone: (954) 262-6026 or 6005  
Fax: (954) 262-3830

**Back Issues:** William S. Hein & Co., Inc. has purchased the entire back stock and reprint rights of the *ILSA Journal of International & Comparative Law*. Individual issues or entire sets are available from William S. Hein & Co., 1285 Main Street, Buffalo, New York, 14209.

The *ILSA Journal of International & Comparative Law* hereby grants permission for copies of all articles on which it holds copyright to be made and used by nonprofit educational institutions, provided that the copies are distributed at or below cost, the author and the Journal are identified, and proper notice is affixed to each copy. All other rights are reserved to the *ILSA Journal*.

<table>
<thead>
<tr>
<th>ILSA JOURNAL OF INTERNATIONAL &amp; COMPARATIVE LAW</th>
<th>Volume 22</th>
<th>Winter 2016</th>
<th>Number 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive and Editorial Board Members for 2015-2016:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>EDITOR-IN-CHIEF</strong></td>
<td>Lisa Hailey</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>MANAGING EDITOR</strong></td>
<td>Brittney Horton</td>
<td><strong>EXECUTIVE EDITOR</strong></td>
<td>Bryan Appel</td>
</tr>
<tr>
<td><strong>LEAD ARTICLES EDITOR</strong></td>
<td>Gregory Cummings</td>
<td><strong>subscriptions editor</strong></td>
<td>Micheline Gros-Jean</td>
</tr>
<tr>
<td><strong>BILINGUAL EDITOR</strong></td>
<td>Michelle Ramos</td>
<td><strong>Lead Technical Editor</strong></td>
<td>William Bromley</td>
</tr>
<tr>
<td></td>
<td>Yinet Sanchez</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Associate Executive Editor</strong></td>
<td>Gillian Maler</td>
<td><strong>Associate Technical Editor</strong></td>
<td>Ashleigh McKenzie</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Greenbook Editor</strong></td>
<td>Anabel Alvarez</td>
</tr>
<tr>
<td><strong>Articles Editor</strong></td>
<td>Garrett J. Monteagudo</td>
<td><strong>Articles Editor</strong></td>
<td>Daniel Muggeo</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Articles Editor</strong></td>
<td>Andrew Shapiro</td>
</tr>
<tr>
<td><strong>Faculty Advisors</strong></td>
<td>Douglas Donoho, Professor of Law</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Roma Perez, Professor of Law</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Joseph Hnylka, Professor of Law</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
SENIOR STAFF MEMBERS:
Harold Caicedo
Scott Gershkow
Jeff Schneider

JUNIOR STAFF MEMBERS:
Michael Aranda
Marlee Arnold
Maria Baker
Adam Benna
Dorian Brown
Michelle Brown
Charles Wes Byrum
Carolina Cabrera
Yvette Calle
Joni Caldwell
Britney Combs
Derek Cornelius
Gianluca Darena
Katherine David
Lisa de la Fé
Mairelys Delgado
Katherine English
Jason Farbiarz
Salvatore Fazio
Anya Francis
Erika Garay
Loris Gayle
Angela Gerg
Dwight Gibiser
Marcos Guerrero
Keisha Hall
Cristina Hernandez
Greggory Jacobs
Lizza Maldonado
Jessica Maxey
Shantel McDonald
Tara Mulrey
Karysabell Murgas
Alessandro Neroni
William Norvell
Paola Palma
Leslie Perez Perez
Georgina Pons
Shantanu Patel

Massimo Reboa
Robin Rios
Marivi Rodriguez
Shayna Rosenblatt
Paula Savchenko
Cristina San Lucas
Carlos Serrano
Jared Siegel
Michelle Skipper
Marina Tous Clots
Kristin Vara
SENIOR STAFF MEMBERS:
Harold Caicedo
Scott Gershkow
Jeff Schneider

JUNIOR STAFF MEMBERS:
Michael Aranda
Marlee Arnold
Maria Baker
Adam Benna
Dorian Brown
Michelle Brown
Charles Wes Byrum
Carolina Cabrera
Yvette Calle
Joni Caldwell
Britney Combs
Derek Cornelius
Gianluca Darena
Katherine David
Lisa de la Fé
Mairelys Delgado
Katherine English
Jason Farbarz
Salvatore Fazio
Anya Francis
Erika Garay
Loris Gayle
Angela Gerg
Dwight Gibiser
Marcos Guerrero
Keisha Hall
Cristina Hernandez
Greggory Jacobs
Lizza Maldonado
Jessica Maxey
Shantel McDonald
Tara Mulrey
Karysabell Murgas
Alessandro Neroni
William Norwell
Paola Palma
Leslie Perez Perez
Georgia Pons
Shantanu Patel

Massimo Reboa
Robin Rios
Marivi Rodriguez
Shayna Rosenblatt
Paula Savchenko
Cristina San Lucas
Carlos Serrano
Jared Siegel
Michelle Skipper
Marina Tous Clots
Kristin Vara
OFFICE OF THE DEAN
Jon Garon, B.A., J.D., Dean and Professor of Law
Tracey-Ann Spencer Reynolds, Executive Assistant to Dean
Elena Langan, B.A., J.D., Associate Dean for Academic Affairs and Associate Professor of Law
Linda F. Harrison, Executive Assistant to Associate Dean for Academic Affairs

DEANS AND DIRECTORS
Lynn Acosta, B.A., M.S., Assistant Dean for Student Services
Catherine Arcabascio, B.A., J.D., Associate Dean, International Programs, and Professor of Law
Timothy Arcaro, B.S., J.D., Associate Dean for AAMPLE and Online Programs and Professor of Law
Olympia Duhart, B.A., J.D., Director of First-Year Lawyering Skills and Values Program and Professor of Law
Jennifer Gordon, B.A., J.D., Director of Public Interest Programs
Linda F. Harrison, B.A., J.D., Associate Dean, Critical Skills Program, and Associate Professor of Law
Robert Levine, B.S., J.D. Assistant Dean, Career and Professional Development, and Adjunct Professor
Jennifer McIntyre, B.S., M.S., Assistant Dean for Online Programs
Josh Metz, B.S., B.S., C.P.A., Director of Administrative and Finance Operations
Elena Minicucci, J.D., Director of Alumni Relations and Adjunct Professor of Law
William Perez, B.A., Assistant Dean of Admissions
Nancy Sanguigni, B.S., M.B.A., Assistant Dean of Clinical Programs
Susan Stephan, B.S. M.A. J.D., Director of Development and Adjunct Professor of Law
Michele Struffolino, B.A., M.Ed., J.D., Assistant Dean of Students and Associate Professor of Law
Chelsea Thorn, Director for Recruitment Marketing, Communications, and Publications
Eric Young, B.A., M.L.S., J.D. Assistant Dean, Law Library & Technology Center, and Associate Professor of Law

FACULTY
John B. Anderson, B.A., J.D., LL.M., Professor Emeritus of Law
Catherine Arcabascio, B.A., J.D., Associate Dean of International Programs and Professor of Law
Timothy Arcaro, B.S., J.D., Associate Dean for AAMPLE and Online Programs and Professor of Law
Heather Baxter, B.A., J.D., Associate Professor of Law
Brion Blackwelder, B.S., J.D., Director, Children & Families Clinic and Associate Professor of Law
Randolph Braccialarghe, B.A., J.D., Professor of Law
Ronald B. Brown, B.S.M.E., J.D., LL.M., Professor of Law
Timothy A. Canova, B.A., J.D., Professor of Law and Public Finance
Kathy Cervimana, B.S., J.D., LL.M., J.S.D., Professor of Law
Megan F. Chaney, B.A., J.D., Associate Professor of Law
Phyllis G. Coleman, B.S., M.Ed., J.D., Professor of Law
Leslie Larkin Cooney, B.S., J.D., Professor of Law
Jane Cross, B.A., J.D., Director, Caribbean Law Programs and Associate Professor of Law
Debra Moss Curtis, B.A., J.D., Professor of Law
Michael Dale, B.A., J.D., Professor of Law
Mark Dobson, B.A., J.D., LL.M., Professor of Law
Douglas Donoho, B.A., J.D., LL.M., Professor of Law
Olympia Duhart, B.A., J.D., Director of First-Year Lawyering Skills and Values Program and Professor of Law
Michael Flynn, B.A., J.D., Professor of Law
Amanda Foster, B.A., J.D., Assistant Professor of Law
Jon Garon, B.A., J.D., Dean and Professor of Law
Pearl Goldman, B.C.L., M. Phil., LL.B., J.D., LL.M., Professor of Law
Joseph M. Grohman, B.A., M.A., J.D., Executive Dean for Faculty Development and Professor of Law
Richard Grosso, B.S., J.D., Director of Environmental & Land Use Law Clinic and Professor of Law
Linda F. Harrison, B.A., J.D., Associate Dean of Critical Skills Program and Associate Professor of Law
Joseph Hnylka, B.A., J.D., Associate Professor of Law
Arete Imoukhuede, B.A., J.D., Professor of Law
Robert M. Jarvis, B.A., J.D., LL.M., Professor of Law
Judith Karp, B.A., M.L.S., J.D., Professor of Law
Shahabudeen Khan, B.S., J.D., Associate Professor of Law
Ishaq Kundawala, B.A., J.D., Professor of Law
Camille Lamar, B.A., J.D., Associate Professor of Law
Elena Langan, B.A., J.D., Associate Dean for Academic Affairs, and Associate Professor of Law
James B. Levy, B.A., J.D., Associate Professor of Law
Kenneth Lewis, Jr., B.A., J.D., Associate Professor of Law
Donna Litman, A.B., J.D., Professor of Law
Elena Marty-Nelson, B.A., J.D., LL.M., Professor of Law
Michael R. Masinter, B.A., J.D., Professor of Law
Jani E. Maurer, B.A., J.D., Professor of Law
Joel A. Mintz, B.A., J.D., LL.M., J.S.D., Professor of Law
Frank Orlando, B.S. Ed., J.D., Judge (retired)
Roma Perez, B.A., J.D., Associate Professor of Law
Michael L. Richmond, A.B., M.S.L.S., J.D., Professor of Law
John Sanchez, B.A., J.D., LL.M., Professor of Law
Florence Shu-Aqueyue, LL.B., LL.M., J.S.M., J.S.D., Professor of Law
Michele Struffolino, B.A., M. Ed., J.D., Assistant Dean of Students and Associate Professor of Law
Fran L. Tetnunc, B.A., J.D., Director of Alternative Dispute Resolution Clinic and Professor of Law
Marilyn Uzdavines, B.A., J.D., Assistant Professor of Law
Kathryn Webber, B.A., J.D., Associate Professor of Law
James D. Wilets, B.A., M.A., J.D., Professor of Law
Eric Young, B.A., M.L.S., J.D., Assistant Dean, Law Library and Technology Center and Associate Professor of Law

ADJUNCT FACULTY

Andrew Adler, B.A., J.D.
Edward Almeyda, B.S., J.D.
Antoinette Appel, B.A., M.A., Ph.D., J.D.
Scott Atherton, B.S., J.D.
Ross Baer, B.A., J.D.
Denise Baker, B.A., J.D.
Steve Ballinger, B.A., J.D.
Roshawn Banks, B.S., J.D.
Courtney Jared Bannus, B.S., J.D.
Rob Beharrielle, B.A., J.D.
Richard Bergman, B.A., J.D.
Johnny Burris, B.G.S., J.D., LL.M
Robert Campbell, B.A., J.D., M.P.H., Ph.D.
Laura Cancilla-Miller
Marilyn Cane, B.A., J.D.
Lydia Cannizzo, B.H.S., J.D.
Jayme Cassidy, B.S., J.D.
Michele Chang, B.A., J.D., M.H.A.
Tracey L. Cohen, B.A., J.D.
Jude Cooper, Esq.
Arthur Daus III, B.A., J.D.
Hon. Robert F. Diaz, A.A., B.A., J.D.
Ken Direktor, B.A., J.D.
Susan Dubow, B.S.
Cynthia Henry Duval, B.A., J.D.
Lynn Epstein, B.S., J.D.
Rebecca Feinberg, B.A., J.D.

Jason Katz, B.S., J.D.
Daniel Kaufman, B.S., J.D.
Kamran Khurshid, B.S., J.D.
Warren Kwavnick, B.C., J.D.
Allan Lerner, B.A., J.D.
Robert Levine, B.S., J.D.
James Lewis, B.A., J.D.
Rochelle Marcus, B.S., M.E.D., J.D.
Chance Meyer, B.S., J.D.
Catherine Michael, B.A., J.D.
Daniel Mielenicki, J.D., LL.M.
Elena Minicucci, B.A., J.D.
Gerald Morris, B.A., J.D.
Charles Morton, B.A., J.D.
John Napolitano, B.A., J.D.
Robert Nicholson, B.A., B.D.
Kamlesh Oza, J.D.
Michelle Parker, B.A., J.D.
Laverne Pinkey, J.D., LL.M.
Becka Rich, A.B., J.D., M.S.
Michael Rocque
Jose Rodriguez-Dod, J.D.
Bruce Rogow, B.B.A., J.D.
Marc Rohr, B.A., J.D.
Morgan Rood, J.D.
Thomas E. Runyan, Esq., B.S., J.D.
Maria Schneider, B.A., J.D.
Robert Schwartz, B.A., J.D.
Stacy Schwartz, B.S., J.D.
Catherine Arcabascio, B.A., J.D., Associate Dean of International Programs and Professor of Law
Timothy Arcaro, B.S., J.D., Associate Dean for AAMPLE and Online Programs and Professor of Law
Heather Baxter, B.A., J.D., Associate Professor of Law
Brion Blackwelder, B.S., J.D., Director, Children & Families Clinic and Associate Professor of Law
Randolph Braccialarghe, B.A., J.D., Professor of Law
Ronald B. Brown, B.S.M.E., J.D., LL.M., Professor of Law
Timothy A. Canova, B.A., J.D., Professor of Law and Public Finance
Kathy Cerminara, B.S., J.D., LL.M., J.S.D., Professor of Law
Megan F. Chaney, B.A., J.D., Associate Professor of Law
Phyllis G. Coleman, B.S., M.Ed., J.D., Professor of Law
Leslie Larkin Cooney, B.S., J.D., Professor of Law
Jane Cross, B.A., J.D., Director, Caribbean Law Programs and Associate Professor of Law
Debra Moss Curtis, B.A., J.D., Professor of Law
Michael Dale, B.A., J.D., Professor of Law
Mark Dobkin, B.A., J.D., LL.M., Professor of Law
Douglas Donoho, B.A., J.D., LL.M., Professor of Law
Olympia Duhart, B.A., J.D., Director of First-Year Lawyering Skills and Values Program and Professor of Law
Michael Flynn, B.A., J.D., Professor of Law
Amanda Foster, B.A., J.D., Assistant Professor of Law
Jon Garson, B.A., J.D., Dean and Professor of Law
Pearl Goldstein, B.C.L., M.Phil., LL.B., J.D., LL.M., Professor of Law
Joseph M. Grohman, B.A., M.A., J.D., Executive Dean for Faculty Development and Professor of Law
Richard Grosso, B.S., J.D., Director of Environmental & Land Use Law Clinic and Professor of Law
Linda F. Harrison, B.A., J.D., Associate Dean of Critical Skills Program and Associate Professor of Law
Joseph Hrylka, B.A., J.D., Associate Professor of Law
Areti Imoukhuede, B.A., J.D., Professor of Law
Robert M. Jarvis, B.A., J.D., LL.M., Professor of Law
Judith Karp, B.A., M.L.S., J.D., Professor of Law
Shahabudeen Khan, B.S., J.D., Associate Professor of Law
Ishaq Kundawala, B.A., J.D., Professor of Law
Camille Lamar, B.A., J.D., Associate Professor of Law
Elena Langan, B.A., J.D., Associate Dean for Academic Affairs, and Associate Professor of Law
James B. Levy, B.A., J.D., Associate Professor of Law
Kenneth Lewis, Jr., B.A., J.D., Associate Professor of Law
Donna Litman, A.B., J.D., Professor of Law
Elena Marty-Nelson, B.A., J.D., LL.M., Professor of Law
Michael R. Masinter, B.A., J.D., Professor of Law
Jani E. Maurer, B.A., J.D., Professor of Law
Joel A. Mintz, B.A., J.D., LL.M., J.S.D., Professor of Law
Frank Orlando, B.S. Ed., J.D., Judge (retired)
Roma Perez, B.A., J.D., Associate Professor of Law

Michael L. Richmond, A.B., M.S.L.S., J.D., Professor of Law
John Sanchez, B.A., J.D., LL.M., Professor of Law
Florence Shu-Acquaye, LL.B., LL.M., J.S.M., J.S.D., Professor of Law
Michele Struffolino, B.A., M. Ed., J.D., Assistant Dean of Students and Associate Professor of Law
Fran L. Tretunic, B.A., J.D., Director of Alternative Dispute Resolution Clinic and Professor of Law
Marilyn Uzdavines, B.A., J.D., Assistant Professor of Law
Kathryn Webber, B.A., J.D., Associate Professor of Law
James D. Wilets, B.A., M.A., J.D., Professor of Law
Eric Young, B.A., M.L.S., J.D., Assistant Dean, Law Library and Technology Center and Associate Professor of Law

ADJUNCT FACULTY

Andrew Adler, B.A., J.D.
Edward Almeyda, B.S., J.D.
Antoinette Appel, B.A., M.A., Ph.D., J.D.
Scott Atherton, B.S., J.D.
Ross Baer, B.A., J.D.
Denise Baker, B.A., J.D.
Steve Ballinger, B.A., J.D.
Roshawn Banks, B.S., J.D.
Courtney Jared Bannan, B.S., J.D.
Rob Beharrell, B.A., J.D.
Richard Bergman, B.A., J.D.
Johnny Burris, B.G.S., J.D., LL.M
Robert Campbell, B.A., J.D., M.P.H., Ph.D.
Laura Cancilla-Miller
Marilyn Cane, B.A., J.D.
Lydia Cannizzo, B.H.S., J.D.
Jayme Cassidy, B.S., J.D.
Michele Chang, B.A., J.D., M.H.A.
Tracey L. Cohen, B.A., J.D.
Jude Cooper, Esq.
Arthur Daus III, B.A., J.D.
Hon. Robert F. Diaz, A.A., B.A., J.D.
Ken Direktor, B.A., J.D.
Susan Dubow, B.S.
Cynthia Henry Duval, B.A., J.D.
Lynn Epstein, B.S., J.D.
Rebecca Feinberg, B.A., J.D.
Jason Katz, B.S., J.D.
Daniel Kaufman, B.S., J.D.
Kamran Khurshid, B.S., J.D.
Warren Kwavnick, B.C., J.D.
Allan Lerner, B.A., J.D.
Robert Levine, B.S., J.D.
James Lewis, B.A., J.D.
Rochelle Marcus, B.S., M.ED., J.D.
Chance Meyer, B.S., J.D.
Catherine Michael, B.A., J.D.
Daniel Mielnicki, J.D., LL.M.
Elena Minicucci, B.A., J.D.
Gerald Morris, B.A., J.D.
Charles Morton, B.A., J.D.
John Napolitano, B.A., J.D.
Robert Nicholson, B.A., J.D.
Kamlesh Oza, J.D.
Michelle Parker, B.A., J.D.
Laverne Pinkey, J.D., LL.M.
Becka Rich, A.B., J.D., M.S.
Michael Rocque
Jose Rodriguez-Dod, J.D.
Bruce Rogow, B.B.A., J.D.
Marc Rohr, B.A., J.D.
Morgan Rood, J.D.
Thomas E. Runyan, Esq., B.S., J.D.
Maria Schneider, B.A., J.D.
Robert Schwartz, B.A., J.D.
Stacy Schwartz, B.S., J.D.
Hon. Rex Ford, B.S., J.D.
Myrna Galligiano-Kozlowski, B.A., J.D.
Andrew Garofalo, B.S., J.D.
Jason Giusman, B.A., J.D.
Adam Goldberg, B.S., J.D., L.L.M.
Evan Goldman, B.A., J.D.
Anthony Gonzalez, B.A., J.D.
Carlos Gonzalez
Shanika Graves, B.A., J.D.
Arthur Green, B.A., J.D.
Torina Haddad-Coleman, B.A., J.D.
Joseph Harbaugh, B.S., L.L.B., L.L.M.
Ross Hargot, B.S., J.D.
Ann Hesford, B.A., J.D.
Peter Home, B.A., J.D., M.B.A.
Hon. Alfred Horowitz, B.A., J.D., L.L.M.
Julie Hough, B.A., J.D.
Jacqueline Howe, B.A., J.D.
Yasmin Jacob, B.A., J.D.
Nick Jovanovic
Kimberly Kanoff Berman, B.S., J.D.
Neil Karabash

Library Staff

Eric Young, B.A., M.L.S., J.D. Assistant Dean of Law Library and
Technology Center and Associate Professor of Law
Becka Rich, B.A., J.D., M.S. Senior Associate Director of Law Library
and Technology Center and Adjunct Professor of Law
Karen Rose, Assistant to the Assistant Dean of the Law Library and
Technology Center
Nikki Williams, Assistant Circulation Manager
Alison Rosenberg, Head of Outreach Services
Rob Behrrell, Outreach & Reference Services Librarian
Carolyn Brown, Outreach & Reference Services Librarian
Mitchell Silverman, Reference & Patron Services Librarian
Chad Moulder, Clinic and Audiovisual Technology Coordinator
Sanjaya Phuyal, Videoconferencing and Audio Visual Field Support
Specialist
Ray Ayala, Help Desk
Kevin Billings, Director of Information Management

Alfreda Francis, Assistant Director of Izone
Cagri Tanyar, Programmer/Analyst
Loy Campbell, Manager of Instructional Design
John DeJulio, Senior Project Manager of OHT
Anel Lara, Assistant Manager of Strategic Support Service
Larry Lettie, Manager for Blackboard Systems
Hector Rhon, Manager for Quality Assurance
Naveed Peerani, Director of Emerging Technologies
Hon. Rex Ford, B.S., J.D.
Myrna Galligano-Kozlowski, B.A., J.D.
Andrew Garofalo, B.S., J.D.
Jason Glusman, B.A., J.D.
Adam Goldberg, B.S., J.D., L.L.M.
Evan Goldman, B.A., J.D.
Anthony Gonzalez, B.A., J.D.
Carlos Gonzalez
Shanika Graves, B.A., J.D.
Arthur Green, B.A., J.D.
Tonja Haddad-Coleman, B.A., J.D.
Joseph Harbaugh, B.S., L.L.B., L.L.M.
Ross Hartog, B.S., J.D.
Ann Hesford, B.A., J.D.
Peter Homer, B.A., J.D., M.B.A.
Hon. Alfred Horowitz, B.A., J.D., L.L.M.
Julie Hough, B.A., J.D.
Jacqueline Howe, B.A., J.D.
Yasmin Jacob, B.A., J.D.
Nick Jovanovich
Kimberly Kanoff Berman, B.S., J.D.
Neil Karadbil

LIBRARY STAFF
Eric Young, B.A., M.L.S., J.D. Assistant Dean of Law Library and Technology Center and Associate Professor of Law
Becka Rich, B.A., J.D., M.S. Senior Associate Director of Law Library and Technology Center and Adjunct Professor of Law
Karen Rose, Assistant to the Assistant Dean of the Law Library and Technology Center
Nikki Williams, Assistant Circulation Manager
Alison Rosenberg, Head of Outreach Services
Rob Beharrell, Outreach & Reference Services Librarian
Carolyn Brown, Outreach & Reference Services Librarian
Mitchell Silverman, Refernce & Patron Services Librarian
Chad Moulder, Clinic and Audiovisual Technology Coordinator
Sanjaya Phuyal, Videoconferencing and Audio Visual Field Support Specialist
Ray Ayala, Help Desk
Kevin Billings, Director of Information Management

Alfreda Francis, Assistant Director of IZone
Cagri Tanyar, Programmer/Analyst
Loy Campbell, Manager of Instructional Design
John DeJulio, Senior Project Manager of OHT
Anel Lara, Assistant Manager of Strategic Support Service
Larry Lettie, Manager for Blackboard Systems
Hector Rhon, Manager for Quality Assurance
Naveed Peerani, Director of Emerging Technologies
EDITOR'S NOTE

Annually, the American Branch of the International Law Association and the International Law Students Association (ILSA) pair up to present the International Law Weekend (ILW) conference at Fordham University School of Law, in New York City. This year’s theme “Global Problems, Legal Solutions: Challenges for Contemporary International Lawyers,” explored how international law mechanisms are used to address various global issues ranging from the law of war, arbitration, guardianship, refugee crises, and even FIFA.

The ILSA Journal of International & Comparative Law is in a unique position not only to send members to attend ILW, but also solicit and publish articles from the distinguished legal scholars who comprise each panel. The International Practitioner’s Notebook is the final result of those efforts. We owe many thanks to all of the organizers and participants of ILW—especially Tessa Walker of ILSA and our published authors for their contributions.

In addition, I would like to thank Bryan Appel, Britney Horton, and Michelle Ramos for accompanying me to ILW and for their tremendous efforts in promoting the Journal at ILW. Finally, I would like to thank Gregory Cummings, our Lead Articles Editor, who invested so much time and dedication to make this International Practitioner’s Notebook possible. His professionalism, passion, and desire to better the Journal cannot be understated.

Finally, I would like to thank the Journal board members, junior and senior staffers for their continued dedication to this publication. It has been an honor to lead and work with you all. I am nothing but hopeful and optimistic for the future of this prestigious publication. I know that Volume 23 will continue the Journal’s tradition of professionalism, respect, and excellence.

Lisa Hailey
Editor-in-Chief, 2015-2016
TABLE OF CONTENTS

Large-Scale Dispute Resolution in Jurisdictions without Judicial Class Actions: Learning From the Irish Experience
S.I. Strong 341

An Interim Essay on FIFA’s World Cup of Corruption: The Desperate Need for International Corporate Governance
Professor Bruce W. Bean 367

Saving Lives and Building Society: The European Migration Agenda Kong
Dr. Catherine Tinker 393

Loss and Damage and the 21st Conference of the Parties to the United Nations Framework Convention on Climate Control
Dr. Wil Burns 415

Emerging International Trends and Practices in Guardianship Law for People with Disabilities
Robert Dinerstein, Esmé Grant Grewal, & Jonathan Martinis 435

Captivity and the Law: Hostages, Detainees and Criminal Defendants in the Fight Against Terrorism
Adam R. Pearlman 461

Fact Finding and States in Emergency
Charles Garraway 471

Securing Child Rights in Time of Conflict
Diane Marie Amann 483

#Lawyeringpeace: The Role of Lawyers in Peacebuilding
Paul R. Williams & Christin Coaster 493
International Law Weekend
Nov. 5-7, 2015

Global Problems, Legal Solutions:
Challenges for Contemporary International Lawyers

Presented by
the American Branch of the International Law Association &
the International Law Students Association

Thursday events will be held at the New York City Bar
42 West 44th Street, New York City

Friday and Saturday panels will be held at Fordham University School of Law
150 West 62nd Street, New York City

Admission to ILW is free for members of ABILA, ILSA, the New York City Bar, and other co-sponsoring organizations, as well as staff of the United Nations and Permanent Missions to the United Nations, and students. For all others, there is a fee of $175.

*Please note this program is subject to change
ILW 2015

Welcome

The American Branch of the International Law Association (ABILA) and the International Law Students Association (ILSA) welcome you to the annual International Law Weekend (ILW) conference in New York City. This exciting event brings together hundreds of practitioners, law professors, members of governmental and non-governmental organizations, and students. The theme of ILW 2015 is “Global Problems, Legal Solutions: Challenges for Contemporary International Lawyers”. Expert panels will explore the many roles that international law plays in addressing global challenges. The aim is to provide an opportunity for discussion and debate about the ways in which international law provides fundamental tools and mechanisms to address emerging global issues. ILW 2015 will offer engaging panels on current problems and innovative solutions in both public and private international law.

ILW begins Thursday evening, November 5, 2015 with a distinguished opening panel at the New York City Bar (42 W. 44th Street). A reception sponsored by Shearman & Sterling LLP will follow and is open to all conference attendees.

The conference continues Friday, November 6 and Saturday, November 7, 2015 at Fordham University School of Law (150 West 62nd Street). Friday’s activities feature a keynote address by Miguel de Serpa Soares, United Nations Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, at Fordham University School of Law. This event is open to all conference attendees.

A number of panels this year will be designed for continuing legal education (CLE). CLE credit will be offered to all ILW attendees at no additional cost through the sponsorship and assistance of White & Case LLP, which is an accredited provider of New York and California CLE credit. Attorneys licensed in other states can apply for CLE credit in their own jurisdiction using the New York CLE certificate provided by White & Case.

On Friday evening, the Permanent Mission of the Republic of Singapore to the United Nations (318 E 48th St, New York, NY 10017) will host a reception for a limited number of conference attendees. Pre-registration is required. If you are pre-registered for this event, please remember to bring photo identification and your conference badge. A nominal ABI LA registration fee of $20 will be charged to confirm participation at the reception. The ABI LA registration fee will be applied to cover other costs of ILW. The support and generosity of the Permanent Mission of the Republic of Singapore is greatly appreciated.

Saturday’s events include meetins of ABI LA and ILSA members. Those interested in joining ABI LA or ILSA are invited to attend.

Due to the generosity of co-sponsoring organizations, attendance at ILW is free for members of ABI LA, ILSA, the New York City Bar and other co-sponsoring organizations, as well as staff of the United Nations and Permanent Missions to the United Nations, and students. For all others, there is a fee of $175.

After the ILW conference has ended, the ILSA Journal of International & Comparative Law publishes an issue of the Journal that contains articles written by speakers and panelists at International Law Weekend. This issue is titled “The International Practitioner’s Notebook.” Please email ilsa.journal.northeastern@gmail.com to subscribe to the Journal or purchase this issue.

Schedule

At-a-Glance

Thursday, November 5, 2015
New York City Bar

6:30pm
The Rule of Law and the Post 2015 Development Agenda
(Meeting Ball, Second Floor)

8:00pm
Opening Reception Sponsored by Shearman & Sterling LLP
(Sedan Lounge, Second Floor)

Friday, November 6, 2015
Fordham Law School

8:00am
Complimentary Coffee provided by International and Non-J.D. Programs, Fordham Law School
(Sedan Lounge)

9:00am
Beyond Int’l Commercial Arbitration: The Promise of Int’l Commercial Mediation
Room 4-420

9:30am
The Post-2015 UN Development Agenda – a different future?
Room 2-020

10:30am
International Law and States in Emergency: Responses and Challenges
Room 2-02A

10:30am
The Road to Paris: What Can We Expect from the 23rd Conference of the Parties to the UNFCCC
Room 2-01A

10:30am
First steps in the new Arms Trade Treaty
Room 2-01A

10:30am
Towards a New Implementing Agreement Under UNCLOS on Marine Biodiversity in Areas Beyond National Jurisdiction
Room 2-01A

11:30am
Lunch Sponsored by the Leitner Center for International Law and Justice
(Sedan Lounge)

1:30pm
United Nations Under-Secretary-General for Legal Affairs and United Nations Legal Counsel
Room 2-02B

4:45pm
Ethics for Counsel in International Adjudication
Room 2-02C

4:45pm
Corporate Responsibility for International Crimes
Room 2-02A

6:30pm
Reception at the Permanent Mission of Singapore (318 E 48th St, New York, NY 10017)
Pre-registration is required.
ILW 2015

Welcome

The American Branch of the International Law Association (ABILA) and the International Law Students Association (ILSA) welcome you to the annual International Law Weekend (ILW) conference in New York City. This exciting event brings together hundreds of practitioners, law professors, members of governmental and non-governmental organizations, and students. The theme of ILW 2015 is "Global Problems, Legal Solutions: Challenges for Contemporary International Lawyers". Expert panels will explore the many roles that international law plays in addressing global challenges. The aim is to provide an opportunity for discussion and debate about the ways in which international law provides fundamental tools and mechanisms to address emerging global issues. ILW 2015 will offer engaging panels on current problems and innovative solutions in both public and private international law.

ILW begins Thursday evening, November 5, 2015 with a distinguished opening panel at the New York City Bar (42 W. 44th Street). A reception sponsored by Shearman & Sterling LLP will follow and is open to all conference attendees.

The conference continues Friday, November 6 and Saturday, November 7, 2015 at Fordham University School of Law (150 West 62nd Street). Friday's activities feature a keynote address by Miguel de Serpa Soares, United Nations Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, at Fordham University School of Law. This event is open to all conference attendees.

A number of panels this year will be designated for continuing legal education (CLE). CLE credit will be offered to all ILW attendees at no additional cost through the sponsorship and assistance of White & Case LLP, which is an accredited provider of New York and California CLE credit. Attorneys licensed in other states may apply for CLE credit in their own jurisdiction using the New York CLE certificate provided by White & Case.

On Friday evening, the Permanent Mission of the Republic of Singapore to the United Nations (318 E 48th St, New York, NY 10017) will host a reception for a limited number of conference attendees. Pre-registration is required. If you are pre-registered for this event, please remember to bring photo identification and your conference badge. A nominal ABILA registration fee of $20 will be charged to confirm participation at the reception. The ABILA registration fee will be applied to cover other costs of ILW. The support and generosity of the Permanent Mission of the Republic of Singapore is greatly appreciated.

Saturday's events include meetings of ABILA and ILSA members. Those interested in joining ABILA or ILSA are invited to attend.

Due to the generosity of co-sponsoring organizations, attendance at ILW is free for members of ABILA, ILSA, the New York City Bar and other co-sponsoring organizations, as well as staff of the United Nations and Permanent Missions to the United Nations, and students. For all others, there is a fee of $175.

After the ILW conference has ended, the ILSA Journal of International & Comparative Law publishes an issue of the Journal that contains articles written by speakers and panelists at International Law Weekend. This issue is titled "The International Practitioner's Notebook." Please email ilsa.journal.nevsouthcenter@gmail.com to subscribe to the Journal or purchase this issue.

Schedule

At-a-Glance

Thursday, November 5, 2015
New York City Bar

6:30pm
The Rule of Law and the Post 2015 Development Agenda
(Meeting Hall, Second Floor)

Opening Reception Sponsored by Shearman & Sterling LLP
(Reception Area, Second Floor)

Friday, November 6, 2015
Fordham Law School

8:00am
Complimentary Coffee provided by international and non-J.D. Programs, Fordham Law School
(Soden Lounge)

8:00am
The Road to Paris: What Can We Expect from the 21st Conference of the Parties to the UNFCCC
Room 2-01A

First steps in the new Arms Trade Treaty
Regime
Room 2-01A

Beyond Art'1
Commercial Arbitration: The Promise of Art'1
Commercial Mediation
Room 2-02C

The Post-2015 UN Development Agenda — a different future?
Room 2-01B

International Law and States in Emergency: Response and Challenges
Room 2-02A

What Is GDP?
Room 2-01B

Break

The Boldest Creditors
Problem in Sovereign Debt Workouts
Room 2-02C

International Investment Arbitration: Friend or Foe?
Room 2-01B

TPP, Trade, and Regulatory Cooperation
Room 2-02A

Private International Law in 2015: The Year in Review
Room 2-01B

Towards a New Implementing Agreement Under UNCLOS on Marine Biodiversity in Areas Beyond the Jurisdiction of States
Room 2-01A

Lunch Sponsored by the Leitner Center for International Law and Justice
(Soden Lounge)

1:30pm
Miguel de Serpa Soares
United Nations Under-Secretary-General for Legal Affairs and United Nations Legal Counsel
Room 2-02B

Break

3:00pm
Challenges of Pandemic Response from the Ebola Crisis
Room 2-01B

Saving Lives and Building Society: The EU's New European Migration Agenda
Room 2-02A

The International Law and Policy of Counterterrorism
Room 2-02A

Pathways to Careers in International Law
Room 2-01B

Arctic Ocean Newswatch
Room 2-01A

Break

4:30pm
Ethics for Counsel in International Adjudication
Room 2-02C

Gender Justice: Addressing Domestic Challenges Through International Law
Room 2-01B

Corporate Responsibility for International Crimes
Room 2-02A

Current Events: Law Making by the UN Through the Lewis of Security Council
International Law
Room 2-01A

Room 2-01B

6:30pm
Reception at the Permanent Mission of Singapore (318 E 48th St, New York, NY 10017)
Pre-registration is required.
<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>8:00am</td>
<td>Complimentary Coffee provided by International and Non-J.D. Programs, Fordham Law School</td>
<td>(Soden Lounge)</td>
</tr>
<tr>
<td>9:00am</td>
<td>A Critical Look at Motions to Disqualify Arbitrators</td>
<td>Room 2-02C</td>
</tr>
<tr>
<td>9:00am</td>
<td>Sanctions in Transition</td>
<td>Room 2-01B</td>
</tr>
<tr>
<td>9:00am</td>
<td>The Individual Petition Procedure in International Human Rights Law: Has it lived up to its expectations?</td>
<td>Room 3-01A</td>
</tr>
<tr>
<td>9:00am</td>
<td>The Impact of War Manuals: The Tension between State and Non-State</td>
<td>Room 2-01A</td>
</tr>
<tr>
<td>9:00am</td>
<td>Expression of Conscience in International Humanitarian Law</td>
<td>Room 2-01B</td>
</tr>
<tr>
<td>10:30am</td>
<td>ILSA Board of Directors Meeting</td>
<td>Room 4-02</td>
</tr>
<tr>
<td>10:30am</td>
<td>Break</td>
<td></td>
</tr>
<tr>
<td>10:45am</td>
<td>It's &quot;Shocking&quot; to Think There is Corruption at FIFA</td>
<td>Room 2-02C</td>
</tr>
<tr>
<td>10:45am</td>
<td>Accountability for Crimes in Syria and Iraq</td>
<td>Room 2-02B</td>
</tr>
<tr>
<td>10:45am</td>
<td>Sustainable Development as a &quot;Grandsource&quot; of Int'l Environmental Law</td>
<td>Room 2-01A</td>
</tr>
<tr>
<td>10:45am</td>
<td>Property Rights in Outer Space</td>
<td>Room 2-01B</td>
</tr>
<tr>
<td>10:45am</td>
<td>Challenges Related to Incorporating &amp; Respecting Children's Rights in Int'l Conflict Resolution</td>
<td>Room 2-01A</td>
</tr>
<tr>
<td>11:45am</td>
<td>ABILA Committee Chairs Meeting</td>
<td>Room 4-02</td>
</tr>
<tr>
<td>12:30pm</td>
<td>Lunch Break</td>
<td></td>
</tr>
<tr>
<td>12:30pm</td>
<td>ABILA Executive Committee Meeting (Lunch Provided)</td>
<td>Room 4-02</td>
</tr>
<tr>
<td>12:30pm</td>
<td>ILSA Congress, Meeting of ILSA Members (Lunch Provided)</td>
<td>Room 2-01B</td>
</tr>
<tr>
<td>1:45pm</td>
<td>Emerging International Trends and Practices in Guardianship</td>
<td>Room 2-02C</td>
</tr>
<tr>
<td>1:45pm</td>
<td>TRIPS Agreement at 20</td>
<td>Room 2-01B</td>
</tr>
<tr>
<td>1:45pm</td>
<td>Hacker, Hacker, Cyber Ser: Int'l Legality of Mass Surveillance, Cyber Attacks by State Actors &amp; Other Issues from the 2016 Jessup Competition</td>
<td>Room 2-01A</td>
</tr>
<tr>
<td>1:45pm</td>
<td>International Court Archivists of the 20th International Legal System</td>
<td>Room 3-01B</td>
</tr>
<tr>
<td>1:45pm</td>
<td>Rising Stars, Raisins Session: The Work of the International Law Association Directors and Sea Level Rise Committee</td>
<td>Room 2-01B</td>
</tr>
<tr>
<td>3:15pm</td>
<td>ABILA Members Meeting</td>
<td>Room 4-02</td>
</tr>
<tr>
<td>3:30pm</td>
<td>Careers in International Development</td>
<td>Room 2-02C</td>
</tr>
</tbody>
</table>
## Schedule

### At-a-Glance

**Saturday, November 7, 2015**

<table>
<thead>
<tr>
<th>Time</th>
<th>Session</th>
</tr>
</thead>
<tbody>
<tr>
<td>8:00am</td>
<td>Complimentary Coffee provided by International and Non-J.D. Programs, Fordham Law School (Soden Lounge)</td>
</tr>
<tr>
<td>9:00am</td>
<td>A Critical Look at Motions in Disparity Arbitrations</td>
</tr>
<tr>
<td>9:00am</td>
<td>Room 2-02C</td>
</tr>
<tr>
<td>9:00am</td>
<td>Sanctions In Transition</td>
</tr>
<tr>
<td>9:00am</td>
<td>Room 2-02B</td>
</tr>
<tr>
<td>9:00am</td>
<td>The Individual Rights Procedure in International Human Rights Law: Has It Lived Up to Its Expectations?</td>
</tr>
<tr>
<td>9:00am</td>
<td>Room 2-02A</td>
</tr>
<tr>
<td>9:00am</td>
<td>The Rule of Law: The Transition between State and Non-State</td>
</tr>
<tr>
<td>9:00am</td>
<td>Room 2-02A</td>
</tr>
<tr>
<td>9:00am</td>
<td>Expressions of Coercion under International Human Rights Law</td>
</tr>
<tr>
<td>9:00am</td>
<td>Room 2-01B</td>
</tr>
<tr>
<td>10:30am</td>
<td>ILSA Board of Directors Meeting</td>
</tr>
<tr>
<td>10:30am</td>
<td>Break</td>
</tr>
<tr>
<td>10:45am</td>
<td>It's &quot;Shocking&quot; to Think There Is Corruption at FIFA</td>
</tr>
<tr>
<td>10:45am</td>
<td>Room 2-02C</td>
</tr>
<tr>
<td>10:45am</td>
<td>Accountability for Crimes in Syria and Iraq</td>
</tr>
<tr>
<td>10:45am</td>
<td>Room 2-02B</td>
</tr>
<tr>
<td>10:45am</td>
<td>Sustainable Development as a &quot;Grounds&quot; of Int'l Environmental Law and Policy</td>
</tr>
<tr>
<td>10:45am</td>
<td>Room 2-02A</td>
</tr>
<tr>
<td>10:45am</td>
<td>Regulating the Orbit Activities and Property Rights in Outer Space</td>
</tr>
<tr>
<td>10:45am</td>
<td>Room 2-01B</td>
</tr>
<tr>
<td>10:45am</td>
<td>Challenges Related to Interpreting &amp; Respecting Children's Rights in Int'l Conflict Resolution</td>
</tr>
<tr>
<td>10:45am</td>
<td>Room 2-01A</td>
</tr>
<tr>
<td>11:45am</td>
<td>ABILA Committee Chairs Meeting</td>
</tr>
<tr>
<td>11:45am</td>
<td>Room 4-02</td>
</tr>
<tr>
<td>12:30pm</td>
<td>Lunch Break</td>
</tr>
<tr>
<td>12:30pm</td>
<td>ABILA Executive Committee Meeting (Lunch Provided)</td>
</tr>
<tr>
<td>12:30pm</td>
<td>Room 4-02</td>
</tr>
<tr>
<td>12:30pm</td>
<td>ILSA Congress, Meeting of ABILA Members (Lunch Provided)</td>
</tr>
<tr>
<td>12:30pm</td>
<td>Room 2-01B</td>
</tr>
<tr>
<td>1:45pm</td>
<td>Emerging International Trends and Practices in Guardianship</td>
</tr>
<tr>
<td>1:45pm</td>
<td>Room 2-02C</td>
</tr>
<tr>
<td>1:45pm</td>
<td>EPRSA Agreement: 2020</td>
</tr>
<tr>
<td>1:45pm</td>
<td>Room 2-02B</td>
</tr>
<tr>
<td>1:45pm</td>
<td>Human Rights: The Legality of Mass Surveillance, Cyber Attack by State Actors &amp; Other Issues from the 2016 JESP Compassion</td>
</tr>
<tr>
<td>1:45pm</td>
<td>Room 2-01A</td>
</tr>
<tr>
<td>1:45pm</td>
<td>International Crime in Architecture of the 2016 International Legal System</td>
</tr>
<tr>
<td>1:45pm</td>
<td>Room 2-01B</td>
</tr>
<tr>
<td>1:45pm</td>
<td>Mensa Una, Bases Lines: The Work of the International Law Association Baselines and Law Level Rise Committee</td>
</tr>
<tr>
<td>1:45pm</td>
<td>Room 2-01A</td>
</tr>
<tr>
<td>3:15pm</td>
<td>Break</td>
</tr>
<tr>
<td>3:30pm</td>
<td>ABILA Members Meeting</td>
</tr>
<tr>
<td>3:30pm</td>
<td>Room 2-02C</td>
</tr>
<tr>
<td>3:30pm</td>
<td>Careers in International Development</td>
</tr>
<tr>
<td>3:30pm</td>
<td>Room 2-02C</td>
</tr>
</tbody>
</table>

### Schedule

**Thursday, November 5**

- **6:30pm**
  - **2nd Floor**
  - **Meeting Hall, New York City Bar**
  - **The Rule of Law and the Post 2015 Development Agenda**
    - A dialogue with senior UN officials and representatives of member states on efforts to advance the UN Rule of Law Initiative and to achieve the Sustainable Development Goals (SDGs) over the next fifteen years. This event has been organized by ABILA in consultation with the ABA's Section on International Law and the New York City Bar Association.
  - **Moderator:**
    - David Stewart, President of the American Branch of the International Law Association Panellists:
      - Ambassador David Donoghue, Permanent Representative of Ireland to the United Nations
      - Ambassador Juan Manuel Gómez Robledo (Mexico), member of the International Law Commission
      - Irene Z. Khan, Director General of the International Development Law Organization
      - Lisa King, Executive Director of UN Global Compact

- **8:00pm**
  - **2nd Floor**
  - **Reception Area, New York City Bar**
  - **Opening Reception**
    - The wine and cheese reception at the New York City Bar is open to all ILW attendees.
    - This reception is generously sponsored by Shearman & Sterling LLP.
Schedule
Friday, November 6

8:00am
Suden Lounge
Complimentary Coffee provided by International and Non-J.D. Programs, Fordham Law School

9:00am
Room 2-02C
Beyond International Commercial Arbitration? The Promise of International Commercial Mediation
Although arbitration has long been touted as the primary means of resolving international commercial and investment disputes, users have expressed an increasing interest in mediation as a faster and cheaper alternative. This panel considers new developments along these lines, including but not limited to the proposed new treaty by UNCITRAL on international commercial mediation and recent empirical research concerning the use and perception of international commercial mediation worldwide. A diverse set of panelists from the public, private, academic, and neutral sectors ensures a wide-ranging and comprehensive analysis.

Moderator:
• S.J. Strong, Manley O. Hudson Professor of Law, University of Missouri
Panelists:
• Kahir Duggal, Senior Associate, Baker McKenzie
• Deborah Massicci, Chair of the Board, International Mediation Institute (IMI)
• private mediator and arbitrator
• Edna Sussman, Principal, SussmanADR LLC, Distinguished ADR Practitioner in Residence, Fordham University School of Law

9:00am
Room 2-02B
The Post-2015 UN Development Agenda – a different future?
The September 2015 United Nations Summit launched a new global development framework, centered on a set of Sustainable Development Goals (SDGs) for the next fifteen years. Will this Agenda be truly universal, comprehensive and transformative? This panel will address the fundamental issues raised during the complex negotiating process, placing special emphasis on the additional dimensions brought into the debate, and explore the various challenges confronting all stakeholders from a variety of perspectives.

Moderator:
• Christiane Bourjouyannis-Vrallas, UN Representative, Maragopouloos Foundation for Human Rights
Panelists:
• Judith Armas, Director of External Relations and Deputy Permanent Observer to the United Nations, International Development Law Organization
• Ambassador Macharia Kamau, Permanent Representative of Kenya to the UN, Co-Facilitator of the intergovernmental negotiations on the post-2015 development agenda
• Daniel Magraw, Senior Fellow and Professorial Lecturer, Foreign Policy Institute, Johns Hopkins School of Advanced International Studies (SAIS)
• Kate Donald, Director, Human Rights in Development Program, Center for Economic and Social Rights

Schedule
Friday, November 6

9:00am
Room 2-02A
International Law and States in Emergency: Responses and Challenges
This panel discussion will involve perspectives on international law responses to threats, with a focus on whether international law has the right tools in order to adequately address a particular state's response to an emergency/extra-ordinary situation. This panel will examine various strategies available under international law, which can be deployed in various situations of states of emergency. The international law response will have to balance the needs of the emergency. If not, is there a way to overcome international law's shortcomings by perhaps engaging in regional responses? This panel will be structured in a roundtable format, with the moderator asking each panelist a series of substantive questions on the above topic.

Moderator:
• Milena Sterio, Professor, Cleveland State University
Panelists:
• Matthew Charity, Professor, Western New England School of Law
• Paul Williams, Professor, American University Washington College of Law
• Charles Garraway, International Humanitarian Fact Finding Commissioner
• Michael Scharf, Co-Dean and Professor, Case Western Reserve University School of Law

9:00am
Room 2-01B
The Road to Paris: What Can We Expect from the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change?
The upcoming 21st Conference of the Parties to the United Nations Framework Convention on Climate Change promises to be one of the most momentous to date. This roundtable seeks to identify and assess the effectiveness of the likely outcomes of the conference, including efforts to establish a legally binding long-term agreement to reduce greenhouse gas emissions, and the obduracy of the parties' efforts to develop effective adaptation and loss and damage mechanisms.

Panelists:
• Kate O'Neill, University of California Berkeley, Department of Environmental Science, Policy and Management
• Will Burns, Co-Director, Forum for Climate Engineering Assessment
• Nate Keohane, Vice President, International Climate, Environmental Defense Fund
• Andrew Strauss, Dean, University of Dayton School of Law
Schedule
Friday, November 6

8:00am
Suden Lounge

Complimentary Coffee provided by International and Non-J.D. Programs, Fordham Law School

9:00am
Room 2-02C

Beyond International Commercial Arbitration: The Promise of International Commercial Mediation

Although arbitration has long been touted as the primary means of resolving international commercial and investment disputes, users have expressed an increasing interest in mediation as a faster and cheaper alternative. This panel considers new developments along these lines, including but not limited to the proposed new treaty by UNCITRAL on international commercial mediation and recent empirical research concerning the use and perception of international commercial mediation worldwide. A diverse set of panelists from the public, private, academic and neutral sectors ensures a wide-ranging and comprehensive analysis.

Moderator:
• S.L. Strong, Martin O. Hudson Professor of Law, University of Missouri

Panelists:
• Kahir Duggal, Senior Associate, Baker & McKenzie
• Deborah Massacci, Chair of the Board, International Mediation Institute (IMI); private mediator and arbitrator
• Edna Sussion, Principal, SusmanADR LLC; Distinguished ADR Practitioner in Residence, Fordham University School of Law

9:00am
Room 2-02B

The Post-2015 UN Development Agenda - a different future?

The September 2015 United Nations Summit launched a new global development framework, centered on a set of Sustainable Development Goals (SDGs) for the next fifteen years. Will this Agenda be truly universal, comprehensive and transformative? This panel will address the fundamental issues raised during the complex negotiating process, placing special emphasis on the additional dimensions brought into the debate, and explore the various challenges confronting all stakeholders from a variety of perspectives.

Moderator:
• Christiane Bourjouyannis-Vrailas, UN Representative, Maropoulous Foundation for Human Rights

Panelists:
• Judit Arwas, Director of External Relations and Deputy Permanent Observer to the United Nations, International Development Law Organization
• Ambassador Macharia Kamau, Permanent Representative of Kenya to the UN, Co-Facilitator of the intergovernmental negotiations on the post-2015 development agenda
• Daniel Magraw, Senior Fellow and Professorial Lecturer, Foreign Policy Institute, Johns Hopkins School of Advanced International Studies (SAIS)
• Kate Donald, Director, Human Rights in Development Program, Center for Economic and Social Rights

Schedule
Friday, November 6

9:00am
Room 2-02A

International Law and States in Emergency: Responses and Challenges

This panel discussion will involve perspectives on international law responses to threats, with a focus on whether international law has the right tools in order to adequately address a particular state's response to an emergency/extraordinary situation. This panel will examine various strategies available under international law, which can be deployed in various situations of states of emergency. Does international law respond well to states of emergency? If not, is there a way to overcome international law's shortcomings by perhaps engaging in regional responses? This panel will be structured in a roundtable format, with the moderator asking each panelist a series of substantive questions on the above topic.

Moderator:
• Milena Sterio, Professor, Cleveland State University

Panelists:
• Matthew Charity, Professor, Western New England School of Law
• Paul Williams, Professor, American University Washington College of Law
• Charles Garraway, International Humanitarian Fact Finding Commission
• Michael Scharf, Co-Dean and Professor, Case Western Reserve University School of Law

9:00am
Room 2-01B

The Road to Paris: What Can We Expect from the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change?

The upcoming 21st Conference of the Parties to the United Nations Framework Convention on Climate Change promises to be one of the most momentous to date. This roundtable seeks to identify and assess the effectiveness of the likely outcomes of the conference, including efforts to establish a legally binding long-term agreement to reduce greenhouse gas emissions, and the adequacy of the partial efforts to develop effective adaptation and loss and damages mechanisms.

Panelists:
• Kate O'Neill, University of California Berkeley, Department of Environmental Science, Policy and Management
• Wil Burns, Co-Director, Forum for Climate Engineering Assessment
• Nate Koehnke, Vice President, International Climate, Environmental Defense Fund
• Andrew Strauss, Dean, University of Dayton School of Law
Schedule
Friday, November 6

9:00am
Room 2-01A

First steps in the new Arms Trade Treaty Regime
In September 2014, the Arms Trade Treaty (ATT) entered into force and consultations began to set up the new treaty regime. Preparatory meetings concluded and the first Conference of States Parties occurred in August 2015. By May 2016, states must submit their first reports on their arms trade. This panel will look back on the progress over the last year and predict how the new treaty regime will function to help prevent the illicit trade in arms.

Moderator:
- William Wurster, Lecturer, The Hague University of Applied Sciences
Panelists:
- Daniel Prins, Chief, Conventional Arms Branch, United Nations Office for Disarmament Affairs
- Cristiano Carneiro, Universidade de Sao Paulo

10:45am
Room 2-02C

The Holdout Creditor Problem in Sovereign Debt Workouts
The central challenge in workouts of sovereign debt problems is how, in the absence of an institutionalized bankruptcy mechanism, to ensure supermajority creditor control of the process. After more than a decade, Argentina is still locked in a fierce courtroom battle with holdouts from its bond restructuring in 2005. Various mechanisms have been proposed, and some implemented, over the last 20 years to address the holdout creditor problem in restructurings of sovereign debt. This panel will review the design and the efficacy of these measures.

Moderator:
- Lee Buchheit, Partner, Cleary Gottlieb Steen & Hamilton LLP
Panelists:
- Anne Krueger, Senior Research Professor of International Economics, Johns Hopkins School of Advanced International Studies
- Yun Liu, Assistant General Counsel, International Monetary Fund
- David Mack, Managing Director, Perry Capital, LLC

Schedule
Friday, November 6

10:45am
Room 2-02B

International Investment Arbitration: Friend or Foil?
Investor-State dispute settlement (ISDS) has become the dispute resolution mechanism of choice for resolving international investment disputes. Yet the legitimacy of ISDS is increasingly under fire. Citing arbitrator conflicts and the lack of an appeals mechanism, the European Union recently called for the establishment of a permanent international investment court. Experts in this panel will evaluate this proposal and current criticisms of ISDS, and discuss possible ways forward.

Moderator:
- Chiara Giorgetti, Professor, University of Richmond
Panelists:
- Stephen M. Schwebel, Independent Arbitrator; former President of the International Court of Justice
- José Alvarez, Herbert and Rose Rubin Professor of International Law, New York University School of Law
- Natalie Morris, Legal Counselor, Permanent Mission of Singapore to the United Nations

10:45am
Room 2-02A

TTIP, Trade, and Regulatory Cooperation
Although regulation has long been viewed as a barrier to trade, it has increasingly been a challenge for the trading regime since tariffs have decreased. Regulatory regimes differ across countries in their aims and in their details. Where regulatory aims are similar, the details nonetheless may require traders to meet different standards, increasing costs while not increasing welfare. How can such regulatory barriers be dismantled? How can regulators work together not only to remove unnecessary regulatory measures but also to learn from each other in order to upgrade regulations while doing so that does not unfairly prejudice each other's constituencies? These are the challenges that 21st trade agreements aim to address. The proposed Transatlantic Trade and Investment Partnership (TTIP) is a leading example.

Moderator:
- Gregory Shaffer, Professor, University of California, Irvine School of Law
Panelists:
- Charles Sabel, Professor, Columbia Law School
- Richard Parker, Professor, University of Connecticut Law School
- Nicola Fernanda, Professor, American University Washington College of Law
- Simon Lester, Trade Policy Analyst, CATO Institute
- Michelle Egan, Assistant Professor, American University School of International Service
Schedule
Friday, November 6

9:00am
Room 2-01A
First steps in the new Arms Trade Treaty Regime
In September 2014, the Arms Trade Treaty (ATT) entered into force and consultations began to set up the new treaty regime. Preparatory meetings concluded and the first Conference of States Parties occurred in August 2015. By May 2016, states must submit their first reports on their arms trade. This panel will both look back on the process over the last year and predict how the new treaty regime will function to help prevent the illicit trade in arms.

Moderator:
• William Woester, Lecturer, The Hague University of Applied Sciences
Panelists:
• Daniel Prins, Chief, Conventional Arms Branch, United Nations Office for Disarmament Affairs
• Cristiane Carneiro, Universidade de Sao Paulo

10:45am
Room 2-02C
The Holdout Creditor Problem in Sovereign Debt Workouts
The central challenge in workouts of sovereign debt problems is how, in the absence of an institutionalized bankruptcy mechanism, to ensure supermajority creditor control of the process. After more than a decade, Argentina is still locked in a fierce courtroom battle with holdouts from its bond restructuring in 2005. Various mechanisms have been proposed, and some implemented, over the last 10 years to address the holdout creditor problem in restructurings of sovereign debt. This panel will review the design and the efficacy of these measures.

Moderator:
• Lee Buchheit, Partner, Cleary Gottlieb Steen & Hamilton LLP
Panelists:
• Anne Krueger, Senior Research Professor of International Economics, Johns Hopkins School of Advanced International Studies
• Yan Liu, Assistant General Counsel, International Monetary Fund
• David Mack, Managing Director, Perry Capital, LLC

Schedule
Friday, November 6

10:45am
Room 2-02B
International Investment Arbitration: Friend or Foe?
Investor-State dispute settlement (ISDS) has become the dispute resolution mechanism of choice for resolving international investment disputes. Yet, the legitimacy of ISDS is increasingly under fire. Citing arbitrator conflicts and the lack of an appeals mechanism, the European Union recently called for the establishment of a permanent international investment court. Experts in this panel will evaluate this proposal and current criticisms of ISDS, and discuss possible ways forward.

Moderator:
• Chiara Giorgetti, Professor, University of Richmond
Panelists:
• Stephen M. Schwede, Independent Arbitrator, former President of the International Court of Justice
• José Alvarez, Herbert and Rose Rubn Professor of International Law, New York University School of Law
• Natalie Morris, Legal Counselor, Permanent Mission of Singapore to the United Nations

10:45am
Room 2-02A
TTIP, Trade, and Regulatory Cooperation
Although regulation has long been viewed as a barrier to trade, it has increasingly become a challenge for the trading regime since tariffs have decreased. Regulatory regimes differ across countries in their aims and in their details. Where regulatory aims are similar, the details nonetheless may require traders to meet different standards, increasing costs while not increasing welfare. How can such regulatory barriers be diminished? How can regulators work together not only to remove unnecessary regulatory measures but also to learn from each other in order to upgrade regulations while doing so that does not unfairly prejudice each other’s constituents. These are the challenges that 21st treaty agreements aim to address. The proposed Transatlantic Trade and Investment Partnership (TTIP) is a leading example.

Moderator:
• Gregory Shaffer, Professor, University of California, Irvine School of Law
Panelists:
• Charles Sabel, Professor, Columbia Law School
• Richard Parker, Professor, University of Connecticut Law School
• Nicola Fernandez, Professor, American University Washington College of Law
• Simon Lester, Trade Policy Analyst, CATO Institute
• Michelle Egan, Assistant Professor, American University School of International Service
Schedule
Friday, November 6

10:45am
Private International Law in 2015: The Year in Review
Room 2-01B
This panel will provide multiple perspectives on important developments of private international law in
the past year, including those that arise close in time to the International Law Weekend. Presentations
will include coverage of recent judicial and other decisions, recent actions on treaties, recent work of
intergovernmental organizations, and recent legislation of the European Union and Organization of
American States. Time will be reserved for discussion so that the implications of the new developments
may be fully considered by the panel and the audience. The panel will include an academic, an
international practitioner, a representative of the OAS, a representative of the Hague Conference on
Private International Law, and a representative of the U.S. Department of State.

Moderator:
Louise Ellen Teitl, Professor of Law, Roger Williams Law School, Bristol, Rhode Island

Panelists:
Ronald A. Brand, Professor of Law and Director, Center for International Legal Education,
University of Pittsburgh School of Law
John J. Rim, Assistant Legal Advisor, U.S. Department of State
Marta Pertegas, First Secretary, Hague Conference on Private International Law
David P. Stewart, Professor of Law, Georgetown University Law Center
Peter Truesdell, Senior Counsel, Covington & Burling LLP, Washington, DC

10:45am
Towards a New Implementing Agreement Under UNCLOS on Marine Biodiversity in Areas
Beyond National Jurisdiction
Room 2-01A
in January of 2015 the United Nations' Working Group charged to study issues relating to the
conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction
(the RBM Working Group), recommended to the General Assembly to develop an international legally
binding instrument under UNCLOS on the conservation and sustainable use of marine biological
diversity in areas beyond national jurisdiction. Prior to holding an Intergovernmental Conference, a
preparatory committee will be established in 2016. This panel will consider potential options through a
moderated Q&A discussion on: a) Institutional mechanisms for effective governance; b) marine genetic
resources; c) area based-management tools; d) case-studies and practical challenges; e) Next steps.

Moderator:
Bére Tladi, Member of the International Law Commission; Professor of International Law,
University of Pretoria

Panelists:
Ambassador Eden Charles, Deputy Permanent Representative of Trinidad and Tobago to
the United Nations, Chairperson of the Sixth Committee and General Assembly Coordinator
on the Oceans and Law of the Sea resolution
Kristina M. Gerdes, Senior High Seas Adviser, International Union for the Conservation of
Nature (IUCN) Global Marine and Polar Programme
Gabriele Goetsche-Weiss, Director, United Nations Division for Ocean Affairs and the Law
of the Sea
Gennie R. Payne, Assistant Professor at Rutgers University
Schedule
Friday, November 6

10:45am
Room 2-01B
Private International Law in 2015: The Year in Review
This panel will provide multiple perspectives on important developments in private international law in the past year, including those that are closely tied to the International Law Weekend. Presentations will include coverage of recent judicial and other decisions, recent actions on treaties, recent work of intergovernmental organizations, and recent legislation of the European Union and Organization of American States. Time will be reserved for discussion so that the implications of the new developments may be fully considered by the panel and the audience. The panel will include an academic, an international practitioner, a representative of the OAS, a representative of the Hague Conference on Private International Law, and a representative of the U.S. Department of State.

Moderator:
- Louise Ellen Teti, Professor of Law, Roger Williams Law School, Bristol, Rhode Island

Panelists:
- Ronald A. Brand, Professor of Law and Director, Center for International Legal Education, University of Pittsburgh School of Law
- John J. Kim, Associate Legal Adviser, U.S. Department of State
- Marta Pertegis, First Secretary, Hague Conference on Private International Law
- David P. Stewar, Professor of Law, Georgetown University Law Center
- Peter Troadoff, Senior Counsel, Covington & Burling LLP, Washington, DC

10:45am
Room 2-01A
Towards a New Implementing Agreement Under UNCLOS on Marine Biodiversity in Areas Beyond National Jurisdiction
In January of 2015 the United Nations’ Working Group charged to study issues relating to the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (the BBN Working Group), recommended to the General Assembly to develop an implementing agreement under UNCLOS on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction. Prior to holding an implementation conference, a preparatory committee will be established in 2016. This panel will consider potential options through a moderated Q&A discussion on: a) institutional mechanisms for effective governance; b) marine genetic resources; c) area based management tools; d) case studies and practical challenges; e) next steps.

Moderator:
- Dire Tladi, Member of the International Law Commission; Professor of International Law, University of Pretoria

Panelists:
- Ambassador Eden Charles, Deputy Permanent Representative of Trinidad and Tobago to the United Nations, Chairperson of the Sixth Committee and General Assembly Coordinator on the Oceans and Law of the Sea resolution
- Gabrielle Gootsche-Wani, Director, United Nations Division for Ocean Affairs and the Law of the Sea
- Cynlie R. Payne, Assistant Professor at Rutgers University
Schedule
Friday, November 6

3:00pm
Room 2-02C

The Challenges of Pandemic Response: Lessons from the Ebola crisis
This panel will discuss lessons to be learned from the international community’s response to the Ebola epidemic and efforts to improve the response to future public health emergencies. Among other topics, the panel will explore pathways to securing increased compliance with the World Health Organization’s International Health Regulations, as well as the feasibility and advisability of establishing a reserve corps of medical health professionals, under the aegis of an international organization, to be deployed in response to global health emergencies.

Moderator:
- Noah Halpern, Associate Legal Officer, United Nations Office of Legal Affairs

Panelists:
- Laurie Garrett, Senior Fellow for Global Health, Council on Foreign Relations
- Dr. Suerie Moon, Research Director and Co-Chair, Forum on Global Governance for Health, Harvard Global Health Institute and Harvard School of Public Health
- Steven Hoffman, Associate Professor of Law and Director of the Global Strategy Lab, University of Ottawa

3:00pm
Room 2-02B

Saving Lives and Building Society: The EU’s New European Migration Agenda
The panel will discuss measures contained in the new EU “European Migration Agenda” and related provisional measures. Adopted in response to the worsening humanitarian crisis, these policies respond to ever-greater numbers of people fleeing war, violence, effects of climate change and other dangers and attempting to enter the EU across the Mediterranean Sea or the Balkan routes. Once inside the EU, many of these “irregular” migrants face new forms of exploitation by smugglers and organized crime, indeterminate delays in processing asylum applications, and even detention with uncertainties due to variations in legal and policy standards in Member State laws related to migrants and refugees.

**This panel is led by the New York City Bar Association’s European Affairs Committee, based on a series of public programs on “The Future of Migration into Europe” and a new “Letter in Support of the European Migrations Agenda” by the Committee sent to the European Council, Parliament, Commission and others.

Moderator:
- Dr. Catherine Tinker, Adjunct Professor, Seton Hall University School of Diplomacy and International Relations; Visiting Professor, UFRGS Law School, Porto Alegre, Brazil

Panelists:
- Lucio Gassetti, Director and Principal Legal Adviser, European Commission, for Foreign and Security Policy and External Relations
- Mary Peanuts, Esq., Morgan Lewis & Bockius LLP, associate in litigation and international arbitration
- Colleen Hoffman, Esq., Davis Polk & Wardwell, LLP, associate in the Financial Institutions Group
- Ivan Simonovic, United Nations Assistant Secretary-General, Director of the New York Office of the UN High Commissioner for Human Rights

3:00pm
Room 2-01B

The International Law and Policy of Counterterrorism
As ISIS, of Raqqa and its offshoots, and other groups spread terror across the globe, it is vital to establish a strong framework for the international law and policy of counterterrorism. This includes understandings and cooperation on surveillance, detention, counterterrorism finance, and the law of espionage. These subjects will be addressed by panelists with both real world and academic experience.

Moderator:
- Vincent Vlckowski, Partner, Seeger Glitner & Lauria LLP, and member of the Executive Committee of ALILA

Panelists:
- Jamal N. Jaffer, Adjunct Professor of Law and Director, Homeland & National Security Law Program at George Mason University School of Law, former Chief Counsel & Senior Advisor at the Senate Foreign Relations Committee, and former Associate Counsel to President George W. Bush
- Matthew Heiman, Vice President, Chief Compliance and Audit Officer, Tyco International; former Attorney Advisor, U.S. Department of Justice National Security Division; former Legal Advisor, Coalition Provisional Authority, Ministry of Justice, Iraq
- Adam R. Pec, Associate Deputy General Counsel, U.S. Department of Defense (appearing in his personal capacity and not as a representative of the Department of Defense); Co-Editor of The American Bar Association’s publication The U.S. Intelligence Community Law Sourcebook
- Peter Margules, Professor of Law, Roger Williams Law School

Pathways to Careers in International Law
A unique forum that brings law students and new lawyers together with experienced practitioners to discuss possible careers in international law. Learn how to network with legal experts from around the world, practice in other legal systems and cultures, become active in international organizations and societies, and develop legal and interpersonal skills. Sponsored by the ABA Section of International Law and ILSA.

Moderator:
- Lesley Bean, Executive Director, International Law Students Association

Panelists:
- Desiree Jaeger-Fine, Principal, Jaeger-Fine Consulting
- M. Imad Khan, Associate, White & Case LLP
- Stephan Grywacz, Owner, Law Office of S. Grywacz, PLLC
- Joshua Alter, Program Director, Office of Transnational Programs; Adjunct Professor of Law, St. John’s University School of Law
Schedule
Friday, November 6

3:00pm
Room 2-02C
The Challenges of Pandemic Response: Lessons from the Ebola crisis
This panel will discuss lessons to be learned from the international community's response to the Ebola epidemic and efforts to improve the response to future public health emergencies. Among other topics, the panel will explore pathways to securing increased compliance with the World Health Organization's international health regulations, as well as the feasibility and advisability of establishing a reserve corps of medical health professionals, under the aegis of an international organization, to be deployed in response to global health emergencies.

Moderator:
• Noah Bialostotzky, Associate Legal Officer, United Nations Office of Legal Affairs

Panelists:
• Laurie Garrett, Senior Fellow for Global Health, Council on Foreign Relations
• Dr. Laura Mason, Research Director and Co-Chair, Forum on Global Governance for Health, Harvard Global Health Institute and Harvard School of Public Health
• Steven Hoffman, Associate Professor of Law and Director of the Global Strategy Lab, University of Ottawa

*This panel is approved for CLE credits

3:00pm
Room 2-02B
Saving Lives and Building Society: The EU's New European Migration Agenda
The panel will discuss measures contained in the new EU "European Migration Agenda" and related provisional measures. Adopted in response to the worsening humanitarian crisis, these policies respond to ever-greater numbers of people fleeing war, violence, effects of climate change and other dangers and attempting to enter the EU across the Mediterranean Sea or the Balkan route. Since inside the EU, many of these "irregular" migrants face new forms of exploitation by smugglers and organized crime, indeterminate delays in processing asylum applications, and other detentions with uncertainties due to variations in legal and policy standards in Member State laws related to migrants and refugees.

**This panel is led by the New York City Bar Association's European Affairs Committee, based on a series of public programs on "The Future of Migration into Europe" and a new "Letter to Support the European Migration Agenda" by the Committee sent to the European Council, Parliament, Commission and others.

Moderator:
• Dr. Catherine Tinker, Adjunct Professor, Seton Hall University School of Diplomacy and International Relations; Visiting Professor, UFRGS Law School, Porto Alegre, Brazil

Panelists:
• Lucio Gassetti, Director and Principal Legal Adviser, European Commission, for Foreign and Security Policy and External Relations
• Mary Peroni, Esq., Morgan Lewis & Bockius LLP, associate in litigation and international arbitration
• Colleen Holden, Esq., Davis Polk & Wardwell, LLP, associate in the Financial Institutions Group
• Ivan Simonovic, United Nations Assistant Secretary-General, Director of the New York Office of the UN High Commissioner for Human Rights

3:00pm
Room 2-01B
Pathways to Careers in International Law
A unique forum that brings law students and new lawyers together with experienced practitioners to discuss possible careers in international law. Learn how to network with legal experts from around the world, practice in other legal systems and cultures, become active in international organizations and societies, and develop legal and interpersonal skills. Sponsored by the ABA Section of International Law and ILSA

Moderator:
• Lesley Bean, Executive Director, International Law Students Association

Panelists:
• Desiree Jaeger-Fine, Principal, Jaeger-Fine Consulting
• M. Imad Khan, Associate, White & Case LLP
• Stephen Grywacz, Owner, Law Office of S. Grywacz, PLLC
• Joshua Alter, Program Director, Office of Transnational Programs; Adjunct Professor of Law, St. John's University School of Law
Schedule
Friday, November 6

3:00pm
Room 2-01A

Arctic Ocean Stewardship

The Arctic Ocean is at the threshold of significant changes. The impacts of these changes will be felt, not just by the wildlife, but by the people who live on the margins of the Arctic Ocean, and particularly, by the traditional communities who derive their subsistence from its marine resources and fisheries. At the same time, opportunities are emerging for economic activities and development of the Arctic region’s natural resources. Three new development opportunities in particular—the prospect of new shipping routes, expanded oil and gas development and new commercial fishing—could generate system-wide environmental impacts and will therefore likely pose novel management challenges for the Arctic nations and the international community. This panel will discuss what role existing international legal mechanisms can play in fostering and supporting environmental security in Arctic waters.

Moderator:
- Suzanne Lalonde, Professor of Law, Faculty of Law, University of Montreal

Panelists:
- Charles H. Norchi, Professor of Law and Director, Centre for Oceans and Coastal Law, University of Maine School of Law
- Alexander Shestakov, Director, WWF Global Arctic Programme
- Kristin Bartenstein, Professor of Law and Programme Director, Institut québécois des hautes études internationales, Faculty of Law, Laval University

4:45pm
Room 2-02B

Gender Justice: Addressing Domestic Challenges Through International Law

The promotion of justice and accountability for gender-based human rights violations continues to pose a significant challenge in post-conflict regions. Impunity for these violations is often pervasive. This panel will explore how international law can be used to promote gender justice domestically through legal advocacy and litigation. It will also examine the lessons learned by the international ad hoc criminal tribunals in processing gender crimes under international law, and discuss their applicability as national settings.

Moderator:
- Daniela Krawetz, International criminal justice and gender consultant, UN Women

Panelists:
- Michelle Jarvis, Principal Legal Counsel, Office of the Prosecutor, ICTY
- Linda Bianchi, Public Prosecutor, Public Prosecution Services of Canada, Ottawa, Ontario, Canada; Former Appeals Counsel, Office of the Prosecutor, ICTR
- Pam Spence, Staff Attorney, Center for Constitutional Rights
- Priya Gopalan, Human rights and gender practitioner; former OHCHR Gender Advisor and ICTY Attorney

4:45pm
Room 2-02A

Ethics for Counsel in International Adjudication

International legal practice has changed significantly in recent years, with a greater number of counsel appearing before an increasing number of international courts and tribunals. Counsel in international adjudication, however, continue to face unclear or nuanced ethical rules, and potentially uncertain or overlapping enforcement. This panel will highlight today's most pressing issues and discuss possible solutions.

Moderator:
- Jeremy Sharpe, Partner, Shearman & Sterling LLP

Panelists:
- Judge Joan Donoghue, International Court of Justice
- Chester Brown, Professor of International Law and International Arbitration, Faculty of Law, University of Sydney
- Marcelo Kohan, Professor of International Law, Graduate Institute in Geneva
- Eleni Obadia, Partner, Derains & Gharavi

*This panel is approved for ethics CLÉ credit
Schedule
Friday, November 6

3:00pm
Room 2-01A
Arctic Ocean Stewardship
The Arctic Ocean is at the threshold of significant changes. The impacts of these changes will be felt, not just by the wildlife, but by the people who live on the margins of the Arctic Ocean, and particularly, by the traditional communities who derive their subsistence from its marine animals and fisheries. At the same time, opportunities are expanding for economic activities and development of the Arctic region’s natural resources. Three new development opportunities in particular—the prospect of new shipping routes, expanded oil and gas development and new commercial fishing—could generate systemic, wide-environmental impacts and will therefore likely pose novel management challenges for the Arctic nations and the international community. This panel will discuss what role existing international legal mechanisms can play in fostering and supporting environmental security in Arctic waters.

Moderator:
Suzanne Labonde, Professor of Law, Faculty of Law, University of Montreal
Panelists:
- Charles H. Novchi, Professor of Law and Director, Centre for Oceans and Coastal Law, University of Maine School of Law
- Alexander Shemetkov, Director, WWF Global Arctic Programme
- Kristine Bartowstein, Professor of Law and Programme Director, Institut québécois des études internationales, Faculty of Law, Laval University

4:45pm
Room 2-02B
Gender Justice: Addressing Domestic Challenges Through International Law
The promotion of justice and accountability for gender-based human rights violations continues to pose a significant challenge in post-conflict regions. Impunity for these violations is often pervasive. This panel will explore how international law can be used to promote gender justice domestically through legal advocacy and litigation. It will also examine the lessons learned by the international ad hoc criminal tribunals in prosecuting gender crimes under international law, and discuss their applicability to national settings.

Moderator:
Daniela Krawetz, International criminal justice and gender consultant, UN Women
Panelists:
- Michelle Jarvis, Principal Legal Counsel, Office of the Prosecutor, ICTY
- Linda Bianchi, Public Prosecutor, Public Prosecution Services of Canada, Ottawa, Ontario, Canada; Former Appeals Counsel, Office of the Prosecutor, ICTY
- Pam Speed, Staff Attorney, Center for Constitutional Rights
- Priya Gopalan, Human rights and gender practitioner; former OHCHR Gender Adviser and ICTY Attorney

4:45pm
Room 2-02A
Corporate Responsibility for International Crimes
Corporate responsibility for international crimes is a burgeoning new topic in international criminal justice. In the past years, states have supported a major conference on the topic at the Peace Palace in The Hague, the African Court has adopted corporate criminal liability for international crimes, the Special Tribunal for Lebanon has indicted a corporation, and Swiss prosecutors have formally opened a criminal investigation into a major Swiss firm for a war crime in the Congo. The implications of this turn are still poorly understood, however, and this panel will bring together a mix of the leading experts on this topic to debate the benefits and shortcomings on this rapidly developing field.

Moderator:
James Stewart, Associate Professor, Allard Law School, University of British Columbia
Panelists:
- Russ Siy, Professor, Seattle Law School
- Beth van Schalk, Leah Kaplan Visiting Professor in Human Rights, Stanford Law School
- Beth Stephens, Professor, Rutgers Law School
- Alex Whiting, Professor of Practice, Harvard Law School
Schedule
Friday, November 6

4:45pm
Room 2-01B
Current Events Through the Lenses of International Law
The panelists will discuss current topics in international relations and will assess and evaluate their impact and relevance to international law and its development. Topics discussed will include the use of force, international intervention in Syria, recent developments in international criminal law, the United Nations African Criminal Court, and others as they develop.

Moderator:
• David Stuart, President of the American Branch of the International Law Association, Professor, Georgetown Law
Panels:
• Paul Dubinsky, Associate Professor of Law, Wayne State
• Margaret de Guzman, Associate Professor, Temple University, Beasley School of Law
• Stephen Mathias, Assistant Secretary-General for Legal Affairs, United Nations
• Michael E. Cooper, Managing Director, The Phosphorus Group, LLC

4:45pm
Room 2-01A
Law-making by the UN Security Council
This panel will address the Security Council as a law-maker. The Council has been increasingly active in both passing self-consistently legislative resolutions—such as 1373 (2001) on terrorism financing—and imposing obligations on parties that often diverge from existing international law. To what extent have these resolutions, in particular the second variety, reduced a country's right to determine of its own accord any normative change? How can one tell whether the Council has imposed new legal obligations on parties? And how would one conceptualize Council-made law as a source of more general international obligations?

Moderator:
• Scott Scheehan, Senior Legal Counsel and Sanctions Team Leader, New Zealand Permanent Mission to the United Nations
Panels:
• Gregory Fox, Professor of Law & Director of the Program for International Legal Studies, Wayne State University Law School
• Ian Johnson, Professor, Fletcher School of Law and Diplomacy, Tufts University
• Lorraine Sievers, Chief, United Nations Security Council Secretariat Branch (retired)

6:30pm
Reception at the Permanent Mission of Singapore
318 E 48th St, New York, NY 10017
Pre-registration is required for this event. For security reasons, only those who pre-registered may attend. Registered guests must bring photo identification to present at check in. A nominal $20 registration fee of $20 will be charged to confirm participation at the reception, which is being generously hosted by the Permanent Mission of Singapore to the United Nations. The ALILA registration fee will be applied to cover other costs of the International Law Weekend. The support of the Permanent Mission of Singapore toward International Law Weekend is greatly appreciated.

Schedule
Saturday, November 7

8:00am
Sodex Lounge
Complimentary Coffee provided by International and Non J.D. Programs, Fordham Law School

9:00am
Room 2-02C
A Critical Look At Motions to Disqualify Arbitrators
Arbitral institutions are facing an increasing number of motions to disqualify arbitrators (arbitrator challenges) on the ground that they lack independence and impartiality. Parties are asserting with increased frequency that arbitrators are predisposed to decide a certain issue in a certain way, or have failed to disclose information concerning circumstances that could be perceived as raising a conflict. Whereas the challenge mechanism was once considered unique and rarely exercised, it is increasingly becoming port and parcel of arbitration proceedings, and may be used strategically to disrupt the proceedings, resulting in serious costs and delay. What can parties, arbitrators and institutions do to prevent the challenge mechanism from being abused for strategic purposes?

Moderator:
• Prof. Franco Ferrari, NYU Law School
Panels:
• Brian King, Freshfields Bruckhaus Deringer US LLP
• Melida Hodgson, Foley Hoag LLP

9:00am
Room 2-02B
Sanctions in Transition
UN Sanctions in Transition UN sanctions have changed dramatically in the last decade. In the 1990s, most sanctions were comprehensive. But by 2000, concerns about the humanitarian consequences of comprehensive sanctions gave birth to a new generation of targeted sanctions. Targeted sanctions have defined the UN discourse on sanctions effectiveness for a decade, and yet another shift is underway again. Today, UN sanctions are becoming general again in an effort to avoid the judicial challenges to targeting and to get at supply chains. This panel will discuss some of the UN’s newest innovations in sanctions across multiple current regimes to assess current trends in targeting.

*This panel is approved for CLE credit

Moderator:
• Larissa Van den Heijk, Professor of Int'l Law, Leiden University
Panels:
• Kristen Boon, Professor of Law, Seton Hall Law School
• Evan Gudgel, Professor of Law, Willam and Mary
• Christine Ahlbom, Associate Legal Officer, Codification Division of the UN

*The Speakers are all members of the ILSA Study Group on Multilateral Sanctions and will draw from their current research. The group’s newsletter can be viewed here: http://www.de-bogota.org/ilsa/study-groups/index.shtml/1955
Schedule

Friday, November 6

4:45pm
Room 2-01B
Current Events Through the Lens of International Law

The panelists will discuss current topics in international relations and will assess and evaluate their impact in and relevance to international law and its developments. Topics discussed will include the use of force, international intervention in Syria, recent developments in international criminal law, the proposed new African Criminal Court, and others as they develop.

Moderator:
• David Stewart, President of the American Branch of the International Law Association, Professor, Georgetown Law

Panelists:
• Paul Dubinsky, Associate Professor of Law, Wayne State
• Margaret de Guzman, Associate Professor, Temple University, Beasley School of Law
• Stephen Mathies, Assistant Secretary-General for Legal Affairs, United Nations
• Michael D. Cooper, Managing Director, The Flouish Group, LLC

4:45pm
Room 2-01A
Law-making by the UN Security Council

This panel will address the Security Council as a law-maker. The Council has been increasingly active in both passing self-consciously legislative resolutions – such as 1377 (2001) on terrorist financing – and imposing obligations on parties that often diverge from existing international law. To what extent have these resolutions, in particular the second variety, created a pattern of normative change? How can one tell whether the Council has imposed new legal obligations on parties? And how would one conceptualize Council-made law as a source of more general international obligations?

Moderator:
• Scott Shafer, Senior Legal Counsel and Sanctions Team Leader, New Zealand Permanent Mission to the United Nations

Panelists:
• Gregory Fox, Professor of Law & Director of the Program for International Legal Studies, Wayne State University Law School
• Ian Johnston, Professor, Fletcher School of Law and Diplomacy, Tufts University
• Lorraine Sievers, Chief, United Nations Security Council Secretariat Branch (retired)

6:30pm
Reception at the Permanent Mission of Singapore

318 E 40th St, New York, NY 10017

Pre-registration is required for this event. For security reasons, only those who pre-registered may attend. Registered guests must bring photo identification to present at check-in. A nominal AILSA registration fee of $25 will be charged to confirm participation at the reception, which is being generously hosted by the Permanent Mission of Singapore to the United Nations. The AILSA registration fee will be applied to cover other costs of the International Law Weekend. The support of the Permanent Mission of Singapore toward International Law Weekend is greatly appreciated.

Schedule

Saturday, November 7

8:00am
Sedin Lounge
Complimentary Coffee provided by International and Non J.D. Programs, Fordham Law School

9:00am
Room 2-42C
A Critical Look At Motions to Disqualify Arbitrators

Arbitral institutions are facing an increasing number of motions to disqualify arbitrators (arbitrator challenges) on the ground that they lack independence and impartiality. Parties are asserting with increased frequency that arbitrators are predisposed to decide a certain issue in a certain way, or have failed to disclose information concerning circumstances that could be perceived as raising a conflict. Whereas the challenge mechanism was once considered unique and newly exercised, it is increasingly becoming part and parcel of arbitration proceedings, and may be used strategically to disrupt the proceedings, resulting in serious costs and delays. What can parties, arbitrators and institutions do to prevent the challenge mechanism from being abused for strategic purposes?

Moderator:
• Prof. Franco Ferrari, NYU Law School

Panelists:
• Brian King, Freshfields Bruckhaus Deringer US LLP
• Melinda Hodgson, Foley Hoag LLP

9:00am
Room 2-42B
Sanctions in Transition

UN Sanctions in Transition UN sanctions have changed dramatically in the last decade. In the 1990s, most sanctions were comprehensive. But by 2000, concerns about the humanitarian consequences of comprehensive sanctions gave birth to a new generation of targeted sanctions. Targeted sanctions have defined the UN discourse on sanctions effectiveness for a decade, and yet another shift is underway again. Today, UN sanctions are becoming general again in an effort to avoid the judicial challenge to targeting and to get at supply chains. This panel will discuss some of the UN’s newest innovations in sanctions across multiple current regimes to assess current trends in targeting.

*This panel is approved for CLE credit

Moderator:
• Larsina Van den Heuil, Professor of Int’l Law, Leiden University

Panelists:
• Kristen Boon, Professor of Law, Seton Hall Law School
• Evan Giddidis, Professor of Law, William and Mary
• Christiane Ahlborn, Associate Legal Officer, Codification Division of the UN

*The Speakers are all members of the ISG Study Group on Multilateral Sanctions and will share from their current research. The group’s mandate can be viewed here: http://www.ilo.org/Int/Study-Groups/index.htm?sid=10855
Schedule
Saturday, November 7

9:00am
Room 2-02A
The Individual Petition Procedure in International Human Rights Law: Has It Lived Up To Its Expectations?
The individual petition procedure was introduced in the European Convention on Human Rights in the early 1950s and was considered revolutionary at the time. International law, traditionally restricted to relations between and among states, would now give standing to allow individuals to complain about human rights violations committed by states. This roundtable will discuss recent critiques of the international human rights movement and explore the continuing value of human rights reporting.

Moderator:
Christina Ceresa, Georgetown University Law School

Panelists:
• Hurst Hannum, Professor of International Law, Fletcher School of Law and Diplomacy,
Tufts University, former counselor to petitioners in the European human rights system and Director of Global Health and Population, T.H. Chan School of Public Health, Harvard University
• Stephen P. Marks, Francois Xavier Bagheader Professor of Health and Human Rights, and Director of Global Health and Population, T.H. Chan School of Public Health, Harvard University
• Gerald Neuman, J. Sinclair Armstrong Professor of International, Foreign and Comparative Law, Harvard Law School; former member of United Nations Human Rights Committee
• Danah Sheldon, Manati/Alm Professor Emeritus of International Law, George Washington University Law School; former member of the Inter-American Commission on Human Rights
• Ruth Wedgewood, Edward R. Butting Professor of International Law and Diplomacy, Johns Hopkins School of Advanced International Studies; former member of UN Human Rights Committee and special rapporteur for follow-up on views; President, International Law Association (worldwide)

9:00am
Room 2-01B
The Department of Defense Law of War Manual: The Tension between State and Non-State Expressions of Customary International Humanitarian Law
Only States participate in the formation of customary international humanitarian law (CIHL) through practice and opinio juris. Nevertheless, other actors - such as the ILC, NGOs, academics, or non-State parties to a conflict - also indirectly contribute to shaping CIHL. This concrete examples such as the new DoD Law of War Manual or the ICRC Study on CIHL, the panelists will discuss how CIHL emerges and the weight to be given to differing assessments of the customary status of specific IHL topics.

Moderator:
Michael Schmidt, Naval War College - Stockton Center for the Study of International Law, University of Exeter Law School, Harvard Law School

Panelists:
• Gabriele Rana, Visiting Professor of Law, Cardozo Law School
• Karl Chang, Attorney Advisor, Office of General Counsel, Department of Defense
• Dr. S. S. Dehal, Senior Advisor - Humanitarian Affairs, The Independent Commission on Multilateralism; Former Head of Customary IHL, project at ICRC
Schedule
Saturday, November 7

9:06am
Room 2-A2A
The Individual Petition Procedure in International Human Rights Law: Has It Lived Up To Its Expectations?
The individual petition procedure was introduced in the European Convention on Human Rights in the early 1950s and was considered revolutionary at the time. International law, traditionally restricted to relations between and among states, would now give standing to allow individuals to complain about human rights violations committed by states. This roundtable will discuss critiques of the international human rights movement and explore the continuing value of human rights reporting.
Moderator:
Christina Cerna, Georgetown University Law School
Panelists:
• Harri Hannum, Professor of International Law, Fletcher School of Law and Diplomacy,
Tufts University, former counsellor to petitioners in the European human rights system
• Stephen P. Markel, Francisco Xavier Bagnoud Professor of Health and Human Rights, and Director of Global Health and Population, T.H. Chan School of Public Health, Harvard University
• Gerald Neuman, J. Sinclair Armstrong Professor of International, Foreign and Comparative Law, Harvard Law School; former member of United Nations Human Rights Committee
• Diane Shallow, Manatt/Arnold Professor Emeritus of International Law, George Washington University Law School; former member of the International Commission on Human Rights
• Ruth Wedgewood, Edward B. Burling Professor of International Law and Diplomacy, Johns Hopkins School of Advanced International Studies; former member of UN Human Rights Committee and special rapporteur for follow-up on views; President, International Law Association (worldwide)

9:00am
Room 2-A1B
The Department of Defense Law of War Manual: The Tension between State and Non-State Expressions of Customary International Humanitarian Law
Only States participate in the formation of customary international humanitarian law (CIHL) through practice and opinio juris. Nevertheless, other actors - such as the ICRC, NGOs, academics, or non-State parties to a conflict - also indirectly contribute to shaping CIHL. Using concrete examples such as the new (but) Law of War Manual or the ICRC Study on CIHL, the panelists will discuss how CIHL emerges and the weight to be given to differing assessments of the customary status of specific Hill topics
Moderator:
Michael Schmitt, Naval War College - Stockton Center for the Study of International Law; University of Exeter Law School; Harvard Law School
Panelists:
• Gabor Rona, Visiting Professor of Law, Cardozo Law School
• Karl Chang, Attorney Advisor, Office of General Counsel, Department of Defense
• Dr. Els Debauf, Senior Advisor - Humanitarian Affairs, The Independent Commission on Multilateralism; Former Head of Customary III, project at ICRC

10:30am
Room 6-A3
ILSA Board of Directors Meeting

10:45am
Room 2-02C
It's "Shocking" to Think There is Corruption at FIFA
The FIFA indictment of 14 individuals triggers many fascinating questions. Why would United States authorities become involved in alleged corruption in soccer; the world's favorite sport which is largely ignored in the U.S.? Should the Justice Department have higher priorities than to get involved with the administration of this sport? Why is it only now that the Swiss Attorney General, the Swiss FIFA Ethics prosecutor and the UK have announced investigations into FIFA corruption? It cannot be that they, like Cape, Renew in Cleveland, are suddenly "shocked, shocked" to find bribery at FIFA? Our expert panel will discuss current developments in the FIFA affair as well as the U.S. connection with this truly international prosecution.

10:45am
Room 2-02H
Accountability for Crimes in Syria and Iraq
With horrific crimes being committed by a number of actors, including but not limited to Assad's regime forces and ISIS, learn about what is being done to document the crimes and propose for accountability. Can the ICC play any meaningful role in light of China and Russia's veto of the referral? What realistic alternatives for a new tribunal exist?

Moderator:
Jennifer Tradin, Associate Professor, NYU Global Affairs; Chair, ABILA ICC Committee
Panelists:
• David Crane, Professor of Practice, Syracuse University School of Law
• Christian Wenaweser, Permanent Representative of Switzerland to the UN
• Richard Dicker, Director, International Justice Program, Human Rights Watch
• Mohammad al-Abdallah, Executive Director, Syran Justice and Accountability Center
Schedule
Saturday, November 7

10:45am
Room 2-02A
Sustainable Development as a "Grundnorm" of International Environmental Law and Policy
Sustainable development opened a new paradigm by requiring linkage between economic viability, social development, and environmental aspects to ensure development that is sustainable. It bridged the initial North-South divide by engendering a clear realization that both environment and development concerns are equally valid and are not necessarily in conflict. This panel will discuss the promising developments pertaining to Sustainable Development Goals as successors to the Millennium Development Goals for the post-2015 Development Agenda.

Moderator:
- Ved Nanda, John Evans University Professor and Thompson G. Marsh Professor of Law and Director, the Ved Nanda Center for International Law, University of Denver Sturm College of Law
Panelists:
- Lakshman Guruswamy, Nicholas Doman Professor of International Environmental Law, University of Colorado Law School
- Larry Johnson, Former UN Assistant Secretary-General for Legal Affairs; Adjunct Professor, Columbia Law School
- Bruce Rashkow, Former Director of the General Legal Division, UN Office of Legal Affairs, Adjunct Professor, Columbia Law School

10:45am
Room 2-01B
Regulating On-Orbit Activities and Property Rights in Outer Space: Translating Broad, Open and (Sometimes) Conflicting Principles of International Law into US and Other National Regimes
New on-orbit activities in outer space will increasingly be a reality in the next decade. These activities may include private research labs and hotels, asteroid mining, and on-orbit servicing of satellites. The Outer Space Treaty (OST), remarkably resilient throughout the decades of the evolution of space activities, contains broad, open, and (sometimes) conflicting principles of the OST. The panel will examine recent efforts by the US Congress to translate OST principles into national law in a fashion that allows "light" regulation of on-orbit activity and at least a limited recognition of property rights over extracted resources.

Moderator:
- Matthew Schaefer, Professor of Law and Director, Space, Cyber, & Telecom Law LLM, University of Nebraska Law College
Panelists:
- Henry Hertzfeld, Research Professor, Elliott School of International Affairs Space Policy Institute; Adjunct Professor of Law, George Washington University
- Frans van der Dunk, Othmer & Perelman Professor of Law, University of Nebraska College of Law
- Giogi Carminati, Principal, Carminati Law
- Caryn Schenewerk, Counsel & Director of Government Affairs, SpaceX

Schedule
Saturday, November 7

10:45am
Room 2-01A
Challenges Related to Incorporating & Respecting Children's Rights in Conflict Resolution Internationally
Incorporating the views and respecting the rights of children in dispute resolution is increasingly important. Children can simultaneously be both victims and offenders, or subject to a claim while simultaneously trying to promote their own best interests in areas such as family law. Increasingly, the law must strike a balance between being overly paternalistic and balancing the rights of others (e.g., family members and/or the community). This panel aims to cover a variety of conflict resolution mediums that affect children, including criminal actions, peace-building, and family law disputes, with an eye towards discerning any broader themes in international dispute resolution affecting children.

Moderator:
- Kaitlin M. Ball, PhD Candidate at the University of Cambridge
Panelists:
- Diane Marie Amann, Professor, University of Georgia; Associate Dean for International Programs & Strategic Initiatives, Woodruff Chair in International Law; Special Adviser on Children in Armed Conflict to the International Criminal Court's Prosecutor
- Ambassador Susan Jacobs, U.S. Department of State, Special Adviser for Children's Issues

11:45am
Room 4-02
ABILA Committee Chairs Meeting

12:30pm
Room 4-02
ABILA Executive Committee Meeting (lunch provided)

12:30pm
Room 2-01B
ILSA Congress, Meeting of ILSA Members (lunch provided)
All ILSA members are invited to attend the ILSA Congress, the bi-annual meeting of ILSA Chapters. At the Congress, ILSA members will meet the 2015-2016 Student Officers, discuss the year's activities, and plan for the future of the organization.
Sustainable Development as a "Grundnorm" of International Environmental Law and Policy

Sustainable development opened a new paradigm by requiring Balance between economic viability, social development, and environmental aspects to ensure development that is sustainable. It bridged the initial North-South divide by engendering a clear realization that both environment and development concerns are equally valid and are not necessarily in conflict. This panel will discuss the promising developments pertaining to Sustainable Development Goals as successors to the Millennium Development Goals for the post-2015 Development Agenda.

Moderator:
- Ved Nanda, John Evans University Professor and Thompson G. Marsh Professor of Law, and Director, the Ved Nanda Center for International Law, University of Denver Sturm College of Law

Panelists:
- Lakshman Guruswamy, Nicholas Doman Professor of International Environmental Law, University of Colorado Law School
- Larry Johnson, Former UN Assistant Secretary-General for Legal Affairs; Adjunct Professor, Columbia Law School
- Bruce Rashkind, Former Director of the General Legal Division, UN Office of Legal Affairs; Adjunct Professor, Columbia Law School

Regulating On-Orbit Activities and Property Rights in Outer Space: Translating Broad, Open and (Sometimes) Conflicting Principles of International Law into US and Other National Regimes

New on-orbit activities in outer space will increasingly be a reality in the next decade. These activities may include private research labs and hotels, asteroid mining, and on-orbit servicing of satellites. The Outer Space Treaty (OST), remarkably resilient throughout the decades of the evolution of space activities, contains broad, open, and (sometimes) conflicting principles of the OST. The panel will examine recent efforts by the US Congress to translate OST principles into national law in a fashion that allows "right" regulation of on-orbit activity and at least a limited recognition of property rights over extracted resources.

Moderator:
- Matthew Schaefer, Professor of Law and Director, Space, Cyber & Telecom Law LLM, University of Nebraska Law College

Panelists:
- Henry Hertzfeld, Research Professor, Elliott School of International Affairs Space Policy Institute; Adjunct Professor of Law, George Washington University
- Frans von der Dunk, Othmer & Perelman Professor of Law, University of Nebraska College of Law
- Giugi Carminati, Principal, Carminati Law
- Caryn Schenewerk, Counsel & Director of Government Affairs, SpaceX

Challenges Related to Incorporating & Respecting Children's Rights in Conflict Resolution Internationally

Incorporating the views and respecting the rights of children in dispute resolution is increasingly important. Children can simultaneously be both victims and offenders, or subject to a claim while simultaneously trying to promote their own best interests in areas such as family law. Increasingly, the law must strike a balance between being overly paternalistic and balancing the rights of others (e.g. family members and/or the community). This panel aims to cover a variety of conflict resolution mediums that affect children, including criminal actions, peace-building, and family law disputes, with an eye towards discerning any broader themes in international dispute resolution affecting children.

Moderator:
- Kathleen M. Ball, PhD Candidate at the University of Cambridge

Panelists:
- Diane Marie Amann, Professor, University of Georgia, Associate Dean for International Programs & Strategic Initiatives, Woodruff Chair in International Law; Special Advisor on Children in Armed Conflict to the International Criminal Court's Prosecutor
- Ambassador Susan Jacobs, U.S. Department of State, Special Advisor for Children's Issues

ABILA Committee Chairs Meeting

ABILA Executive Committee Meeting (lunch provided)

ILSA Congress, Meeting of ILSA Members (lunch provided)

All ILSA members are invited to attend the ILSA Congress, the bi-annual meeting of ILSA Chapters. At the Congress, ILSA members will meet the 2015-2016 Student Officers, discuss the year's activities, and plan for the future of the organization.
Schedule
Saturday, November 7

1:45pm Room 2-02C
Emerging International Trends and Practices in Guardianship

The United Nations' Convention on the Rights of Persons with Disabilities, together with the Hague Convention on the International Protection of Adults and the Yokohama Declaration have laid out emerging international law on guardianship and ultimately the legal capacity and rights of an individual with a disability to make decisions. This panel will explore the framework that these bodies of law have created for establishing the rights of individuals to preserve their legal capacity and how international decision making bodies are addressing guardianship issues between them. Experts will share how the U.S. is reshaping its policies on guardianship and what can be learned from countries abroad that have redeveloped their own judicial system and legal policies around guardianship.

Moderator:
- Emma Grant Grewal, Senior Director of Government Relations, ANCOR; Chair, ABILA Disability Committee

Panelists:
- Bob Dinerstein, Professor of Law, Washington College of Law, American University
- Jonathan Marxinis, Legal Director, Quality Trust

1:45pm Room 2-02B
TRIPS Agreement at 20

2015 marks the 20th anniversary of the entering into effect of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights. How effective was the TRIPS Agreement in the past two decades? What have been its strengths and weaknesses? What are the future challenges in the international intellectual property field? This timely panel is sponsored by the ABILA Committee on International Intellectual Property.

Moderator:
- Peter K. Yu, Professor of Law & Co-Director, Center for Law and Intellectual Property, Texas A&M University School of Law; Member, ABILA Executive Committee; Chair, ABILA Committee on International Intellectual Property

Panelists:
- Tahit Amin, Co-Founder and Director of Intellectual Property, I-MARK Initiative for Medicines, Access & Knowledge
- Timothy Traine, President, Global IP Strategy Ctr, P.C.; President, International AntiCounterfeiting Coalition (1999-2005)

1:45pm Room 2-01B
International Courts as Architects of the International Legal System and Sub-Systems

The contribution of international courts to the consolidation the rules pertaining to the functioning of the international legal system (i.e. secondary rules) has been the object of very limited attention. Most discussions have pertained to the making of primary rules of international law. Such a lack of attention is surprising given the wide-ranging exercise of power that lies with the definition of secondary rules. This panel will examine and critically evaluate the contribution of international courts to the consolidation of secondary rules of international law in a variety of areas.

International courts as architects and the fluctuating idea of legalism (Jean d'Aspremont): The making of secondary rules on international environmental disputes (Makane Mbofung Mbofung): The "clean hands" doctrine as an established secondary rule in international investment arbitration (Attila Tanzi): The contribution of the International Court of Justice to the development of secondary rules in international human rights law (Dominika Svarc)

Moderator:
- Jean d'Aspremont, Professor, University of Manchester & University of Amsterdam

Panelists:
- Makane Mbofung Mbofung, Professor, University of Geneva
- Attila Tanzi, Professor, University of Bologna
- Dominika Svarc, Assistant Appeals Counsel, UN Mechanism for International Criminal Tribunals
Schedule
Saturday, November 7

1:45pm
Room 2-02C

Emerging International Trends and Practices in Guardianship

The United Nations Convention on the Rights of Persons with Disabilities, together with the Hague Convention on the International Protection of Adults and the Yokohama Declaration have laid out emerging international law on guardianship and ultimately the legal capacity and rights of an individual with a disability to make decisions. This panel will explore the foundation that these bodies of law have created for establishing the rights of individuals to preserve their legal capacity and how international decision making bodies are addressing guardianship issues before them. Experts will share how the U.S. is rehashing its policies on guardianship and self-determination and what can be learned from countries abroad that have redeveloped their own judicial system and legal policies around guardianship.

Moderator:
- Esme Grant Grewal, Senior Director of Government Relations, ABAJAR; Chair, ABILA Disability Committee

Panelists:
- Bob Dinerstein, Professor of Law, Washington College of Law, American University
- Jonathan Martinis, Legal Director, Quality Trust

*This panel is approved for CLE credit

1:45pm
Room 2-02B

TRIPS Agreement at 20

2015 marks the 20th anniversary of the entering into effect of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights. How effective was the TRIPS Agreement in the past two decades? What have been its strengths and weaknesses? What are the future challenges in the international intellectual property field? This timely panel is sponsored by the ABILA Committee on International Intellectual Property.

Moderator:
- Peter K. Yu, Professor of Law & Co-Director, Center for Law and Intellectual Property, Texas A&M University School of Law; Member, ABILA Executive Committee; Chair, ABILA Committee on International Intellectual Property

Panelists:
- Tahir Amini, Co-Founder and Director of Intellectual Property, I-MAK Initiative for Medicines Access & Knowledge
- Timothy Trainer, President, Global IP Strategy Ctr, P.C.; President, International AntiCounterfeiting Coalition (1999-2005)

*This panel is approved for CLE credit

1:45pm
Room 2-02A

Tinker, Tailor, Cyber Spy: International Legality of Mass Surveillance, Cyber Attacks by State Actors & Other Issues from the 2016 Jessup Compromis

A panel of experts will discuss some of the topics of the 2016 Jessup Competition, which addresses the legality of mass surveillance programs, the apprehension of property allegedly used in the frameworks of those programs and the international legal consequences of cyberattacks attributable to states. This panel will be recorded and made available online for all Jessup participants after the conference.

Moderator:
- Tarig Mohiedeen, Jessup Competition Director, International Law Students Association

Panelists:
- Catherine Lustrino, Associate Director, Institute for Law, Science and Global Security, Georgetown University
- Issac Kilir, Visiting Assistant Professor of International Relations and Law at Syracuse University; Research Associate at the Institute for National Security and Counterterrorism; and Assistant Director of the Global Black Spots Project at the Monterey Institute of the Maswell School of International Relations
- Felix Wu, Professor of Law, Cardozo School of Law, and Faculty Director, Cardozo Data Law Initiative (CDLI)

1:45pm
Room 2-01B

International Courts as Architects of the International Legal System and Sub-Systems

The contribution of international courts to the consolidation the rules pertaining to the functioning of the international legal system (i.e., secondary rules) has been the object of very limited attention. Most discussions have pertained to the making of primary rules of international law. Such a lack of attention is surprising given the wide-ranging exercise of power that lies with the definition of secondary rules. This panel will examine and critically evaluate the contribution of international courts to the consolidation of secondary rules in international law in a variety of areas.

*International courts as architects and the fluctuating idea of legal system (Jean d’Aspremont): The making of secondary rules in international environmental disputes (Dakka Malou Mvengu). The "sham hands" doctrine as an established secondary rule in international investment arbitration? (Attila Tanzi). The contribution of the International Court of Justice to the development of secondary rules in international human rights law (Gonzalo de Sousa)

Moderator:
- Jean d’Aspremont, Professor, University of Manchester & University of Amsterdam

Panelists:
- Malou Mvengu Dakka, Professor, University of Geneva
- Attila Tanzi, Professor, University of Bologna
- Dominica Scarc, Assistant Appeals Counsel, UN Mechanism for International Criminal Tribunals
Schedule
Saturday, November 7

1:45pm
Room 2-91A
Rising Seas, Baselines Issues: The Work of the International Law Association Baselines and Sea Level Rise Committee

This panel will bring together the chair of the ILA Committee on Baselines under the Law of the Sea, the chair of the ILA Committee on International Law and Sea Level Rise, and the co-rapporteur of the Committee on International Law and Sea Level Rise to discuss the current work of these committees and related developments in the law of the sea. Countries represented on the panel are: speakers from Norway, the United Kingdom and the United States.

Moderator:
• George Walker, Dean’s Professor of Admiralty and International Law, Wake Forest University School of Law, member of the IILA Baselines Committee, chair of the ABLA Law of the Sea Committee

Panelists:
• Ashley Rash, Retired Captain, U.S. Navy Judge Advocate General’s Corps and retired attorney-advisor, Office of the Legal Adviser, U.S. Department of State; chair, IILA Committee on Baselines
• David Vidas, Research Professor, Director of the Law of the Sea Programme, The Fridtjof Nansen Institute, Norway; chair, IILA International Law and Sea Level Rise Committee
• David Freestone, Visiting Scholar and Professional Lecturer, George Washington University School of Law; co-rapporteur, IILA International Law and Sea Level Rise Committee

3:30pm
Room 1-402
ABILA Members Meeting

3:30pm
Room 2-62C
Careers in International Development

This roundtable discussion features practitioners with experience in international development within the U.S. Government. With unique and contrasting perspectives on pursuing a career in these fields, the speakers will provide students with invaluable advice and tips on courses of study, summer and academic year jobs to pursue, how to network, and unlikely paths to a career in this field.

Moderator:
• Norman L. Greene, Partner, Schoeman Suddike Kaufman & Stern LLP

Panelists:
• David Young, Acting Deputy General Counsel, USAID
• Jan Jin, Assistant General Counsel, USAID
• Amanda Wall, Attorney Adviser for Human Rights and Refugee Law, Office of the Legal Adviser, U.S. Department of State
• Monique Ricker, Attorney Adviser, Office of General Counsel, Millennium Challenge Corporation

Thank You

Sponsors

ABILA and ILSA gratefully acknowledge the generous support of the following sponsors of ILW 2015:

Advanced Discovery
American Bar Association
American Society of International Law
American University, Washington College of Law
Boston University
Brill/Martimus Nijhoff
Case Western Reserve University School of Law
Cardozo School of Law
The Center for Global Affairs, NYU - SPS
Center for Law and Intellectual Property, Texas A&M University School of Law
Challute Lindsey LLP
Clayton Godfree Stern & Hamilton LLP
Columbia Law School
Cornell Law School
Council for American Students in International Negotiations (CASIN)
Covington & Burling LLP
Dean Rusk International Law Center, University of Georgia School of Law
The Federalist Society International & National Security Law Practice Group
Fletcher School of Law & Diplomacy, Tufts University
Foley Hoag LLP
Fordham University School of Law
George Washington University Law School
Georgetown University Law Center
Hofstra University, Maurice A. Deane School of Law
Human Rights First
International & Non-JD Programs, Fordham Law School
Johns Hopkins University, School of Advanced International Studies
Klein & Spalding LLP
Leitner Center for International Law & Justice
New York City Bar
New York University Law School
Oxford University Press
Permanent Mission of Singapore to the United Nations
Princeton University, James Madison Program in American Ideals and Institutions
Princeton University Program in Law & Public Affairs (LAPA)
Rutgers Law School
Shearman & Sterling LLP
St. John’s University School of Law
Texas A&M University School of Law
University of Maine School of Law
University of Nebraska Lincoln College of Law
University of Pennsylvania School of Law
White & Case LLP
Schedule
Saturday, November 7

1:45pm
Room 2-01A
Rising Seas, Baselines Issues: The Work of the International Law Association Baselines and Sea Level Rise Committee
This panel will bring together the chair of the ILA Committee on Baselines under the Law of the Sea, the chair of the ILA Committee on International Law and Sea Level Rise, and the co-rapporteur of the Committee on International Law and Sea Level Rise to discuss the current work of these committees and related developments in the law of the seas. Countries represented on the panel are speakers from Norway, the United Kingdom and the United States.

Moderator:
- George Walker, Dean’s Professor of Admiralty and International Law, Wake Forest University School of Law; member of the ILA Baselines Committee, chair of the ABILA Law of the Sea Committee

Panelists:
- Ashley Roach, Retired Captain, U.S. Navy Judge Advocate General’s Corps and retired attorney-adviser, Office of the Legal Adviser, U.S. Department of State; chair, ILA Committee on Baselines
- Davia Vidaas, Research Professor, Director of the Law of the Sea Programme, The Fridtjof Nansen Institute, Norway; chair, ILA International Law and Sea Level Rise Committee
- David Freestone, Visiting Scholar and Professional Lecturer, George Washington University School of Law; co-rapporteur, ILA International Law and Sea Level Rise Committee

3:30pm
Room 4-02
ABILA Members Meeting

3:30pm
Room 2-02C
Careers in International Development
This roundtable discussion features practitioners with experience in international development within the U.S. Government. With unique and contrasting perspectives on pursuing a career in these fields, the speakers will provide students with invaluable advice and tips on courses of study, summer and academic year jobs to pursue, how to network, and unlikely paths to a career in this field.

Moderator:
- Norman L. Greene, Partner, Schoennan Updike Kaufman & Stora LLP

Panelists:
- David Young, Acting Deputy General Counsel, USAID
- Jon Kim, Assistant General Counsel, USAID
- Amanda Wall, Attorney Advisor for Human Rights and Refugee Law, Office of the Legal Adviser, U.S. Department of State
- Monique Rickert, Attorney Advisor, Office of General Counsel, Millennium Challenge Corporation

Thank You
Sponsors

ABILA and ILSA gratefully acknowledge the generous support of the following sponsors of ILW 2015:

Advanced Discovery
American Bar Association
American Society of International Law
American University, Washington College of Law
Boston University
Brill/Martinson Niijhoff
Case Western Reserve University School of Law
Cardozo School of Law
The Center for Global Affairs, NYU - SPS
Center for Law and Intellectual Property, Texas A&M University School of Law
Chafetz Lindsey LLP
Cleary Gottlieb Steen & Hamilton LLP
Columbia Law School
Cornell Law School
Council for American Students in International Negotiations (CASIN)
Covington & Burling LLP
Dean Rusk International Law Center, University of Georgia School of Law
The Federatist Society International & National Security Law Practice Group
Fletcher School of Law & Diplomacy, Tufts University
Foley Hoag LLP
Fordham University School of Law
George Washington University Law School
Georgetown University Law Center
Hofstra University, Maurice A. Deane School of Law
Human Rights First
International & Non-JD Programs, Fordham Law School
Johns Hopkins University, School of Advanced International Studies
King & Spalding LLP
Leitner Center for International Law & Justice
New York City Bar
New York University Law School
Oxford University Press
Permanent Mission of Singapore to the United Nations
Princeton University, James Madison Program in American Ideals and Institutions
Princeton University Program in Law & Public Affairs (ILFA)
Rutgers Law School
Shelman & Sterling LLP
St. John’s University School of Law
Texas A&M University School of Law
University of Maine School of Law
University of Nebraska Lincoln College of Law
University of Pennsylvania School of Law
White & Case LLP
Thank You
Organizational Leaders

2015 ILW Program Committee

Chiara Giorgetti
University of Richmond, School of Law

Jeremy Sharpe
Shearman & Sterling LLP

David Stewart
American Branch of the International Law Association

Santiago Villalpando
United Nations Office of Legal Affairs

Tessa Walker
International Law Students Association

Ruth Wedgewood
President, International Law Association
(ex officio and fundraising)

Patrons of the American Branch of the International Law Association

Roberto Aguierre Luxi
Charles N. Brower
Lee Bachhoit
David D. Caron

Christina Cerna
Edward Gordon
Anthony Larson
Cynthia Lichtenstein

Houston Putnam Lowry
John F. Murphy
James A.R. Nafziger
Ved Nanda

Andrew Newburg
John E. Noyes
Anhla Sabater
Charles D. Siegel (deceased)

Paul B. Stephan
David Stewart
Ruth Wedgewood

Thank You
Organizational Leaders

American Branch of the International Law Association (Founded 1873)

Chair, Executive Committee: Ruth Wedgewood

President: David P. Stewart

Vice Presidents: Catherine Amirfar Paul R. Dubinsky Philip M. Moreman

Anhla Sabater Leila N. Sadat

Honorary Vice Presidents: Charles N. Brower John Carey Valerie Epps

Edward Gordon Gary N. Holick P. Nicholas Kourides

Cynthia Lichtenstein John F. Murphy James A.R. Nafziger

Ved P. Nanda John E. Noyes Susan W. Tiefenbrun

Robert B. von Mehren

Co-Directors of Study: Chiara Giorgetti Aaron X. Fellmeth

Honorary Secretary: Amy R. Boye

Honorary Treasurer: Houston Putnam Lowry

Executive Committee: William Aceves Roberto Aguierre Luxi Catherine Amirfar

Andrea K. Bjorklund Amy R. Boye Ronald A. Brand

Christina M. Cerna Paul R. Dubinsky Aaron X. Fellmeth

Steven A. Hammond Sherry Holbrook Scott Horton

Karen Hudes Spergel Larry D. Johnson Houston Putnam Lowry

Phillip M. Moremen Gabor Rona Anhla Sabater

Leila N. Sadat Michael P. Scharf Steven M. Schneebaum

David P. Stewart Louise Ellen Teitz Nancy Thevenin

Jennifer Trahan Vincent Vitsky George K. Walker

Ruth Wedgewood Peter K. Yu
Thank You
Organizational Leaders

2015 ILW Program Committee

Chiara Giorgetti
University of Richmond, School of Law

Jeremy Sharpe
Shearman & Sterling LLP

David Stewart
American Branch of the International Law Association

Santiago Villalpando
United Nations Office of Legal Affairs

Tessa Walker
International Law Students Association

Ruth Wedgewood
President, International Law Association (ex officio and fundraising)

Patrons of the American Branch of the International Law Association

Roberto Aguirre Luzi
Charles N. Brower
Lee Buchheit
David D. Caron

Christina Cerna
Edward Gordon
Anthony Larson
Cynthia Lichtenstein

Houston Putnam Lowry
John F. Murphy
James A.R. Nafziger
Ved Nanda

Andre Newburg
John E. Noyes
Anibal Sabater
Charles D. Siegal (deceased)

Paul B. Stephan
David Stewart
Ruth Wedgewood

Thank You
Organizational Leaders

American Branch of the International Law Association (Founded 1873)

Chair, Executive Committee: Ruth Wedgewood

President: David P. Stewart

Vice Presidents: Catherine Amirfar Paul R. Dubinsky Philip M. Moremen

Anibal Sabater Leila N. Sadat

Honorary Vice Presidents: Charles N. Brower John Carey Valerie Epps

Edward Gordon Gary N. Horlick P. Nicholas Kourides

Cynthia Lichtenstein John F. Murphy James A.R. Nafziger

Ved P. Nanda John E. Noyes Susan W. Tiefenbrun

Robert B. von Mehren

Co-Directors of Study: Chiara Giorgetti Aaron X. Fellmeth

Honorary Secretary: Amit R. Boye

Honorary Treasurer: Houston Putnam Lowry

Executive Committee: William Aceves

Andrea K. Bjorklund

Christina M. Cerna Paul R. Dubinsky Aaron X. Fellmeth

Steven A. Hammond Sherry Holbrook Scott Horton

Karen Hudes Spergel Larry D. Johnson

Houston Putnam Lowry

Philip M. Moremen

Leila N. Sadat

Michael P. Scharf

Steven M. Schneebaum

David P. Stewart Louise Ellen Tetz

Nancy Thovenin

Jennifer Trahan

Vincent Viskovsky

George K. Walker

Ruth Wedgewood

Peter K. Yu
LARGE-SCALE DISPUTE RESOLUTION IN JURISDICTIONS WITHOUT JUDICIAL CLASS ACTIONS: LEARNING FROM THE IRISH EXPERIENCE

S.I. Strong*

I. INTRODUCTION ................................................................. 341

II. LARGE-SCALE CLAIMS IN COUNTRIES WITHOUT LARGE-SCALE RELIEF — THE IRISH EXPERIENCE ...................................................... 342
A. Army Hearing Loss Claims .................................................. 345
B. Residential Institutions Claims .............................................. 346
C. Magdalen Laundry Claims .................................................... 350
D. Sympathetomy Claims ........................................................ 354
E. Pyrite Construction Claims .................................................. 355

III. THE DEPUY PROCEDURE .................................................. 357
A. DePuy as a Purely Private Dispute ........................................ 357
B. DePuy as a Standard Products Liability Case ........................ 360
C. Additional Logistical Elements .............................................. 362

IV. CONCLUSION ................................................................. 363

I. INTRODUCTION

Recent years have seen an unprecedented expansion of the ability to assert large-scale claims in national judicial systems, either on a collective or representative (class) basis.1 Numerous countries, including many that excoriated United States-style class actions in the past, have now adopted various forms of collective redress as society’s need to respond to large-scale claims has increased.2 Although every jurisdiction has developed its own unique method of responding to large-scale legal injuries, there appears to be

---

Thank You

Organizational Leaders

International Law Students Association Executive Office

Executive Director: Lesley A. Benn
Programs Director: Tessa Walker
Jesup Competition Director: Tariq Mohiddin
External Relations Coordinator: Olga Koslova

International Law Students Association Board of Directors

Chair: Steven M. Schneebaum, Steven M. Schneebaum, P.C.
Executive Director (ex officio): Lesley A. Benn, International Law Students Association
Treasurer: David Quayat, Edward H. Royle & Associates
Student President: Maral Shoaei, University of Denver Sturm College of Law
Student VP: Ismael A. Vélez de la Rosa, Inter American University of Puerto Rico, School of Law
Student CCO: Keely McWhorter, Ohio Northern University Pettit College of Law
Board Members: Elizabeth Black, White & Case LLP
William W. Burke-White, University of Pennsylvania Law School
Russell Dalferes
Mark Ellis, International Bar Association
Chiara Giorgetti, University of Richmond School of Law
Brian Havel, DePaul University College of Law
Andrew Holmes, 42 Bedford Row Chambers, London
Jason Johns, Wisconsin Legislative Strategies
Lucas Lixinski, University of New South Wales
Louis O’Neill, White & Case LLP
Dinah Shelton, George Washington University School of Law
Quang Trinh, PwC, Australia

LARGE-SCALE DISPUTE RESOLUTION IN JURISDICTIONS WITHOUT JUDICIAL CLASS ACTIONS: LEARNING FROM THE IRISH EXPERIENCE

S.I. Strong*

I. INTRODUCTION ................................................................. 341
II. LARGE-SCALE CLAIMS IN COUNTRIES WITHOUT LARGE-SCALE RELIEF — THE IRISH EXPERIENCE ................................................................. 343
   A. Army Hearing Loss Claims ............................................. 345
   B. Residential Institutions Claims ........................................ 346
   C. Magdalen Laundry Claims .............................................. 350
   D. Symphysiotomy Claims .................................................. 354
   E. Pyrite Construction Claims ................................................ 355
III. THE DEPUY PROCEDURE ................................................. 357
   A. DePuy as a Purely Private Dispute .................................... 357
   B. DePuy as a Standard Products Liability Case ..................... 360
   C. Additional Logistical Elements ........................................ 362
IV. CONCLUSION ................................................................. 363

I. INTRODUCTION

Recent years have seen an unprecedented expansion of the ability to assert large-scale claims in national judicial systems, either on a collective or representative (class) basis. Numerous countries, including many that excoriated United States-style class actions in the past, have now adopted various forms of collective redress as society’s need to respond large-scale claims has increased. Although every jurisdiction has developed its own unique method of responding to large-scale legal injuries, there appears to be

* D.Phil., University of Oxford; Ph.D. (law), University of Cambridge; J.D., Duke University, Master in Professional Writing, University of Southern California; B.A., University of California, Davis. The author, who is admitted to practice as an attorney in New York, Illinois and Missouri and as a solicitor in England and Wales, is the Manley O. Hudson Professor of Law at the University of Missouri and Senior Fellow at the Center for the Study of Dispute Resolution. The author would like to thank Tarlogh O’Donnell SC and Arran Dowling-Hussey for insights into the processes under discussion here. All errors of course remain the author’s own.


a growing consensus that contemporary legal systems require some means of responding to widespread harm involving the same or similar facts.

Not every jurisdiction has adopted this view, however. One country—the Republic of Ireland—has resisted the development of large-scale forms of judicial relief, despite several instances where such a mechanism would have been useful. The most recent of these disputes, Gaffney v. DePuy, involves over 1000 claims relating to defective hip implants. The dispute is so extensive that the Irish High Court has estimated that the claims will not be fully resolved until 2022 if the dispute remains in the judicial system. As a result, the court, working with the parties, has approved the use of an extremely innovative alternative dispute resolution mechanism to resolve the claims in a more efficient, just and orderly manner.

As novel as this procedure is, this is not the first time that Ireland has needed to provide redress for widespread legal harm. However, the DePuy matter is different in several key regards and provides an intriguing example of how large-scale arbitration can develop in a jurisdiction that does not offer large-scale relief in its national courts. In so doing, Ireland puts to rest the longstanding debate among international scholars and practitioners about whether large-scale arbitration can develop in a legal system that does not provide for judicial forms of class or collective relief. The Irish example also provides a new procedural model that can be contrasted to existing forms of class, mass and collective arbitration and offers various insights into the creation, form and use of mass claims commissions.

The discussion begins in Section II with a brief history of large-scale disputes in Ireland. The article then moves in Section III to an analysis of the claims against DePuy to determine whether and to what extent the dispute resolution mechanism used in DePuy improves upon procedures developed in earlier disputes. The discussion concludes in Section IV by drawing together the various strands of thought and providing some forward-looking proposals for Ireland and other jurisdictions that do not offer large-scale relief in their national judicial systems.

II. LARGE-SCALE CLAIMS IN COUNTRIES WITHOUT LARGE-SCALE RELIEF – THE IRISH EXPERIENCE

According to basic principles of Irish and international law, individuals are entitled to the timely, efficient and just resolution of their legal disputes. (forthcoming 2016), S.I. STRONG, CLASS, MASS, AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW 22 (2013).

8. Large-scale arbitration is becoming increasingly popular and can take a variety of forms. See STRONG, supra note 7, at 38-104 (discussing class arbitration in the United States and Colombia, mass arbitration in the international investment context, and collective arbitration in the United States, Spain and Germany).


10. For example, both the Irish Constitution and the European Convention on Human Rights require timely access to justice. See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 222 ("In the determination of his civil rights and
a growing consensus that contemporary legal systems require some means of responding to widespread harm involving the same or similar facts.

Not every jurisdiction has adopted this view, however. One country—the Republic of Ireland—has resisted the development of large-scale forms of judicial relief, despite several instances where such a mechanism would have been useful. The most recent of these disputes, Gaffney v. DePuy, involves over 1,000 claims relating to defective hip implants. The dispute is so extensive that the Irish High Court has estimated that the claims will not be fully resolved until 2022 if the dispute remains in the judicial system. As a result, the court, working with the parties, has approved the use of an extremely innovative alternative dispute resolution mechanism to resolve the claims in a more efficient, just and orderly manner.

As novel as this procedure is, this is not the first time that Ireland has needed to provide redress for widespread legal harm. However, the DePuy matter is different in several key respects and provides an intriguing example of how large-scale arbitration can develop in a jurisdiction that does not offer large-scale relief in its national courts. In so doing, Ireland puts to rest the longstanding debate among international scholars and practitioners about whether large-scale arbitration can develop in a legal system that does not provide for judicial forms of class or collective relief.

The Irish example also provides a new procedural model that can be contrasted to existing forms of class, mass and collective arbitration and offers various insights into the creation, form and use of mass claims commissions. As a result, there is much that the United States and international legal communities can learn from the Irish experience.

The discussion begins in Section II with a brief history of large-scale disputes in Ireland. The article then moves in Section III to an analysis of the claims against DePuy to determine whether and to what extent the dispute resolution mechanism used in DePuy improves upon procedures developed in earlier disputes. The discussion concludes in Section IV by drawing together the various strands of thought and providing some forward-looking proposals for Ireland and other jurisdictions that do not offer large-scale relief in their national judicial systems.

II. LARGE-SCALE CLAIMS IN COUNTRIES WITHOUT LARGE-SCALE RELIEF—THE IRISH EXPERIENCE

According to basic principles of Irish and international law, individuals are entitled to the timely, efficient and just resolution of their legal disputes.


8. Large-scale arbitration is becoming increasingly popular and can take a variety of forms. See STRONG, supra note 7, at 58-104 (discussing class arbitration in the United States and Colombia; mass arbitration in the international investment context; and collective arbitration in the United States, Spain and Germany).


10. For example, both the Irish Constitution and the European Convention on Human Rights require timely access to justice. See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 222 ("In the determination of his civil rights
This requirement can lead to some difficulties in cases involving mass claims, since the absence of a standing mechanism to deal with such matters could lead to unconstitutional delays.\textsuperscript{11} However, over the years, Ireland has managed to avoid the problems associated with large-scale legal injuries by creating various ad hoc dispute resolution devices.\textsuperscript{12}

There are of course some problems with this approach. For example, the use of highly individualized procedures can lead to due process concerns if parties in one dispute believe that they are being treated unfairly as compared to parties in other sorts of disputes.\textsuperscript{13} However, this system also carries a number of potential benefits. This approach allows the Irish legal system to learn from earlier mistakes and develop better procedures over time. Ad hoc mechanisms also promote procedural flexibility and allow remedies to be tailored to the particular injury at hand.\textsuperscript{14} Indeed, the concept of procedural flexibility is often lost in contemporary arbitration, given the

\begin{footnotesize}
\begin{enumerate}
\item This is not to say that victim’s rights groups have not been active in seeking legal redress for their injuries. See, e.g., Carol Ryan, Irish Church’s Forgotten Victims Take Case to U.N., N.Y. TIMES (May 25, 2011), http://www.nytimes.com/2011/05/25/world/europe/25ht-abuse25.html?_r=2 (discussing the group Justice for Magdalenes’ complaint to the United Nations Committee Against Torture regarding injuries associated with the operation of the Magdalens); Sinead O’Carroll, Symphysiotomy Victims Tell the UN About Cruel and Barbaric Childbirth Operations, JOURNAL.IE (Mar. 11, 2014), http://www.thejournal.ie/symphysiotomy-1355549-Mar2014/ (discussing the Survivors of Symphysiotomy’s complaint to the United Nations Committee Against Torture regarding certain medical procedures associated with childbirth).


\item See BILLIET, supra note 7 at 24–26.
\end{enumerate}
\end{footnotesize}
This requirement can lead to some difficulties in cases involving mass claims, since the absence of a standing mechanism to deal with such matters could lead to unconstitutional delays.\footnote{See S.I. Strong, Increasing Legalism in International Commercial Arbitration: A New Theory of Causes, A New Approach to Causes, 7 WORLD ARB. & MED. REV. 117, 125 (2013).} However, over the years, Ireland has managed to avoid the problems associated with large-scale legal injuries by creating various ad hoc dispute resolution devices.\footnote{See BILLET, supra note 7 at 24-26.}

There are of course some problems with this approach. For example, the use of highly individualized procedures can lead to due process concerns if parties in one dispute believe that they are being treated unfairly as compared to parties in other sorts of disputes.\footnote{Ibid.} However, this system also carries a number of potential benefits. This approach allows the Irish legal system to learn from earlier mistakes and develop better procedures over time. Ad hoc mechanisms also promote procedural flexibility and allow remedies to be tailored to the particular injury at hand.\footnote{Ibid.} Indeed, the concept of procedural flexibility is often lost in contemporary arbitration, given the

field’s increasing legalism and the similarity of many arbitral rule sets to each other and to judicial processes.\footnote{See generally SIMPSON THACHER & BARTLETT, COMPARISON OF INTERNATIONAL ARBITRATION RULES (3d ed., 2008) (charting international arbitration rules and procedures of four different institutions). Strong, supra note 7, at 43 (noting similarities between class arbitration rules and Rule 23 of the Federal Rules of Civil Procedure). Strong, supra note 13 at 117.}

Over the years, Ireland has addressed large-scale claims arising in a variety of contexts, including hearing loss in soldiers, abuse of residents in residential institutions, abuse of persons in religiously run institutions (the Magdalene (Magdalene) laundries), assault on women during and after childbirth, and defective construction of dwellings through the use of pyrite.\footnote{See Joanne Blemmerhassett, Is It Time To get the Multi-Party Started? Exploring the Spectrum of Mass Harm Redress in Ireland, in ACCESSING JUSTICE: APPRAISING CLASS ACTIONS 347, 347-83 (Jasminka Kalajdzic et al. eds., 2011).} Although these disputes differ from the DePuy case in several key regards,\footnote{A number of these earlier procedures could be framed as compensation schemes rather than arbitration. See Mullenix, supra note 9, at 831-89; Steenson & Sayler, supra note 9, at 528-30.} many of the procedures have been incorporated into the mechanism that will be used to resolve the disputes in DePuy and therefore merit consideration.

A. Army Hearing Loss Claims

One of the first large-scale legal disputes to arise in Ireland involved claims against the state by more than 10,000 soldiers who had suffered hearing loss as a result of the state’s failure to provide auditory protection at a time when it was known that repeat firing of guns would lead to hearing loss. Eventually, the cost associated with resolving these claims would be in excess of €321 million.\footnote{Ibid.}

When seeking to resolve the claims, the Irish Department of Health and Children convened an expert group to “examine and make recommendations on an appropriate system and criteria for the assessment of hearing disability arising from hearing loss, with particular reference to noise induced hearing
loss. The report established a tariff system (reflected in what was eventually known as the Green Book) that identified the amount of compensation associated with particular types of hearing loss and injury. Although the assessment system did not require injured parties to participate in any particular dispute resolution process, the creation of a formal tariff encouraged most parties to settle, since the tariff was to be taken into account in any litigation that ensued. Although some concerns were enunciated that the system violated constitutional protections regarding separation of powers, the scheme was, in practical terms, relatively successful.

### B. Residential Institutions Claims

Several years later, the Irish state faced another set of claims, this time involving approximately 15,000 persons who had been resident in an industrial school, reformatory school, children’s home, special hospital, or a similar institution while minors and who had endured sexual, physical, or emotional abuse or serious neglect during their time in that institution. Although a number of these institutions were overseen by certain religious organizations, the institutions were in some ways functionally similar to prisons, in that many of the residents were young offenders who had been convicted of trivial offenses and sent to the institution as an alternative to serving jail time. After a formal inquiry into the actions, the state took primary responsibility for the wrongdoing that occurred in the residential institutions, a decision that resulted in a massive financial exposure for the state.

The state adopted a statutory redress procedure that was based on a system devised by Canada to deal with cases involving aboriginal (First Nations) children who were taken from their families at a young age. The mechanism provided for a relatively informal dispute resolution process that was in many ways akin to non-binding arbitration. Claims were heard by

---


22. **Section 4 of the Civil Liability (Assessment of Hearing Injury) Act stated:**

1. In all proceedings claiming damages for personal injury arising from hearing loss, the courts shall, in determining the extent of the injuries suffered, have regard to Chapter 7 (Irish Hearing Disability Assessment System) of the Report and, in particular, to the matters set out in paragraph 1 (Summary) and Table 4 (Disability Percentage Age Correction Factor) to paragraph 7 (Age Related Hearing Loss Correction) of that Chapter.

2. In all proceedings claiming damages for personal injury arising from tinnitus, the courts shall, in determining the extent of the injuries suffered, have regard to the classification method contained in paragraph 9 (Tinnitus) of Chapter 7 (Irish Hearing Disability Assessment System) of the Report.


27. **For example, the state’s decision to provide a blanket immunity to religious institutions involved in the residential institutions case was said to have cost €250 million. See Susan Mitchell, Where Has All the Taxpayers’ Money Gone? SUNDAY BUSINESS POST (Dec. 18, 2005), http://www.business post.ie/where-has-all-the-taxpayers-money-gone.**

28. **See Residential Institutions Redress Act 2002; Irish Redress Scheme, supra note 24. Additional regulations were put into place to supplement the 2002 Act. See Residential Institutions Redress Board, supra note 24 (under “About Us”).**

29. **See Residential Institutions Redress Board, supra note 24 (providing complaint forms and discussing the procedure); see also Steven C. Bennett, Non-Binding Arbitration: An Introduction, 61 DERR. RESOL. J. 23, 23-24 (May-June 2006) (discussing the use of non-binding arbitration in the United States, including court-mandated non-binding arbitration, as in In re Federated Dep’t Stores, 328 F.3d 829 (6th Cir. 2003), which directed creditors in bankruptcy to non-binding arbitration).**
The report established a tariff system (reflected in what was eventually known as the Green Book) that identified the amount of compensation associated with particular types of hearing loss and injury. Although the assessment system did not require injured parties to participate in any particular dispute resolution process, the creation of a formal tariff encouraged most parties to settle, since the tariff was to be taken into account in any litigation that ensued. Although some concerns were enunciated that the system violated constitutional protections regarding separation of powers, the scheme was, in practical terms, relatively successful.

B. Residential Institutions Claims

Several years later, the Irish state faced another set of claims, this time involving approximately 15,000 persons who had been resident in an industrial school, reformatory school, children’s home, special hospital, or a similar institution while minors and who had endured sexual, physical, or emotional abuse or serious neglect during their time in that institution. Although a number of these institutions were overseen by certain religious organizations, the institutions were in some ways functionally similar to prisons, in that many of the residents were young offenders who had been convicted of trivial offenses and sent to the institution as an alternative to serving jail time. After a formal inquiry into the actions, the state took primary responsibility for the wrongdoing that occurred in the residential institutions, a decision that resulted in a massive financial exposure for the state.

The state adopted a statutory redress procedure that was based on a system devised by Canada to deal with cases involving aboriginal (First Nations) children who were taken from their families at a young age. The mechanism provided for a relatively informal dispute resolution process that was in many ways akin to non-binding arbitration. Claims were heard by

---


22. Section 4 of the Civil Liability (Assessment of Hearing Injury) Act stated:
   (1) In all proceedings claiming damages for personal injury arising from hearing loss, the courts shall, in determining the extent of the injuries suffered, have regard to Chapter 7 (Irish Hearing Disability Assessment System) of the Report and, in particular, to the matters set out in paragraph 1 (Summary) and Table 4 (Disability Percentage Age Correction Factor) to paragraph 7 (Age Related Hearing Loss Correction) of that Chapter.
   (2) In all proceedings claiming damages for personal injury arising from tinnitus, the courts shall, in determining the extent of the injuries suffered, have regard to the classification method referred to in paragraph 9 (Tinnitus) of Chapter 7 (Irish Hearing Disability Assessment System) of the Report.


27. For example, the state’s decision to provide a blanket immunity to religious institutions involved in the residential institutions case was said to have cost €250 million. See Susan Mitchell, Where Has All the Taxpayers’ Money Gone? SUNDAY BUS. POST (Dec. 18, 2003), http://www.business post.ie/where-has-all-the-taxpayers-money-gone/.

28. See Residential Institutions Redress Act 2002; Irish Redress Scheme, supra note 24. Additional regulations were put into place to supplement the 2002 Act. See RESIDENTIAL INSTITUTIONS REDRESS BOARD, supra note 24 (under "About Us").

29. See RESIDENTIAL INSTITUTIONS REDRESS BOARD, supra note 24 (providing complaint forms and discussing the procedure); see also Steven C. Bennett, Non-Binding Arbitration: An Introduction 61 DIP. RESOL. J. 22, 23–24 (May–June 2006) (discussing the use of non-binding arbitration in the United States, including court-mandated non-binding arbitration, as in In re Federated Dep’t Stores, 328 F.3d 829 (6th Cir. 2003), which directed creditors in bankruptcy to non-binding arbitration).
the "Residential Assessment Board," which was said to be "wholly independent," although it was headed by a former High Court judge.30 The process was relatively straightforward. Parties were told that:

[when the [Residential Assessment] Board receives your application, it will obtain any further information necessary for making its decision in your case. In particular, the Board will wish to be satisfied that it has all the relevant medical evidence relating to your injuries.

The Board is also required by the Act to ask (a) any person named in your application as responsible for abuse which you suffered, and (b) the representative of the institution in which the abuse took place, to provide the Board with evidence appropriate to your application. For this purpose, they will be given a copy of your application and may be given such further information regarding your application as the Board considers appropriate.

When it has obtained all the evidence which it requires, the Board will deal with your application as follows.

Informal settlement
Where the Board is satisfied that you are entitled to redress, it may make an offer in settlement of your application, which you are free to accept or reject. If you accept the settlement offer, no further proceedings are necessary. If you reject the settlement offer, your application will proceed to a hearing by the Board.

Hearing by the Board
If it is not possible to deal with your application by way of a settlement, the Board will allocate a date for the hearing of your application. This hearing, which will be as informal as possible, will be conducted by a panel consisting of two or three members of the Board. The hearing will enable you or the Board to call witnesses to give oral evidence and to question other witnesses.

30. See RESIDENTIAL INSTITUTIONS REDRESS BOARD, supra note 24. Although this process does not appear to constitute an improper conflation of arbitration and judicial procedures, Ireland must take care not to confuse the two. See S.J. Strong, Limits of Procedural Choice of Law, 39 BROOK. J. INT’L L. LAW 1027, 1074–75 (2014) (noting issues relating to the appointment of judges as “arbitrators” created problems in a form of “judicial arbitration” proposed by the U.S. state of Delaware, as discussed in Delaware Coalition for Open Government v. Sterne, 894 F. Supp. 2d 493 (D. Del. 2012), aff’d, 733 F.3d 510 (3d Cir. 2013), cert. denied, 134 S. Ct. 1551 (2014)).

Once the award was issued by the Board or Review Committee, parties had one month to decide whether to accept the award.32 Parties who accepted the award waived the right to bring a case on the same facts in court.33 Parties who did not accept the award did not waive their right to litigate their dispute, but they were not allowed to come back to the Board or Review Committee if they received less at trial than in the redress procedures.34

In many ways, the residential institutions case was similar to the army hearing loss case, in that a tariff of damages was again set up pursuant to statute following an expert assessment.35 However, in this instance, the question of causation remained open and subject to resolution through the assessment process. This approach proved highly problematic in light of the difficulty of proving that the mental and other injuries suffered by the plaintiffs were the result of the actions of the residential institution as opposed to other early childhood trauma, such as parental abandonment.36 Furthermore, many participants and observers took the view that allowing robust cross-examination on questions of causation effectively re-victimized the plaintiffs.37

31. RESIDENTIAL INSTITUTIONS REDRESS BOARD, supra note 24.
32. See id.
33. See id.
34. See id.
36. See McDonald, supra note 25, Irish Redress Scheme, supra note 24.
37. See Irish Redress Scheme, supra note 24.
the “Residential Assessment Board,” which was said to be “wholly independent,” although it was headed by a former High Court judge. The process was relatively straightforward. Parties were told that:

When the [Residential Assessment] Board receives your application, it will obtain any further information necessary for making its decision in your case. In particular, the Board will wish to be satisfied that it has all the relevant medical evidence relating to your injuries.

The Board is also required by the Act to ask (a) any person named in your application as responsible for abuse which you suffered, and (b) the representative of the institution in which the abuse took place, to provide the Board with evidence appropriate to your application. For this purpose, they will be given a copy of your application and may be given such further information regarding your application as the Board considers appropriate.

When it has obtained all the evidence which it requires, the Board will deal with your application as follows.

Informal settlement
Where the Board is satisfied that you are entitled to redress, it may make an offer in settlement of your application, which you are free to accept or reject. If you accept the settlement offer, no further proceedings are necessary. If you reject the settlement offer, your application will proceed to a hearing by the Board.

Hearing by the Board
If it is not possible to deal with your application by way of a settlement, the Board will allocate a date for the hearing of your application. This hearing, which will be as informal as possible, will be conducted by a panel consisting of two or three members of the Board. The hearing will enable you or the Board to call witnesses to give oral evidence and to question other witnesses.

30. See RESIDENTIAL INSTITUTIONS REDRESS BOARD, supra note 24. Although this process does not appear to constitute an improper conflation of arbitration and judicial procedures, Ireland must take care not to conflate the two. See S.I. Strong, Limits of Procedural Choice of Law, 39 BROOK. J. INT’L. L. LAW 1027, 1074-75 (2014) (noting issues relating to the appointment of judges as “arbitrators” created problems in a form of “judicial arbitration” proposed by the U.S. state of Delaware, as discussed in Delaware Coalition for Open Government v. Zirne, 894 F. Supp. 2d 493 (D. Del. 2012), aff’d, 733 F.3d 510 (3d Cir. 2013), cert. denied, 134 S. Ct. 1551 (2014)).

31. RESIDENTIAL INSTITUTIONS REDRESS BOARD, supra note 24.

32. See id.

33. See id.

34. See id.


36. See McDonald, supra note 25; Irish Redress Scheme, supra note 24.

37. See Irish Redress Scheme, supra note 24.
This is not to say that the residential institutions redress scheme was without benefits. For example, the redress mechanism eliminated certain issues, such as those relating to the statute of limitations (which would have run in most if not all cases), vicarious liability of the state and residential institutions in question (since many of the institutions where run by religious institutions that were not formally incorporated or associated with the state), and prejudicial delay, that would have made recovery in the courts difficult, if not impossible.\(^{38}\)

In the end, the state paid out approximately €1.46 billion to resolve the matter, although injured individuals received only minimal compensation.\(^{39}\) Although the scheme had its benefits, many people in Ireland have criticized the procedure, even though outsiders have framed the mechanism as "an overwhelming success."\(^{40}\)

C. Magdalen Laundry Claims

The next series of claims was somewhat similar to those involving residential institutions, although the injuries in this case came at the hands of various religious organizations that provided housing and work for unwed mothers and other socially suspect persons in a variety of institutions, most notably the Magdalen laundries, during the 1950s and 1960s.\(^{41}\) While there has been some debate about the nature and extent of the alleged abuse, the Irish Human Rights Commission found in 2010 that there was sufficient evidence of "unlawful imprisonment, servitude, forced labour and cruel and

38. Under the Irish Constitution, parties can be barred from bringing a claim if the respondent can prove there was inordinate and inexcusable delay in bringing the case. See Irish Const. (Bunreacht na hÉireann) arts. 34.1, 40.3.1, Donnellan v. Westport Textiles Ltd. [2011] IEHC 11 [37] (Hogan, J.), Hilary A. Delany, Practice and Procedure - Judicial Review Proceedings – Discretionary Factors – Effect of Delay, 22 Dublin U. L.J. 236.

39. See Compensation for Abuse at Residential Institutions May Hit €1.5 Billion, NEWSTALK.COM (Feb. 25, 2014) (noting the bill was shared equally between the state and the eighteen religious congregations responsible for the institutions where the abuse took place), http://www.newstalk.com/compensation-for-abuse-at-residential-institutions-may-hit-1-5-billion, McDonald, supra note 25. Although the scheme officially ended some years ago, claims are still occasionally heard under this process. See G v. Residential Institutions Redress Board, [2015] IESC 41 (2015); Irish Redress Scheme, supra note 24.


43. Some have referred to "State collusion" in the context of women's relegation to certain religious-run institutions. See Report of the Inter-Departmental Committee, supra note 42; Carol Ryan, Seeking Redress for a Mother's Life in a Workhouse, N.Y. TIMES (Feb. 6, 2013), http://www.nytimes.com/2013/02/07/world/europe/seeking-redress-in-ireland-over-magdalen-laundry.html?_r=0 (last visited Feb. 21, 2016). Certainly there was a very close relationship between the Catholic Church and the state during the time in question. See S. J. Strong, Christian Constitutions: Do They Protect Internationally Recognized Human Rights and Minimize the Potential for Violence Within a Society? A Comparative Analysis of American and Irish Constitutional Law and Their Religious Elements, 29 CASE WEST. RES. INT’L L. J. 1, 21-26, 28-31 (1997) (noting the close constitutional relationship between the Catholic Church and the state and noting the prohibitive religious mores of the time).

44. Mr. Justice John Quirke, THE MAGDALENS COMMISSION REPORT (2013) (Ir.), http://www.justice.ie/en/JE/LR/2-%E0%B8%81%E0%B8%98%E0%B8%94%E0%B8%82%E0%B8%9B%E0%B8%97%E0%B8%9E%E0%B8%9A%E0%B8%94%E0%B8%98%E0%B8%A3%E0%B8%94%E0%B8%97%E0%B8%95%E0%B8%9F%E0%B8%A3%E0%B8%94%E0%B8%AA%E0%B8%9A%E0%B8%94%E0%B8%A3%20REPORT.pdf; see also Kayla Hertz, Today Marks 19 Years Since the Last Magdalen Laundry in Ireland Closed, IRISH CENTRAL, (Oct. 25, 2015), http://www.irishtimes.com/roots/history/Today-marks-18-years-since-the-last-Magdalene-laundry-in-Ireland-closed.html.


This is not to say that the residential institutions redress scheme was without benefits. For example, the redress mechanism eliminated certain issues, such as those relating to the statute of limitations (which would have run in most if not all cases), vicarious liability of the state and residential institutions in question (since many of the institutions where run by religious institutions that were not formally incorporated or associated with the state), and prejudicial delay, that would have made recovery in the courts difficult, if not impossible.38

In the end, the state paid out approximately €1.46 billion to resolve the matter, although injured individuals received only minimal compensation.39 Although the scheme had its benefits, many people in Ireland have criticized the procedure, even though outsiders have framed the mechanism as “an overwhelming success.”40

C. Magdalen Laundry Claims

The next series of claims was somewhat similar to those involving residential institutions, although the injuries in this case came at the hands of various religious organizations that provided housing and work for unwed mothers and other socially suspect persons in a variety of institutions, most notably the Magdalens laundries, during the 1950s and 1960s.41 While there has been some debate about the nature and extent of the alleged abuse, the Irish Human Rights Commission found in 2010 that there was sufficient evidence of “unlawful imprisonment, servitude, forced labour and cruel and degrading treatment” to justify an inquiry into the situation.42 Because the state had been complicit in the interment of the women in the institutions, the state again accepted responsibility for the injuries,43 and in 2013, a formal state apology was issued and an $82 million compensation scheme set in place.44

Legislation was enacted setting up a pursuant a tariff scheme for monetary compensation on terms outlined in the state’s official report.45 This time, the redress scheme also provided a novel system of in-kind benefits, such as health care and other services, based on provision of a special card.46 These benefits were provided as a means in Ireland of avoiding some of the problems that arose in the residential institutions case when vulnerable and to some

42. id; see also John Burke, State Worst Hit by Magdalen’s Unlawful Detention, SUNDAY BUSI- 

43. Some have referred to “State collusion” in the context of women’s relegation to certain religious-run institutions. See Report of the Inter-Departmental Committee, supra note 42; Carol Ryan, Seeking Redress for a Mother’s Life in a Workhouse, N.Y. TIMES (Feb. 6, 2013), http://www.nytimes.com/2013/02/07/world/europe/seeking-redress-in-ireland-over-magdalene-laundry.html?_r=0 (last visited Feb. 21, 2016). Certainly there was a very close relationship between the Catholic Church and the state during the time in question. See S.I. Strong, Christian Constitutions: Do They Protect Internationally Recognized Human Rights and Minimize the Potential for Violence Within a Society? A Comparative Analysis of American and Irish Constitutional Law and Their Religious Elements, 29 CASE WES T. RES. INT’L L.J. 1, 21-26, 28-31 (1997) (noting the close constitutional relationship between the Catholic Church and the state and noting the prohibitive religious mores of the time).


extent financially unsophisticated parties were given a large lump-sum cash payment. 47

Those setting up the redress mechanism for the Magdalen laundries case learned other important lessons. For example, unlike the residential institutions case, the Magdalen laundries compensation procedure did not require any proof of causation of individual injury. 48 Instead, the scheme “exclude[d] mutually antagonistic roles and positions and avoid[ed] invasive and painful inquiry and interrogation” and instead sought to create a “a speedy procedure as part of a final process of healing, reconciliation and closure.” 49

The Magdalen compensation process included other innovative elements as well. For example, the state decided to adopt and apply “the principles of restorative justice and the methods applicable to and used in alternative dispute resolution” when designing the compensation scheme. 50 As a result, “the Commission undertook an ‘interest-based dispute resolution process’ which acknowledged the ‘blameless status of the women (‘the Magdalen women’) . . . and focused upon their present and future needs, interests and underlying requirements.” 51

In this setting, “restorative justice” was defined as a process by which “collaboration and consensus replaces positional and adversarial methods” of dispute resolution. 52 Thus, “[t]he Commission decided to engage in a conversation and enter into a dialogue with the women in order to discover exactly who the Magdalen women now are, how they now are and where they now are,” thereby giving “a voice to each of the Magdalen women who wished to participate in the process.” 53 However, the process also needed “to give careful consideration to the needs and interests of the State and to other persons affected by the proposed Scheme,” since “it would be unjust and unrealistic . . . to ignore the obvious fact that our nation is currently affected by an economic recession of unprecedented proportions which is likely to endure for a protracted period of time.” 54

When establishing the process, the Commission also met with representatives of the various religious orders that had been responsible for management of Magdalen laundries. 55 Although many of the members of these religious organizations were of a different generation than those who had run the laundries during the relevant time period, the religious congregations “indicated an interest in meeting with the women who formerly resided with them if the women wished to meet with them” and “expressed a desire to engage in any reconciliation and restorative process which will assist in healing and reducing the hurt experienced by the ladies in the laundries.” 56

In many ways, the restorative justice aspect of the Magdalen redress scheme is reminiscent of the Northern Ireland peace process, in that the designers of the Magdalen scheme sought not only to understand the interests of the relevant parties (rather than simply their litigation demands) but also to provide a deeper reconciliation than might be possible through monetary compensation alone. 57 Thus, the Magdalen scheme contemplated mediation between the survivors and the nuns, who felt somewhat traumatized by the claims made against their religious orders. 58 However, that process never materialized, since many of the survivors of the laundries did not want to be forced to interact with those who had been the cause of their suffering. 59

At this point, “decisions have been made on 86 per cent of applications out of the 776 received to date with €18 million paid out so far.” 60 Although the process has been criticized on a number of levels (for example, parties

47. See QUIRK, supra note 44, at 7.
48. See id. at 5.
49. Id.
50. Id. at 2.
51. Id.

In order to discover the needs, interests and requirements of the Magdalen women the Commission decided to replace sworn evidence (upon which the assessment of damages in an adversarial based system is based) with informal conversations. Only those women who expressed a wish to converse were contacted. A large majority of the eligible Magdalen women expressed a wish to participate and did so.

52. Id. at 25.
53. Id.

54. Id.
55. See id. at 27.
56. Id. at 28.
57. See id. at 2. This influence may due in part to the fact that Senator Martin McAleese, one of the prominent participants in the Northern Ireland peace process, headed up one of the investigative committees in the Magdalen laundries case. See Pamela Duncan, Will Ireland Apologise to the Women of the Magdalen Laundries’ TIME (July 4, 2011), http://content.time.com/time/world/article/ 0,8399,2081008,00.html.
58. See Duncan, supra note 57.
59. See id.
extent financially unsophisticated parties were given a large lump-sum cash payment.47

Those setting up the redress mechanism for the Magdalen laundries case learned other important lessons. For example, unlike the residential institutions case, the Magdalen laundries compensation procedure did not require any proof of causation of individual injury.48 Instead, the scheme “exclude[d] mutually antagonistic roles and positions and avoid[ed] invasive and painful inquiry and interrogation” and instead sought to create a “a speedy procedure as part of a final process of healing, reconciliation and closure.”49

The Magdalen compensation process included other innovative elements as well. For example, the state decided to adopt and apply “the principles of restorative justice and the methods applicable to and used in alternative dispute resolution” when designing the compensation scheme.50 As a result, “the Commission undertook an ‘interest-based dispute resolution process’ which acknowledged the ‘blameless status of the women (‘the Magdalen women’’) . . . and focused upon their present and future needs, interests and underlying requirements.”51

In this setting, “restorative justice” was defined as a process by which “collaboration and consensus replaces positional and adversarial methods” of dispute resolution.52 Thus, “[t]he Commission decided to engage in a conversation and enter into a dialogue with the women in order to discover exactly who the Magdalen women now are, how they now are and where they now are,” thereby giving “a voice to each of the Magdalen women who wished to participate in the process.”53 However, the process also needed “to give careful consideration to the needs and interests of the State and to other persons affected by the proposed Scheme,” since “it would be unjust and unrealistic . . . to ignore the obvious fact that our nation is currently affected by an economic recession of unprecedented proportions which is likely to endure for a protracted period of time.”54

When establishing the process, the Commission also met with representatives of the various religious orders that had been responsible for management of Magdalen laundries.55 Although many of the members of these religious organizations were of a different generation than those who had run the laundries during the relevant time period, the religious congregations “indicated an interest in meeting with the women who formerly resided with them if the women wished to meet with them” and “expressed a desire to engage in any reconciliation and restorative process which will assist in healing and reducing the hurt experienced by the ladies in the laundries.”56

In many ways, the restorative justice aspect of the Magdalen redress scheme is reminiscent of the Northern Ireland peace process, in that the designers of the Magdalen scheme sought not only to understand the interests of the relevant parties (rather than simply their litigation demands) but also to provide a deeper reconciliation than might be possible through monetary compensation alone.57 Thus, the Magdalen scheme contemplated mediation between the survivors and the nuns, who felt somewhat traumatized by the claims made against their religious orders.58 However, that process never materialized, since many of the survivors of the laundries did not want to be forced to interact with those who had been the cause of their suffering.59

At this point, “decisions have been made on 86 per cent of applications out of the 776 received to date with €18 million paid out so far.”60 Although the process has been criticized on a number of levels (for example, parties

47. See QUIRKE, supra note 44, at 7.
48. See id. at 5.
49. Id.
50. Id. at 2.
51. Id.
52. Id. at 25.
53. Id.
54. Id.
55. See id. at 27.
56. Id. at 28.
57. See id. at 2. This influence may due in part to the fact that Senator Martin McAleese, one of the prominent participants in the Northern Ireland peace process, headed up one of the investigative committees in the Magdalen laundries case. See Pamela Duncan, Will Ireland Apologize to the Women of the Magdalene Laundries? TIME (July 4, 2011), http://content.time.com/content/world/article/0,8599,2081088,00.html.
58. See Duncan, supra note 57.
59. See id.
who accept compensation must waive their rights to litigate the matter further and compensation under the scheme is generally lower than what could be obtained at trial,\(^{61}\) the mechanism has made it easier for victims to receive compensation, since they do not need to prove liability or causation and can avoid difficulties similar to those seen in the residential institutions case, such as issues relating to statutes of limitations and prejudicial delay.\(^{62}\)

D. Symphysiotomy Claims

A fourth set of large-scale claims involved women who had been forced to undergo symphysiotomy and pубiототоmу surgery, a medically unnecessary and, by all accounts, barbaric procedure imposed on approximately 1500 women during and immediately after childbirth from the 1940s to the 1980s.\(^{63}\) After years of campaigning by victims' rights groups, the Minister for Health and Children eventually commissioned a report into the practice,\(^{64}\) and a group redress scheme was finally established in 2014.\(^{65}\)

The mechanism again involved a public apology on the part of the government as well as an ex gratia scheme that established set tariffs for certain types of injuries without the need to establish causation.\(^{66}\) The process, which was administered by retired Judge Maureen Clark, relied largely, if not exclusively, on documents rather than on oral proceedings.\(^{67}\)

The scheme was entirely voluntary, which meant there was the possibility of future proceedings from women who did not opt into the system (as with other programs, acceptance of compensation under the scheme required a waiver of future litigation against the state).\(^ {68}\) Although individual claimants might obtain more if they proceeded on an individual basis, they would have had to face a variety of issues, including constitutional concerns regarding prejudicial delay and difficulties in obtaining the necessary medical records.\(^{69}\)

E. Pyrite Construction Claims

Despite the wide variety of types of injuries in the preceding cases, one feature was common throughout, namely the presence of state liability. However, not all large-scale disputes in Ireland have involved wrongdoing on the part of the state. To the contrary, the most recent large-scale action in Ireland prior to DePay came about as the result of purely private acts. The injury in this case arose as a result of construction defects relating to involving excess pyrite in crushed stone flooring.\(^{70}\) Although it initially appeared as if recovery for these sorts of damages would be entirely private,
who accept compensation must waive their rights to litigate the matter further and compensation under the scheme is generally lower than what could be obtained at trial.\textsuperscript{61} the mechanism has made it easier for victims to receive compensation, since they do not need to prove liability or causation and can avoid difficulties similar to those seen in the residential institutions case, such as issues relating to statutes of limitations and prejudicial delay.\textsuperscript{62}

\subsection{Symphysiotomy Claims}

A fourth set of large-scale claims involved women who had been forced to undergo symphysiotomy and pubiotomy surgery, a medically unnecessary and, by all accounts, barbaric procedure imposed on approximately 1500 women during and immediately after childbirth from the 1940s to the 1980s.\textsuperscript{63} After years of campaigning by victims’ rights groups, the Minister for Health and Children eventually commissioned a report into the practice,\textsuperscript{64} and a group redress scheme was finally established in 2014.\textsuperscript{65}

The mechanism again involved a public apology on the part of the government as well as an ex gratia scheme that established set tariffs for certain types of injuries without the need to establish causation.\textsuperscript{66} The process, which was administered by retired Judge Maureen Clark, relied largely, if not exclusively, on documents rather than on oral proceedings.\textsuperscript{67}

The scheme was entirely voluntary, which meant there was the possibility of future proceedings from women who did not opt into the system (as with other programs, acceptance of compensation under the scheme required a waiver of future litigation against the state).\textsuperscript{68} Although individual claimants might obtain more if they proceeded on an individual basis, they would have had to face a variety of issues, including constitutional concerns regarding prejudicial delay and difficulties in obtaining the necessary medical records.\textsuperscript{69}

\subsection{Pyrite Construction Claims}

Despite the wide variety of types of injuries in the preceding cases, one feature was common throughout, namely the presence of state liability. However, not all large-scale disputes in Ireland have involved wrongdoing on the part of the state. To the contrary, the most recent large-scale action in Ireland prior to Depuy came about as the result of purely private acts.

The injury in this case arose as a result of construction defects relating to involving excess pyrite in crushed stone flooring.\textsuperscript{70} Although it initially appeared as if recovery for these sorts of damages would be entirely private,

\begin{itemize}
\item[61.] See QUIRE, supra note 44, at 7.
\item[62.] See supra note 38 and accompanying text.
\item[63.] See Kellie Morgan & Nick Thompson, \textit{"He Was Saving Me in Half"—Ireland’s Gruesome Era of Symphysiotomy}, CNN (Jan 30, 2015), http://www.cnn.com/2015/01/30/europe/ireland-symphysiotomy/; O’Carroll, supra note 12 (noting approximately 1500 symphysiotomies were carried out in Ireland); Over 550 claims have been brought thus far. See Paul Cullen, \textit{Symphysiotomy Compensation Refused to 53 Women}, IRISH TIMES (Apr 14, 2015), http://www.irishtimes.com/news/health/symphysiotomy-compensation-refused-to-53-women-1.21174497.
\item[66.] Proof of the surgical procedure is sufficient for at least some compensation. See PAYMENT SCHEME, supra note 65 (reflecting Terms of The Surgical Symphysiotomy Payment Scheme). However, some victims are finding it difficult to meet what they are referring to as an “impossible” level of proof. See Cullen, supra note 63.
\item[67.] See PAYMENT SCHEME, supra note 65 (reflecting Terms of The Surgical Symphysiotomy Payment Scheme).
\item[68.] See id.
\item[69.] See Silvia Martinez Gracia, \textit{Medical Negligence–Standard of Care}, 19 MEDICO-LEGAL J. IRE. 113 (2013) (discussing Nelson v. McQuillan, Unreported March 8 2013 (H. CI)); Silvia Martinez Gracia, \textit{Medical Negligence – Breach of Duty}, 18 MEDICO-LEGAL J. IRE. 100 (discussing Kearney v. McQuillan [2010] IESC 20 (SC), which upheld the High Court award on liability and amended the damages award to $325,000); Murphy, supra note 64, at 45-48; Mark Tottenham, Medical Negligence–Symphysiotomy–Inordinate and Inexcusable Delay, 12 MEDICO-LEGAL J. IRE. 95 (2006) (discussing Kearney v. McQuillan [2006] IEHC 186 (H. CI)); see also PAYMENT SCHEME, supra note 65 (reflecting Terms of The Surgical Symphysiotomy Payment Scheme, which provides for damages ranging from €50,000 to €150,000).
\item[70.] See Bleinherbansett, supra note 16.
various difficulties arose,\textsuperscript{71} and the scope of damages led the state to enact a statute that provided for state compensation (the Pyrite Remediation Scheme) relating to remediation efforts.\textsuperscript{72} The scheme, which contemplates an online-only procedure that allows injured parties to recoup certain costs associated with the rehabilitation of the property in question, has at this point received over 700 applications.\textsuperscript{73} There have been questions whether the mechanism should be extended to cover similar problems involving mica construction blocks.\textsuperscript{74}

The Pyrite Remediation Scheme is remarkable for several reasons. First, there is no allegation of state wrongdoing, as was the case with previous large-scale disputes.\textsuperscript{75} Instead, the state only became involved as a result of the private sector’s failure to provide adequate compensation and the unconscionability associated with leaving homeowners without any remedy.\textsuperscript{76} While the state is continuing to engage with insurers and other responsible parties “with a view to agreeing a process within which the latter can contribute resources to the remediation process,” it is unclear how what the outcome of those discussions will be and how much the private sector will be able to pay in the way of damages.\textsuperscript{77} To some extent, the issue relates to financial resources, but there are also a number of legal questions that are waiting to be resolved by the European Court of Justice.\textsuperscript{78} The matter was heard in November 2015, and a decision is expected in due course.\textsuperscript{79}

Second, the pyrite program “is not a compensation scheme” per se, and “[h]ome owners will not be able to seek the recoupment of costs associated with the remediation of a dwelling undertaken prior to the commencement of the scheme.”\textsuperscript{80} Instead, the program simply seeks to rehabilitate homes that have been damaged as a result of the use of pyrite during construction.\textsuperscript{81} III. The DePay Procedure

As the preceding discussion demonstrates, Ireland has a diverse and relatively extensive experience with large-scale disputes, despite the absence of any standard judicial mechanisms providing for class or collective redress. However, the Irish legal system is current facing its biggest test to date, as a result of the DePay dispute. Although the DePay matter is similar in ways to earlier actions, there are also a number of key differences that must be addressed.

A. DePay as a Purely Private Dispute

The first item to note is that the DePay dispute is purely private in nature. While some of the earlier large-scale actions also involved private parties (for example, various religious congregations were involved in matters involving residential institutions and the Magdalene laundries and a number of private entities (such as general contractors, materials producers and insurers) were responsible for the legal injuries at issue in the pyrite dispute), there is nothing to suggest that the state is in any way responsible for the problems at issue in DePay or that the state will need to intervene in the dispute as a matter of public policy, since DePay, as a large international corporation, appears to have sufficient financial resources to remedy the situation on its own.\textsuperscript{82}


\textsuperscript{73} Pyrite Resolution Board, supra note 72; Families Who Were Forced Out Of Their Homes by Pyrite Move Back in JOURNAL (July 20, 2015) (noting over 500 applications have been approved but only 5 homes have been rehabilitated since 2013), http://www.thejournal.ie/families-homes-move-damage-remediation-scheme-2210767-Jul2015/.


\textsuperscript{75} See Pyrite Resolution Bill 2013: Second Stage (2013). http://oireachtasdebates.oireachtas.ie/debate%20authoring/debateswebpack.nsf/takes/seanad20131216000557/opendocument@GGG00500 (last visited Feb. 21, 2016) [hereinafter Second Stage].

\textsuperscript{76} See id.

\textsuperscript{77} See id.

\textsuperscript{78} See Case C-613/14, supra note 71 (concerning a question referred to the European Court of Justice by the Irish Supreme Court); Pyrite Hears, supra note 71.

\textsuperscript{79} See Case C-613/14, supra note 71.

\textsuperscript{80} See Case C-613/14, supra note 71.

\textsuperscript{81} See id.

\textsuperscript{82} For example, DePay has also been subject to class actions and multidistrict litigation in both the United States and Australia concerning its hip implants, which led to a $2.5 billion global settlement
and the scope of damages led the state to enact a statute that provided for state compensation (the Pyrite Remediation Scheme) relating to remediation efforts. The scheme, which contemplates an online-only procedure that allows injured parties to recoup certain costs associated with the rehabilitation of the property in question, has at this point received over 700 applications. There have been questions whether the mechanism should be extended to cover similar problems involving mica construction blocks.

The Pyrite Remediation Scheme is remarkable for several reasons. First, there is no allegation of state wrongdoing, as was the case with previous large-scale disputes. Instead, the state only became involved as a result of the private sector's failure to provide adequate compensation and the unconscionability associated with leaving homeowners without any remedy. While the state is continuing to engage with insurers and other the responsible parties "with a view to agreeing a process within which the latter can contribute resources to the remediation process," it is unclear how what the outcome of those discussions will be and how much the private sector will be able to pay in the way of damages. To some extent, the issue relates to financial resources, but there are also a number of legal questions that are waiting to be resolved by the European Court of Justice. The matter was heard in November 2015, and a decision is expected in due course.

Second, the pyrite program "is not a compensation scheme" per se, and "[h]ome owners will not be able to seek the recoupment of costs associated with the remediation of a dwelling undertaken prior to the commencement of the scheme." Instead, the program simply seeks to rehabilitate homes that have been damaged as a result of the use of pyrite during construction.

III. THE DEPUY PROCEDURE

As the preceding discussion demonstrates, Ireland has a diverse and relatively extensive experience with large-scale disputes, despite the absence of any standard judicial mechanisms providing for class or collective redress. However, the Irish legal system is currently facing its biggest test to date, as a result of the DePuy dispute. Although the DePuy matter is similar in ways to earlier actions, there are also a number of key differences that must be addressed.

A. DePuy as a Purely Private Dispute

The first item to note is that the DePuy dispute is purely private in nature. While some of the earlier large-scale actions also involved private parties (for example, various religious congregations were involved in matters involving residential institutions and the Magdalene laundries and a number of private entities (such as general contractors, materials producers and insurers) were responsible for the legal injuries at issue in the pyrite dispute), there is nothing to suggest that the state is in any way responsible for the problems that are at issue in DePuy or that the state will need to intervene in the dispute as a matter of public policy, since DePuy, as a large international corporation, appears to have sufficient financial resources to remedy the situation on its own.


73. Pyrite Resolution Board, supra note 72, Families Who Were Forced Out Of Their Homes by Pyrite Move Back In, JOURNAL (July 20, 2015) (noting over 500 applications have been approved but only 5 houses have been rehabilitated since 2013), http://www.thejournal.ie/families-homes-move-damage-remediation-scheme-2210767-Jul2015/.


76. See id.

77. Id.

78. See Case C-613/14, supra note 71 (concerning a question referred to the European Court of Justice by the Irish Supreme Court, Pyrite Heave, supra note 71).

79. See Case C-613/14, supra note 71.

80. Second Stage, supra note 75.

81. See id.

82. For example, DePuy has also been subject to class actions and multidistrict litigation in both the United States and Australia concerning its hip implants, which led to a $2.5 billion global settlement.
These factors suggest that it will not be necessary for the Irish state to undertake some of the measures that is has in the past, such as a formal government investigation into the nature and causes of the victims' injury and the adoption of legislation creating a public redress scheme that is governed or at least strongly influenced by a formal tariff system based on the findings set forth in those government reports. Although some of the earlier dispute resolution mechanisms (for example, the system set up to address army deafness claims) did not include any independent means of resolving individual claims, the use of the tariff system was nevertheless very helpful in guiding settlement discussions between the parties and reducing the number of disputes that made it to court.\textsuperscript{83} Other schemes provided for a non-binding method of dispute resolution based on the tariffs but allowed parties to opt out of the government scheme if they were unhappy with the result.\textsuperscript{84} However, the perceived reasonableness of the tariff scheme, combined with various practical and legal difficulties that would arise if the case were to go to court, helped encourage parties to accept the decision of the various assessment boards.

Although these tariff schemes have occasionally been criticized, the absence of this sort of formal damages analysis could be somewhat problematic in DePuy, since the creation of a government-approved benchmark was very helpful in encouraging settlement. Not only was the process of devising the tariffs reasonably transparent, it was also considered relatively objective and reasonable in how it weighed the various interests.\textsuperscript{85}

All is not lost, however. In fact, the participants in the DePuy dispute have attempted to recreate this mechanism by adopting an independent evaluation scheme that will provide parties with a reasonable understanding of what the likely quantum of damages are, which is doubtless meant to encourage parties to settle the matter without a full hearing.\textsuperscript{86} The process involves a retired High Court judge to oversee the scheme and a team of ten independent evaluators to examine medical reports submitted by the plaintiffs and identify the appropriate settlement offer.\textsuperscript{87}

This procedure involves a number of critical elements. First, the independent evaluators are not drawn from or chosen by the law firms representing the plaintiffs, nor are they chosen by the defendant corporation, thereby avoiding the type of “battle of the experts” that is routine in United States litigation.\textsuperscript{88} Although many U.S.-trained lawyers may question the validity of evaluators who have not been appointed by the parties, numerous authorities from the United States and elsewhere have supported the use of court-appointed experts.\textsuperscript{89}

Second, evaluators are drawn from the ranks of senior barristers who already demand a high level of respect within the Irish legal system.\textsuperscript{90} As a result, the evaluation mechanism can be expected to generate results that are generally considered to be independent, trustworthy and technically competent with respect to the merits of the claims. Furthermore, the use of an independent team of evaluators suggests that there will not be any discrimination against or differential treatment of particular plaintiffs. Indeed, the fact that claims are being handled in a unified and standardized manner reduces the likelihood that plaintiffs will receive different settlement offers depending on who their lawyer is, when they file suit, etc.

Third, the evaluators in DePuy will benefit from certain pre-existing features of the Irish legal system. At this point, assessment of personal injury damages in the Irish legal system is relatively predictable as a result of two factors. First, juries are not available in most civil disputes in Irish courts.\textsuperscript{91}

\begin{itemize}
\item \textsuperscript{86} See Go-Ahead, supra note 4.
\item \textsuperscript{87} See id.
\item \textsuperscript{88} See Scott Brewer, Scientific Expert Testimony and Intellectual Due Process, 107 YALE L.J. 1533, 1565 (1998) (suggesting the primary problem with the battle of the experts is that the competition “is waged before spectators who are for the most part not competent even to understand, much less to apply in a nonarbitrary manner, that intellectual contest’s rules”).
\item \textsuperscript{89} See David Sonenshein & Charles Fitzpatrick, The Problem of Partisan Experts and the Potential for Reform Through Concurrent Evidence, 32 REV. LITIG. 1, 36-45 (2013).
\item \textsuperscript{90} See About Us, THE BAR OF IRELAND – THE LAW LIBRARY, https://www.lawlibrary.ie/About-Us.aspx (last visited Feb. 21, 2016). Most Irish barristers are, like their English counterparts, self-employed, which increases their independence. Furthermore, senior barristers (Senior Counsel, or S.C.s., in Ireland and Queen’s Counsel, or Q.C.’s, in England) are held in high esteem in the legal community and hold a reputation for technical excellence, particularly in their field of specialization.
\end{itemize}
encourage parties to settle the matter without a full hearing.86 The process involves a retired High Court judge to oversee the scheme and a team of ten independent evaluators to examine medical reports submitted by the plaintiffs and identify the appropriate settlement offer.87

This procedure involves a number of critical elements. First, the independent evaluators are not drawn from or chosen by the law firms representing the plaintiffs, nor are they chosen by the defendant corporation, thereby avoiding the type of “battle of the experts” that is routine in United States litigation.88 Although many U.S.-trained lawyers may question the validity of evaluators who have not been appointed by the parties, numerous authorities from the United States and elsewhere have supported the use of court-appointed experts.89

Second, evaluators are drawn from the ranks of senior barristers who already demand a high level of respect within the Irish legal system.90 As a result, the evaluation mechanism can be expected to generate results that are generally considered to be independent, trustworthy and technically competent with respect to the merits of the claims. Furthermore, the use of an independent team of evaluators suggests that there will not be any discrimination against or differential treatment of particular plaintiffs. Indeed, the fact that claims are being handled in a unified and standardized manner reduces the likelihood that plaintiffs will receive different settlement offers depending on who their lawyer is, when they file suit, etc.

Third, the evaluators in DePuy will benefit from certain pre-existing features of the Irish legal system. At this point, assessment of personal injury damages in the Irish legal system is relatively predictable as a result of two factors. First, juries are not available in most civil disputes in Irish courts.91

---

86. See Go-Ahead, supra note 4.
87. See id.
88. See Scott Brewer, Scientific Expert Testimony and Intellectual Due Process, 107 YALE L.J. 1533, 1565 (1998) (suggesting the primary problem with the battle of the experts is that the competition "is waged before spectators who are for the most part not competent even to understand, much less to apply in a nonarbitrary manner, that intellectual content's rules").
90. See About Us, THE BAR OF IRELAND – THE LAW LIBRARY, https://www.lawlibrary.ie/About-Us.aspx (last visited Feb. 21, 2016). Most Irish barristers are, like their English counterparts, self-employed, which increases their independence. Furthermore, senior barristers (Senior Counsel, or S.C.s, in Ireland and Queen's Counsel, or Q.C.'s, in England) are held in high esteem in the legal community and hold a reputation for technical excellence, particularly in their field of specialization.
Second, Ireland has adopted an extremely innovative administrative mechanism, similar in ways to New Zealand’s no-fault tort compensation scheme, that deals with personal injury and wrongful death claims on a preliminary basis. Together, these two mechanisms reduce uncertainty regarding the settlement value of a personal injury claim and increase the likelihood of an amicable settlement without the need of a full trial. While a certain degree of unpredictability can arise in cases where aggravated damages exist, since such damages are often highly individualized, the DePuy evaluation system expressly excludes aggravated damages.

B. DePuy as a Standard Products Liability Case

Another difference between DePuy and many of the earlier large-scale disputes in Ireland is that DePuy does not involve highly emotional claims that strike at the very fabric of Irish society. Instead, DePuy constitutes a routine products liability case that is remarkable only for the number of injured parties.

This aspect of the DePuy dispute suggests that the claims evaluation process can remain largely if not wholly confidential, as is typical of private forms of dispute resolution. In this, the DePuy process will differ from other large-scale matters in Ireland, since many of those cases featured a number of highly publicized elements. For example, many of the previous proceedings involved formal government investigations into the nature and extent of claims. Furthermore, recommendations for damages awards (tariffs) were published and extensively reviewed in the media. However, some aspects of those earlier processes, most notably the outcome of individual claims, were kept confidential unless and until a party decided to take a dispute to court.

At this point, it does not appear likely that the DePuy process will result in the widespread publication of a general tariff of damages, particularly since the defendant has not admitted that the products are defective in every case. However, this features does not appear problematic, since there seems to be only a limited public interest in both the process and the individual outcomes associated with the DePuy dispute. Not only are no public monies being expended with respect to either the process or the outcome, but the public has already been made aware of the existence of the dispute through media reports and DePuy’s recall of the hip implants. Furthermore, Ireland has never required full disclosure of the individual underlying facts in earlier large-scale disputes, so the absence of that element in DePuy is not unduly concerning.

---

92. The Injuries Board is a state-run entity that handles all personal injuries claims unless the parties settle the matter directly between themselves. See About Us, Injuries Board Ireland, http://injuriesboard.ie/eng/About_Us/ (last visited Feb. 21, 2016). Through its administrative process, the Board provides general estimates on amounts recoverable through the “Book of Quantum” and various costs estimators, and eventually issues an award known as an assessment, which the parties may accept or reject. See Frequently Asked Questions, Injuries Board Ireland, http://injuriesboard.ie/eng/FAQs/ (last visited Feb. 21, 2016). If the parties reject the assessment, they may take the claim to court. Thus, the Injuries Board acts as an initial semi-independent neutral evaluator whose recommendation need not be accepted by the parties. The Irish system is in many ways very similar to New Zealand’s no-fault tort regime, although the Irish system does not bar access to the courts, as the New Zealand system does. See About the Accident Compensation (AC) Act 2001, ACC (last updated Jan. 24, 2014), http://www.acc.co.nz/about-acc/legal/legislation/abat00152, Stephen Todd, Treatment Injury in New Zealand, 86 CH-KENT L. REV. 1169, 1178 (2011). The Injuries Board procedure is also somewhat reminiscent of non-binding arbitration. See Bennett, supra note 27, at 23-24.

93. Aggravated damages are permitted in the Irish legal system, although they are considered compensatory in nature. See LAW REFORM COMMISSION REPORT ON AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES para. 5.25 (2000), http://www.lawreform.ie/_fileupload/Reports/rAggravatedDamages.htm (last visited Feb. 21, 2016) (recommending that aggravated damages be defined as “damages to compensate a plaintiff for added hurt, distress or insult caused by the manner in which the defendant committed the wrong giving rise to the plaintiff’s claim, or by the defendant’s conduct subsequent to the wrong, including the conduct of legal proceedings”). Exemplary damages, however, include a punitive element. See id. para 1.01. Though the Irish approach to aggravated and exemplary damages is somewhat more flexible than that found in England, recovery is still relatively rare. See PAUL WARD, TORT LAW IN IRELAND 234 (2010) (noting exemplary damages in Ireland include a punitive element).

94. See Go-Ahead, supra note 4.

95. The residential institutions and Magdalen laundry cases were particularly traumatizing for both the litigants and Irish society as a whole.


97. See Go-Ahead, supra note 4. This is not to say that the matter will remain shielded entirely from view. For example, some public notice of developments could arise if the court retains any sort of general supervisory jurisdiction over the dispute. Although Irish courts typically do not retain supervisory jurisdiction over a matter, there have been instances where supervisory jurisdiction over certain administrative law matters. See Hilary DeLany, Significant Themes in Judicial Review of Administrative actions, 230 DUBLIN U. L. J. 73 (1998) (noting “the courts’ supervisory jurisdiction in judicial review proceedings is not to vindicate rights as such, but to ensure that public powers are exercised in accordance with basic standards of legality, fairness and rationality”). However, given that the DePuy matter will be administered privately, the need and ability to retain supervisory jurisdiction may not exist.

98. For example, the Catholic Church successfully resisted producing all of the records relating to residential institutions. See McDonald, supra note 25.
Second, Ireland has adopted an extremely innovative administrative mechanism, similar in ways to New Zealand's no-fault tort compensation scheme, that deals with personal injury and wrongful death claims on a preliminary basis. Together, these two mechanisms reduce uncertainty regarding the settlement value of a personal injury claim and increase the likelihood of an amicable settlement without the need of a full trial. While a certain degree of unpredictability can arise in cases where aggravated damages exist, such damages are often highly individualized, the DePuy evaluation system expressly excludes aggravated damages.

B. DePuy as a Standard Products Liability Case

Another difference between DePuy and many of the earlier large-scale disputes in Ireland is that DePuy does not involve highly emotional claims that strike at the very fabric of Irish society. Instead, DePuy constitutes a routine products liability case that is remarkable only for the number of injured parties.

This aspect of the DePuy dispute suggests that the claims evaluation process can remain largely if not wholly confidential, as is typical of private forms of dispute resolution. In this, the DePuy process will differ from other large-scale matters in Ireland, since many of those cases featured a number of highly publicized elements. For example, many of the previous proceedings involved formal government investigations into the nature and extent of claims. Furthermore, recommendations for damages awards (tariffs) were published and extensively reviewed in the media. However, some aspects of those earlier processes, most notably the outcome of individual claims, were kept confidential unless and until a party decided to take a dispute to court.

At this point, it does not appear likely that the DePuy process will result in the widespread publication of a general tariff of damages, particularly since the defendant has not admitted that the products are defective in every case. However, this features does not appear problematic, since there seems to be only a limited public interest in both the process and the individual outcomes associated with the DePuy dispute. Not only are there no public monies being expended with respect to either the process or the outcome, but the public has already been made aware of the existence of the dispute through media reports and DePuy's recall of the hip implants. Furthermore, Ireland has never required full disclosure of the individual underlying facts in earlier large-scale disputes, so the absence of that element in DePuy is not unduly concerning.

92. The Injuries Board is a state-run entity that handles all personal injuries claims unless the parties settle the matter directly between themselves. See About Us, Injuries Board Ireland, http://injuriesboard.ie/eng/About_Us/ (last visited Feb. 21, 2016). Through its administrative process, the Board provides general estimates on amounts recoverable through the "Book of Quantum" and various costs estimators, and eventually issues an award known as an assessment, which the parties may accept or reject. See Frequently Asked Questions, Injuries Board Ireland, http://injuriesboard.ie/eng/FAQs/ (last visited Feb. 21, 2016). If the parties reject the assessment, they may take the claim to court. Thus, the Injuries Board acts as an initial semi-independent neutral evaluator whose recommendation need not be accepted by the parties. The Irish system is in many ways very similar to New Zealand's no-fault tort regime, although the Irish system does not bar access to the courts, as the New Zealand system does. See About the Accident Compensation (AC) Act 2001, ACC (last updated Jan. 24, 2014), http://www.acc.co.nz/about-acc/legal/legislation/aba00052, Stephen Todd, Treatment Injury in New Zealand, 86 CHI-KENT L. REV. 1169, 1178 (2011). The Injuries Board procedure is also somewhat reminiscent of non-binding arbitration. See Bennett, supra note 27, at 23–24.

93. Aggravated damages are permitted in the Irish legal system, although they are considered compensatory in nature. See LAW REFORM COMMISSION'S REPORT ON AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES para. 5.25 (2000), http://www.lawreform.ie/_fileUpload/Reports/rAggravatedDamages.htm (last visited Feb. 21, 2016) (recommended that aggravated damages be defined as "damages to compensate a plaintiff for added hurt, distress or insult caused by the manner in which the defendant committed the wrong giving rise to the plaintiff's claim, or by the defendant's conduct subsequent to the wrong, including the conduct of legal proceedings"). Exemplary damages, however, include a punitive element. See id. para 1.01. Though the Irish approach to aggravated and exemplary damages is somewhat more flexible than found in England, recovery is still relatively rare. See PAUL WARD, TORT LAW IN IRELAND 234 (2010) (noting exemplary damages in Ireland include a punitive element).

94. See Go-Ahead, supra note 4.

95. The residential institutions and Magdalen laundry cases were particularly traumatizing for both the litigants and Irish society as a whole.
C. Additional Logistical Elements

Experience in Ireland has shown that resolution of large-scale disputes can be a time-consuming process, despite the parties’ best efforts.\footnote{Indeed, some matters can be closed prematurely. Thus, the symphysiotomy redress scheme had to be reopened to allow for additional claims. See Extension for Victims to Claim Symphysiotomy Payment Scheme, IRISH WORLD (Dec. 10, 2014), http://www.theriworld.com/extension-for-victims-to-claim-symphysiotomy-payment-scheme/ (last visited Feb. 21, 2016).} However, DePuy attempts to overcome the potential delays through an entire team of evaluators and a documents-only procedure. Thus, “[a] decision on claims will be made within six weeks of receipt of all documentation,” and every six months, “the manager of the scheme will have to report to the chairperson on progress achieved including the number of cases dealt with and whether they have been rejected, accepted or processed.”\footnote{See id.; Healy, supra note 5; Green Light, supra note 4.} As a result, the alternative procedure should be much faster than individual bilateral litigation in the Irish courts, which would have continued to at least 2022.\footnote{See supra note 4.}

The move toward efficiency has not been without costs. For example, DePuy’s documents-only approach is somewhat unusual for Ireland, since Irish courts allow for oral hearings in virtually all cases.\footnote{See Right to Oral Hearing has Become Growth Area in Judicial Review Cases, IRISH TIMES (Oct. 07, 2013), http://www.irishtimes.com/news/crime-and-law/right-to-oral-hearing-has-become-growth-area-in-judicial-review-cases-1.1552800.} However, this approach is similar to the documents-only procedure used in a number of other large-scale disputes and to Ireland’s preliminary mechanism for dealing with personal injury and wrongful death claims.\footnote{See supra note 2 (discussing the Injuries Board).} Furthermore, the voluntary nature of the DePuy scheme allows those who want an oral hearing or other more personalized assessments (such as those relating to aggravated damages) to opt out of the scheme and bring their claims in court.\footnote{See Go-Ahead, supra note 4.}

Some questions arise as to how successful the proposed mechanism will be. For example, the claims at issue here are recent enough that it is unlikely parties will run into some of the litigation problems that other mass claimants suffered, such as those relating to the possibility of prejudicial delay in bringing suit.\footnote{See supra note 92 (discussing the Injuries Board).} This phenomenon could lead to a higher number of opt-outs than was seen in other large-scale disputes. However, plaintiffs who proceed to court will need to prove causation, which was a significant problem in the residential institutions case.\footnote{See supra note 38 and accompanying text. DePuy has not admitted that its products were defective in all cases. See Go-Ahead, supra note 4.} This feature could drive litigants back to the assessment process, as could the fact that many plaintiffs are relatively elderly and may prefer quick resolution to the matter.

IV. CONCLUSION

As the preceding suggests, there is much that can be learned from the Irish experience with large-scale legal disputes. Indeed, Ireland provides answers to a number of questions that have plagued the legal community for some time. First and foremost, Ireland demonstrates that a country does not need to have a judicial form of class or collective redress to create an innovative form of large-scale arbitral relief.\footnote{See supra note 7.} Instead, the DePuy procedure was based on the Rules of the Superior Courts, which permit judges to “invite” parties to use an alternative dispute resolution process, supplemented by the inherent jurisdiction of the court to issue directions.\footnote{See Rules of the Superior Courts Order 56A: Mediation and Conciliation Rule 2(A)(1) (SI 502/2010) (h), http://www.courts.ie/rules.jsf/b652f6d0 ebenfalls7980256db7f00399507279ce5d53030e5 58b0577af0b3d47d17OpenDocument. Although this rule speaks of mediation, conciliation or other court-approved mechanism other than arbitration, the actual process used in DePuy reflects a number of elements similar to non-binding arbitration. See Bennett, supra note 29, at 23–24. The Rules’ restriction on arbitration could therefore be interpreted as being limited to binding arbitration.} This phenomenon suggests that innovative results can be obtained even in a relatively unsophisticated legal environment, if the parties are willing to work together. Although further analysis of the DePuy evaluation scheme will be needed before the mechanism can be placed into the taxonomy of large-scale arbitral mechanisms, Ireland’s contribution to the world of class, mass and collective arbitration is intriguing.\footnote{As a preliminary matter, the mechanism seems to be collective in nature, since participants must individually agree to participate in the process. See STRONG, supra note 7, at 17, 84–85 (defining collection arbitration as involving individual consent on a pre-dispute or post-dispute basis). However, full analysis of the DePuy scheme was not possible at the time of writing, since many of the details of the mechanism were not available.}

Second, the DePuy dispute demonstrates that arbitration can be used to resolve mass torts, something that has been questioned in the past.\footnote{See id at 24; S.I. STRONG, MASS TORTS AND ARBITRATION: LESSONS FROM ABACUS V. ARGENTINE REPUBLIC, IN UNCERTAIN CAUSATION IN TORT LAW 250, 250–332 (Miquel Martin-Casals & Diego M.}
C. Additional Logistical Elements

Experience in Ireland has shown that resolution of large-scale disputes can be a time-consuming process, despite the parties' best efforts.99 However, DePay attempts to overcome that history through an entire team of evaluators and a documents-only procedure. Thus, "[a] decision on claims will be made within six weeks of receipt of all documentation," and every six months, "the manager of the scheme will have to report to the chairperson on progress achieved including the number of cases dealt with and whether they have been rejected, accepted or processed."100 As a result, the alternative procedure should be much faster than individual bilateral litigation in the Irish courts, which would have continued to at least 2022.101

The move toward efficiency has not been without costs. For example, DePay's documents-only approach is somewhat unusual for Ireland, since Irish courts allow for oral hearings in virtually all cases.102 However, this approach is similar to the documents-only procedure used in a number of other large-scale disputes and to Ireland's preliminary mechanism for dealing with personal injury and wrongful death claims.103 Furthermore, the voluntary nature of the DePay scheme allows those who want an oral hearing or other more personalized assessments (such as those relating to aggravated damages) to opt out of the scheme and bring their claims in court.104

Some questions arise as to how successful the proposed mechanism will be. For example, the claims at issue here are recent enough that it is unlikely parties will run into some of the litigation problems that other mass claimants suffered, such as those relating to the possibility of prejudicial delay in bringing suit.105 This phenomenon could lead to a higher number of opt-outs than was seen in other large-scale disputes. However, plaintiffs who proceed to court will need to prove causation, which was a significant problem in the residential institutions case.106 This feature could drive litigants back to the assessment process, as could the fact that many plaintiffs are relatively elderly and may prefer quick resolution to the matter.

IV. CONCLUSION

As the preceding suggests, there is much that can be learned from the Irish experience with large-scale legal disputes. Indeed, Ireland provides answers to a number of questions that have plagued the legal community for some time.

First and foremost, Ireland demonstrates that a country does not need to have a judicial form of class or collective redress to create an indigenous form of large-scale arbitral relief.107 Instead, the DePay procedure was based on the Rules of the Superior Courts, which permit judges to "invite" parties to use an alternative dispute resolution process, supplemented by the inherent jurisdiction of the court to issue directions.108 This phenomenon suggests that innovative results can be obtained even in a relatively unsophisticated legal environment, if the parties are willing to work together. Although further analysis of the DePay evaluation scheme will be needed before the mechanism can be placed into the taxonomy of large-scale arbitral mechanisms, Ireland's contribution to the world of class, mass and collective arbitration is intriguing.109

Second, the DePay dispute demonstrates that arbitration can be used to resolve mass torts, something that has been questioned in the past.110

---

99. Indeed, some matters can be closed prematurely. Thus, the symphysiotomy redress scheme had to be reopened to allow for additional claims. See Extension for Victims to Claim Symphysiotomy Payment Scheme, IRISH WORLD (Dec. 10, 2014), http://www.therishworld.com/extension-for-victims-to-claim-symphysiotomy-payment-scheme/ (last visited Feb. 21, 2016).
100. Go-Ahead, supra note 4.
101. See id.; Healy, supra note 5; Green Light, supra note 4.
103. See supra note 92 (discussing the Injuries Board).
104. See Go-Ahead, supra note 4.
105. Parties were put on notice of the alleged defect in 2010, when DePay issued a worldwide recall for these particular hip implants. See Man Settles Action, supra note 96.
106. See supra note 38 and accompanying text. DePay has not admitted that its products were defective in all cases. See Go-Ahead, supra note 4.
107. See supra note 7 and accompanying text.
108. See Rules of the Superior Courts Order 56A: Mediation and Conciliation Rule 2(A)(X)(1)(SI 502/2010) (I.), http://www.courts.ie/rules/s8/S856526B6100BEB7E9B326BDB703099507279C5D5F504C5/9562577fbc0934d7017/openDocument. Although this rule speaks of mediation, conciliation or other court-approved mechanism other than arbitration, the actual process used in DePay reflects a number of elements similar to non-binding arbitration. See Bennett, supra note 29, at 23–24. The Rules' restriction on arbitration could therefore be interpreted as being limited to binding arbitration.
109. As a preliminary matter, the mechanism seems to be collective in nature, since participants must individually agree to participate in the process. See STRONG, supra note 7, at 17, 84–85 (defining collection arbitration as involving individual consent on a pre-dispute or post-dispute basis). However, full analysis of the DePay scheme was not possible at the time of writing, since many of the details of the mechanism were not available.
110. See id. at 24; S.I. Strong, Mass Torts and Arbitration: Lessons From Abacat v. Argentine Republic, in UNCERTAIN CAUSATION IN TORT LAW 250, 250–332 (Miguel Martín-Casals & Diego M.
However, such proceedings will develop only to the extent such measures are necessary in the relevant legal environment. Interestingly, the Irish experience demonstrates that the absence of a judicial means of resolving large-scale legal claims does not mean that such disputes do not arise in that particular society; instead, it means that the legal system will have to go to extraordinary lengths to deal with those sorts of matters. As DePay demonstrates, the absence of large-scale judicial relief drove the parties to arbitration not only as a matter not only of efficiency and party autonomy (the standard justifications for arbitration) but also as a matter of justice, a rationale that has been raised in the context of mass arbitrations in the investment context. As a result, arbitration is elevated from a secondary or “alternative” form of dispute resolution to an integral and necessary part of a formal system of justice.

Third, the Irish experience suggests that large-scale disputes are more easily resolved when both the process and the outcome are based on principled predictability. This proposition is illustrated by the successful adoption of government-approved tariffs in early Irish disputes and by the use of independent evaluators in DePay. In each of these situations, the presence of objective data regarding the value of the claims encourages settlement of disputes in a rational and timely manner. Furthermore, the benefit of standardized benchmarks is useful regardless of whether the claims are adjudicated by a court, an assessment board or an arbitral tribunal. Indeed, many of the armed forces loss cases settled despite the absence of a formal adjudicative element.

As useful as this information is, questions arise as to whether the Irish model, particularly in the private law context, can be adopted in other jurisdictions. For example, the driving feature in the DePay case appears to be the use of senior barristers as independent evaluators. Unfortunately, some jurisdictions, most notably the United States, do not have a similarly independent and well-respected body of legal experts. As a result, it may be that the DePay mechanism would be best suited to countries with a split bar or to disputes that are highly technical in nature.

Papayannis eds., (2015) (discussing whether and to what extent arbitration can be used to resolve mass torts as a matter of national and international law).

111. Similar rationales have been seen in cases involving international investment arbitration. See Strong, supra note 7, at 278 (citing the preliminary award on jurisdiction in Abacal v. Argentine Republic as indicating “the rejection of the admissibility of the present claims may equal a denial of justice”).

112. See generally Catherine Elliott & Frances Quinn, English Legal System 193-200 (14th ed. 2013)

113. Highly technical disputes might be amenable to resolution by non-legal experts in that field.

Finally, Ireland’s experiment with restorative justice is extremely intriguing, even if it is unclear whether and to what extent Ireland will continue to move in this direction. On the one hand, the private nature of the DePay and pyrite disputes suggests that Irish large-scale claims may be evolving in a way that will limit the need for restorative justice. However, only three years have passed since restorative justice was attempted in the Magdalene laundries case, which suggests that there is time for Ireland and for other jurisdictions to adopt this approach. Hopefully the lessons of the Magdalene laundries dispute are not lost, since Ireland has the identified some truly novel ways of bringing restorative and therapeutic justice into the world of tort litigation. Indeed, other countries who are seeking to find ways of resolving certain types of emotionally sensitive mass claims (such as those involving widespread racial or sexual abuse) might do well to look at Irish models of restorative justice in the tort law setting.

These efforts might be assisted in Ireland itself by the enactment of the proposed new law on mediation. While it remains unclear whether and to what extent this legislation would extend to large-scale disputes, statutory support for consensual dispute resolution, when combined with an Irish ethos of reconciliation informed by the success of the Northern Ireland peace process, may provide for a more productive means of resolving large-scale disputes than has been seen in countries such as the United States.

As the preceding suggests, Ireland’s efforts in the area of large-scale dispute resolution are truly noteworthy. Furthermore, there is much that members of both the United States and international legal community can learn from Irish innovations in this field. It is hoped that this article provides some guidance in that regard.


115. Though the field is young, it is intriguing. See Eddie Greene, “Can We Talk?” Therapeutic Jurisprudence, Restorative Justice, and Tort Litigation, in Civil Justice and Civil Justice 233, 246–52 (B.H. Bornstein et al. eds., 2008).


117. See M.L. Goodbody, Mediation Bill to be Published Later This Year, Lexology, http://www.lexology.com/library/detail.aspx?g=a4504518-151-4c09-88fe-6750f2788380 (last visited Feb. 21, 2016) (suggesting the proposed bill is expected to be enacted into law in 2016); Dan Buckley, Mediation Option for Legal Disputes, IRISH EXAMINER (July 7, 2015) (discussing the content of the proposed bill); http://www.ishreexaminer.com/ireland/mediation-option-for-legal-disputes-341074.html.

118. See Duncan, supra note 57 (regarding role of Martin McAleese in the Magdalene laundries case).
However, such proceedings will develop only to the extent such measures are necessary in the relevant legal environment. Interestingly, the Irish experience demonstrates that the absence of a judicial means of resolving large-scale legal claims does not mean that such disputes do not arise in that particular society; instead, it means that the legal system will have to go to extraordinary lengths to deal with those sorts of matters. As DePuy demonstrates, the absence of large-scale judicial relief drove the parties to arbitration not only as a matter not only of efficiency and party autonomy (the standard justifications for arbitration) but also as a matter of justice, a rationale that has been raised in the context of mass arbitrations in the investment context.111 As a result, arbitration is elevated from a secondary or “alternative” form of dispute resolution to an integral and necessary part of a formal system of justice.

Third, the Irish experience suggests that large-scale disputes are more easily resolved when both the process and the outcome are based on principled predictability. This proposition is illustrated by the successful adoption of government-approved tariffs in early Irish disputes and by the use of independent evaluators in DePuy. In each of these situations, the presence of objective data regarding the value of the claims encourages settlement of disputes in a rational and timely manner. Furthermore, the benefit of standardized benchmarks is useful regardless of whether the claims are adjudicated by a court, an assessment board or an arbitral tribunal. Indeed, many of the army hearing loss cases settled despite the absence of a formal adjudicative element.

As useful as this information is, questions arise as to whether the Irish model, particularly in the private law context, can be adopted in other jurisdictions. For example, the driving feature in the DePuy case appears to be the use of senior barristers as independent evaluators. Unfortunately, some jurisdictions, most notably the United States, do not have a similarly independent and well-respected body of legal experts.112 As a result, it may be that the DePuy mechanism would be best suited to countries with a split bar or to disputes that are highly technical in nature.113

Papayannis eds., 2015) (discussing whether and to what extent arbitration can be used to resolve mass torts as a matter of national and international law).

111. Similar rationales have been seen in cases involving international investment arbitration. See STRONG, supra note 7, at 278 (citing the preliminary award on jurisdiction in Absolut v. Argentine Republic as indicating “the rejection of the admissibility of the present claims may equal a denial of justice”).


113. Highly technical disputes might be amenable to resolution by non-legal experts in that field.

Finally, Ireland’s experiment with restorative justice is extremely intriguing, even if it is unclear whether and to what extent Ireland will continue to move in this direction. On the one hand, the private nature of the DePuy and pyrite disputes suggests that Irish large-scale claims may be evolving in a way that will limit the need for restorative justice.114 However, only three years have passed since restorative justice was attempted in the Magdalene laundries case, which suggests that there is time for Ireland and for other jurisdictions to adopt this approach. Hopefully the lessons of the Magdalene laundries dispute are not lost, since Ireland has the identified some truly novel ways of bringing restorative and therapeutic justice into the world of tort litigation.115 Indeed, other countries who are seeking to find ways of resolving certain types of emotionally sensitive mass claims (such as those involving widespread racial or sexual abuse) might do well to look at Irish models of restorative justice in the tort law setting.116

These efforts might be assisted in Ireland itself by the enactment of the proposed new law on mediation.117 While it remains unclear whether and to what extent this legislation would extend to large-scale disputes, statutory support for consensual dispute resolution, when combined with an Irish ethos of reconciliation informed by the success of the Northern Irish peace process, may provide for a more productive means of resolving large-scale disputes than has been seen in countries such as the United States.118

As the preceding suggests, Ireland’s efforts in the area of large-scale dispute resolution are truly noteworthy. Furthermore, there is much that members of both the United States and international legal community can learn from Irish innovations in this field. It is hoped that this article provides some guidance in that regard.


115. Though the field is young, it is intriguing. See Edie Greene, “Can We Talk?” Therapeutic Jurisprudence, Restorative Justice, and Tort Litigation, in CIVIL JUSTICE AND CIVIL JUSTICE 233, 246–52 (J.H. Bormstein et al. eds., 2008).


117. See A.L. Gooch, Mediation Bill to be Published Later This Year, LEXOLOGY, http://www.lexology.com/library/detail.aspx?g=a4504518-a151-4c09-8f8a-67599278b8380 (last visited Feb. 21, 2016) (suggesting the proposed bill is expected to be enacted into law in 2016). Dan Mackey, Mediation Option for Legal Disputes, IRISH EXAMINER (July 7, 2015) (discussing the content of the proposed bill), http://www.irishexaminer.com/ireland/mediation-option-for-legal-disputes-341074.html.

118. See Duncan, supra note 57 (regarding role of Martin McAleese in the Magdalene laundries case).
AN INTERIM ESSAY ON FIFA'S WORLD CUP OF CORRUPTION: THE DESPERATE NEED FOR INTERNATIONAL CORPORATE GOVERNANCE STANDARDS AT FIFA

Professor Bruce W. Bean

I. THE INDICTMENTS

A. The May 27, 2015, Indictment
B. The Superseding Indictment

II. WHAT IS A FIFA?

A. FIFA and Corruption
B. Can FIFA Officials Be Subject to United States Criminal Law?
C. Is FIFA a "Cesspit?"

III. SELECTION OF THE 2018/2022 WORLD CUP VENUES

A. A Stunning Decision
B. FIFA's Reaction to Corruption Generally
C. The Garcia Report
D. Charade or Farce?
E. A Perfect Corporate Governance Vacuum
F. How Did We Get Here?

IV. IMMEDIATE PROSPECTS FOR FIFA-"SEVEN DWARVES AND NO SNOW WHITE"

V. CONCLUSION: WHAT IS TO BE DONE?

VI. EPILOGUE

I. THE INDICTMENTS

A. The May 27, 2015, Indictment

On May 27, 2015, the United States Department of Justice unsealed a 161-page indictment (the "Indictment") in the United States District Court for the Eastern District of New York. A Brooklyn Grand Jury returned the Indictment against fourteen defendants, current or former officials of Fédération Internationale de Football Association, ("FIFA") and five businessmen associated with businesses involved with FIFA. The public filing was coordinated with raids by United States and Swiss officials on FIFA facilities in Miami and at FIFA headquarters in Zurich. Swiss

* Professor at Michigan State University College of Law.

authorities also conducted an early morning raid on Zurich’s luxury Baur au Lac Hotel arresting seven FIFA officials.\(^2\)

In addition to the fourteen individuals charged with various United States federal crimes, the Indictment described twenty-five unnamed co-conspirators, at least some of whom were identified to the Grand Jury.\(^3\) The Indictment related to the worldwide operations of FIFA, the governing body for international football, known as soccer in North America and Samoa. The Indictment described numerous acts committed within the territory of the United States, plus many funds transfers through the United States banking system.\(^4\) The crimes charged include $150,000,000 in bribes paid over a period of twenty years, often in connection with the selection of a host nation for the quadrennial FIFA World Cup or the sale of marketing and broadcast rights for FIFA events.\(^5\) The charges against the defendants included “RICO” counts (the Racketeering Influenced Criminal Organizations Act,\(^6\) originally enacted to secure convictions of Mafia members), plus wire fraud, conspiracy and other charges.\(^7\)

At the time the Indictment was unsealed, Loretta Lynch, the United States Attorney General, announced that guilty pleas had been already been secured from four individuals and two corporate legal entities.\(^8\) The long-serving President of FIFA, Joseph (Sepp) Blatter, was not named in the Indictment and was reelected to a fifth four-year term as FIFA’s President just days after the raids, arrests and release of the Indictment.\(^9\) In the media storm that raged after the scope and gravity of the charges became known,

Blatter announced he would resign once a newly called Extraordinary Congress of FIFA member elected a new President in February 2016.\(^10\)

### B. The Superseding Indictment

At 6 AM on December 3, 2015, Swiss police raided the Baur au Lac Hotel in Zurich and arrested two additional FIFA officials.\(^11\) Later that day a 236-page Superseding Indictment was unsealed by Attorney General Loretta Lynch.\(^12\) The Superseding Indictment describes payment of more than $200,000,000 in bribes and charges sixteen additional individuals associated with football in the Western hemisphere,\(^13\) bringing the total of individual and corporate defendants charged to forty-one. At the press conference announcing the Superseding Indictment and the arrest of two FIFA officials, Attorney General Lynch disclosed that eight additional individuals had pleaded guilty.\(^14\) Forfeitures already agreed to by the twelve persons who had pled guilty by that date totaled $190,000,000.\(^15\) The ninety-two count Superseding Indictment also refers to twenty-four unindicted co-conspirators.\(^16\) Many of these individuals should be easily identifiable to anyone who reads the Superseding Indictment, is familiar with FIFA and has access to Google.\(^17\) At her press conference Attorney General Lynch spoke directly to these as yet publicly unidentified co-conspirators: “The message from this announcement should be clear to every culpable individual who remains in the shadows, hoping to evade our investigation: You will not wait us out. You will not escape our focus.”\(^18\)

---

5. Id.  
6. 18 U.S. Code § 1961 et seq.  
12. United States of America v. Jeffrey Webb et al. (Nov. 25, 2015), (No. 15-252 (s-1)).  
14. Id.  
15. Id.  
16. United States of America v. Jeffrey Webb et al. (Nov. 25, 2015), (No. 15-252 (s-1)).  
17. “...Co-Conspirator #3 was also the general secretary of the Copa America Centenario executive committee, a joint CONCACAF/CONMEBOL body that was created in 2014 to oversee the 2016 Copa America Centenario...” Id. at para. 72.  
authorities also conducted an early morning raid on Zurich’s luxury Baur du Lac Hotel arresting seven FIFA officials. In addition to the fourteen individuals charged with various United States federal crimes, the Indictment described twenty-five unnamed co-conspirators, at least some of whom were identified to the Grand Jury. The Indictment related to the worldwide operations of FIFA, the governing body for international football, known as soccer in North America and Samoa. The Indictment described numerous acts committed within the territory of the United States, plus many funds transfers through the United States banking system. The crimes charged include $150,000,000 in bribes paid over a period of twenty years, often in connection with the selection of a host nation for the quadrennial FIFA World Cup or the sale of marketing and broadcast rights for FIFA events. The charges against the defendants included “RICO” counts (the Racketeering Influenced Criminal Organizations Act originally enacted to secure convictions of Mafia members), plus wire fraud, conspiracy and other charges.

At the time the Indictment was unsealed, Loretta Lynch, the United States Attorney General, announced that guilty pleas had already been secured from four individuals and two corporate legal entities. The long-serving President of FIFA, Joseph (Sepp) Blatter, was not named in the Indictment and was reelected to a fifth four-year term as FIFA’s President just days after the raids, arrests and release of the Indictment. In the media storm that raged after the scope and gravity of the charges became known,

5. Id.
6. 18 U.S. Code § 1961 et seq.

Blatter announced he would resign once a newly called Extraordinary Congress of FIFA member elected a new President in February 2016. B. The Superseding Indictment

At 6 AM on December 3, 2015, Swiss police raided the Baur au Lac Hotel in Zurich and arrested two additional FIFA officials. Later that day a 236-page Superseding Indictment was unsealed by Attorney General Loretta Lynch. The Superseding Indictment describes payment of more than $200,000,000 in bribes and charges sixteen additional individuals associated with football in the Western hemisphere, bringing the total of individual and corporate defendants charged to forty-one. At the press conference announcing the Superseding Indictment and the arrest of two FIFA officials, Attorney General Lynch disclosed that eight additional individuals had pleaded guilty. Forfeitures already agreed to by the twelve persons who had pled guilty by that date totaled $190,000,000. The ninety-two count Superseding Indictment also refers to twenty-four unindicted co-conspirators. Many of these individuals should be easily identifiable to anyone who reads the Superseding Indictment, is familiar with FIFA and has access to Google. At her press conference Attorney General Lynch spoke directly to these as yet publicly unidentifiable co-conspirators: “The message from this announcement should be clear to every culpable individual who remains in the shadows, hoping to evade our investigation: You will not wait us out. You will not escape our focus.”

12. United States of America v. Jeffrey Webb et al. (Nov. 25, 2015), (No. 15-252 (s-1)).
14. Id.
15. Id.
16. United States of America v. Jeffrey Webb et al (Nov. 25, 2015), (No. 15-252 (s-1)).
17. "...Co-Conspirator #3 was also the general secretary of the Copa America Centenario executive committee, a joint CONCACAF/CONMEBOL body that was created in 2014 to oversee the 2016 Copa America Centenario..." id. at para. 72.
Given the twelve individuals who have already pled guilty and the twenty-four co-conspirators remaining unindicted, it is certain that that there will be further indictments and/or guilty pleas.

II. WHAT IS A FIFA?

FIFA is a not-for-profit association organized under the Swiss Civil Code. Its role is to govern international football. FIFA as a legal entity has not been charged with violations of United States law. As the global authority for international football, FIFA has 209 Members, one from each nation or territory with a national football association. FIFA members pay annual fees to FIFA and are required to be members of one of FIFA’s six continental confederations, Confederation of North, Central American and Caribbean Association Football (“CONCACAF”), Confederacion Sudamericana de Futbol (“CONMEBOL”), Union des Associations Europeennes de Football (“UEFA”), Confederation Africaine de Football (“CAF”), Asian Football Confederation (“AFC”), and Oceana Football Association (“OFC”). As set forth in the FIFA Statutes, these confederations have a significant role in FIFA.

19. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [CIVIL CODE] DEC. 10, 1907, SR 210, art. 60 (Switz.).

20. Pursuant to United States practice, as enthusiastically applied by the Justice Department over the past decade, legal entities, in particular business corporations, are subject to being charged with criminal violations of federal laws and regulations. The United States Supreme Court confirmed this practice of charging legal entities by abandoning centuries of prior common law. New York Cent. & H.R.R. Co. v. U.S., 212 U.S. 481 (1909).

Some of the earlier writers on common law held the law to be that a corporation could not commit a crime. It is said to have been held by Lord Chief Justice Holt (Anonymous, 12 Mod. 559) that “a corporation is not indictable, although the particular members of it are.” In Blackstone’s Commentaries, chapter 18, § 12, we find it stated: “A corporation cannot commit treason, or felony, or other crime in its corporate capacity, though its members may, in their individual capacities.” Id. at 492.

We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. Id. at 495.


24. Id.

25. Id.


Given the twelve individuals who have already pled guilty and the twenty-four co-conspirators remaining unindicted, it is certain that that there will be further indictments and/or guilty pleas.

II. WHAT IS A FIFA?

FIFA is a not-for-profit association organized under the Swiss Civil Code. Its role is to govern international football. FIFA as a legal entity has not been charged with violations of United States law. As the global authority for international football, FIFA has 209 Members, one from each nation or territory with a national football association. FIFA members pay annual fees to FIFA and are required to be members of one of FIFA’s six continental confederations, Confederation of North, Central American and Caribbean Association Football (“CONCACAF”), Confederacion Sudamericana de Futbol (“CONMEBOL”), Union des Associations Europeennes de Football (“UEFA”), Confederation Africaine de Football (“CAF”), Asian Football Confederation (“AFC”), and Oceania Football Association (“OFC”). As set forth in the FIFA Statutes, these confederations have a significant role in FIFA.

19. SCHWEIZERISCHES ZIVILGESETZBUCH (ZGB) (CIVIL CODE) DEC. 10, 1907, SR 210, art. 60 (Switz.).

20. Pursuant to United States practice, as enthusiastically applied by the Justice Department over the past decade, legal entities, in particular business corporations, are subject to being charged with criminal violations of federal laws and regulations. The United States Supreme Court confirmed this practice of charging legal entities by abandoning centuries of prior common law. New York Cent. & H.R.R. Co. v. U.S., 212 U.S. 481 (1909).

Some of the earlier writers on common law held the law to be that a corporation could not commit a crime. It is said to have been held by Lord Chief Justice Holt (Anonymous, 12 Mod. 559) in Blackstone’s Commentaries, chapter 18, § 12, we find it stated: ‘A corporation cannot commit treason, or felony, or other crime in its corporate capacity, though its members may, in their individual capacities.’ Id. at 492.

We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. Id. at 495.


2016] Bean 371

More than 70% of FIFA’s revenues are tied to the sale of television and marketing rights to its World Cup and championship games which are conducted every four years. FIFA pays no taxes on its profits, including the $969 million of profits it earned between 2007 and 2014 on almost $10 billion in revenues.

A. FIFA and Corruption

The increased commercialization and globalization of football in recent decades has marvelously magnified the value of corporate sponsorships, marketing and broadcast rights, sales of football team-related items, etc. The Superseding Indictment alleges that many tens of millions of dollars in bribes have been paid in connection with the operations of FIFA and its continental confederations.

Over time, the organizations formed to promote and govern soccer in regions and localities throughout the world, including the United States, became increasingly intertwined with one another and with the sports marketing companies that enabled them to generate unprecedented profits through the sale of media rights to soccer matches. The corruption of the enterprise arose and flourished in this context.

These allegations of corruption will not surprise fans of football, who for decades have been hearing about FIFA scandals of all kinds, including gambling, game-fixing and money laundering, in addition to commercial bribery.

B. Can FIFA Officials Be Subject to United States Criminal Law?

Without doubt international football is the world’s most popular sport. It is played in every country, territory, and remote island on the planet, from North Korea and South Sudan to Antarctica. It is a game requiring no


24. Id.

25. Id.


elaborate infrastructure, no expensive equipment, and no extraordinary physical characteristics for those who simply want to kick a ball toward a goal without using their hands. At the height of professional football, of course, extraordinary skills are essential.

Football, played as “soccer” in the United States, Canada and American Samoa, has a long history in the United States. An American Football Association was organized in 1884. This regional group was replaced by the American Amateur Football Association in 1911, which changed its name to United States Football Association (“USFA”) and was recognized by FIFA in 1913. The USFA added the word “soccer” to its name in 1945 and operated as the United States Soccer Football Association until 1974 when the word “football” was dropped. Since then it has operated as the United States Soccer Federation.

Soccer in the United States has grown in popularity in recent decades, in part, because parents have become more aware of the risks of severe injury for children playing traditional American football, and because of greater familiarity with the game encouraged by the United States hosting the 1984 Los Angeles Olympics and the FIFA World Cup in 1994. The United States Men’s Team has qualified to participate in FIFA World Cup competitions since 1990. The United States Women’s Team has won three of the seven FIFA Women’s World Cups, which commenced in 1991.

While football is the number one sport in many other nations, it is only second, third or fourth in popularity in the United States. Most of the world’s best teams and best players are not American, and it is generally accepted that the European football leagues play at the highest level. The European football confederation, UEFA, is comprised of fifty-three national football organizations. This includes perennial producers of champion athletes, France, Germany and England, as well as Andorra, the Faroe Islands, San Marino and Russia.

The comparatively insignificant position of soccer in the United States compared to football in the rest of the world may have been the reason President of Russia Vladimir Putin, in commenting on the Department of Justice May 27, 2015 Indictment, said: “This is another blatant attempt to extend [U.S.] jurisdiction to other states.” Putin perhaps believes the United States has no genuine interest in FIFA activities and had timed the release of the indictment and arrest of FIFA officials in Switzerland to impact the re-election of the FIFA President FIFA’s long-time President, Joseph “Sepp” Blatter.

Putin compared the Department of Justice’s “interference” in FIFA with the “persecution” by the United States of Julian Assange and Edward Snowden. President Putin’s not-so-subtle animus toward the United States may perhaps also be seen in a statement in support of FIFA’s President Sepp Blatter. Two months after release of the May 27, 2015 Indictment, at a July 25 meeting with Blatter in St. Petersburg, Putin referred to Mr. Blatter: “I don’t believe a word about him being involved in corruption personally,” Putin added: “[The] heads of big international sporting organizations . . . deserve special recognition. If there is anyone who deserves the Nobel Prize, it’s those people.”

While superpower politics may play a role in everything Mr. Putin says and does, his sensitivity about the FIFA Indictment was certainly based in part on the furor accompanying the selection of Russia as the venue for the 2018 World Cup. On December 2, 2010, the FIFA Executive Committee announced that Russia was to be the host nation for the 2018 FIFA World Cup and the tiny desert sheikdom of Qatar had been chosen as the host for
elaborate infrastructure, no expensive equipment, and no extraordinary physical characteristics for those who simply want to kick a ball toward a goal without using their hands. At the height of professional football, of course, extraordinary skills are essential.

Football, played as "soccer" in the United States, Canada and American Samoa, has a long history in the United States. An American Football Association was organized in 1884. This regional group was replaced by the American Amateur Football Association in 1911, which changed its name to United States Football Association ("USFA") and was recognized by FIFA in 1913. The USFA added the word "soccer" to its name in 1945 and operated as the United States Soccer Football Association until 1974 when the word "football" was dropped. Since then it has operated as the United States Soccer Federation.

Soccer in the United States has grown in popularity in recent decades, in part, because parents have become more aware of the risks of severe injury for children playing traditional American football, and because of greater familiarity with the game encouraged by the United States hosting the 1984 Los Angeles Olympics and the FIFA World Cup in 1994. The United States Men's Team has qualified to participate in FIFA World Cup competitions since 1990. The United States Women's Team has won three of the seven FIFA Women's World Cups, which commenced in 1991.

While football is the number one sport in many other nations, it is only second, third or fourth in popularity in the United States. Most of the world's best teams and best players are not American, and it is generally accepted that the European football leagues play at the highest level. The European football confederation, UEFA, is comprised of fifty-three national football organizations. This includes perennial producers of champion athletes, France, Germany and England, as well as Andorra, the Faroe Islands, San Marino and Russia.

The comparatively insignificant position of soccer in the United States compared to football in the rest of the world may have been the reason President of Russia Vladimir Putin, in commenting on the Department of Justice May 27, 2015 Indictment, said: "This is another blatant attempt to extend [U.S.] jurisdiction to other states." Putin perhaps believes the United States has no genuine interest in FIFA activities and had timed the release of the indictment and arrest of FIFA officials in Switzerland to impact the re-election of the FIFA President FIFA's long-time President, Joseph "Sepp" Blatter.

Putin compared the Department of Justice's "interference" in FIFA with the "persecution" by the United States of Julian Assange and Edward Snowden. Putin's not-so-subtle animus toward the United States may perhaps also be seen in a statement in support of FIFA's President Sepp Blatter. Two months after release of the May 27, 2015 Indictment, at a July 25 meeting with Blatter in St. Petersburg, Putin referred to Mr. Blatter: "I don't believe a word about him being involved in corruption personally." Putin added: "[The] heads of big international sporting organizations . . . deserve special recognition. If there is anyone who deserves the Nobel Prize, it's those people."

While superpower politics may play a role in everything Mr. Putin says and does, his sensitivity about the FIFA Indictment was certainly based in part on the furor accompanying the selection of Russia as the venue for the 2018 World Cup. On December 2, 2010, the FIFA Executive Committee announced that Russia was to be the host nation for the 2018 FIFA World Cup and the tiny desert sheikdom of Qatar had been chosen as the host for the 2022 FIFA World Cup.
the 2022 FIFA World Cup.42

Putin’s view of the American government’s self-image as the “world’s only Superpower” is well known, but it is, nevertheless, legitimate to consider the jurisdiction of the Department of Justice to indict FIFA officials and persons affiliated with FIFA when FIFA operates from Zurich, Switzerland as a Swiss non-governmental organization. A quick reading of the Indictment or the Superseding Indictment, however, makes clear that in this particular case the basis for jurisdiction was not merely the tenuous connection of wire transfers that sped fleetingly through banks in New York.43 There are FIFA offices in Miami, and United States citizens and residents are clearly identified in each of the indictments. Whatever stretches of jurisdiction have previously been asserted by the Department of Justice, a careful consideration of the facts alleged in the indictments establishes that the acts there described create a substantial basis for the exercise of traditional territorial jurisdiction.

C. Is FIFA a “Cesspit?”

In dealing with the charge that the United States should not have intervened in FIFA’s supervision and management of the world’s most popular sport, an Economist article notes: “America has a long history of being tougher on white collar crime and corruption than other countries.”44


43. In two recent cases, however, one involving a non-U.S. company and the other two U.S. companies, the U.S. enforcement agencies went out of their way to assert that the FCPA’s territorial provisions, particularly as they apply to foreign companies, confer jurisdiction over foreign bank transfers whose only connection to the United States is the use of correspondent accounts at U.S. banks to clear foreign U.S. dollar transactions.


2016] Bean 375

The Economist further commented, that while Mr. Putin expressed unhappiness with the May 27, 2015, Indictment, “Most of Europe is happy, believing that FIFA has long been a cesspit of corruption in desperate need of fresh faces and reform.”45

It is interesting to note that once the Department of Justice announced its indictment other nations suddenly discovered FIFA-related crimes worth investigating. The United Kingdom Serious Fraud Office disclosed in October 2015 that it was considering whether it could investigate money laundering claims against certain persons involved in the alleged payment of a United States $414,000 bribe paid from Sydney, Australia to a FIFA executive in Trinidad, which may have passed through London.46 The Swiss Federal Office of Justice has also recently discovered corruption within FIFA. It worked with the Department of Justice in coordinating the raids on FIFA in Zurich which resulted in the arrest of FIFA officials and is now also investigating possible money laundering violations by Swiss banks.47 In addition, in October 2015 Swiss authorities commenced an investigation of FIFA’s President, Sepp Blatter.48 Other investigations may well be triggered, but it is telling that there was no serious official concern about FIFA bribery and corruption prior to the filing of the May 27, 2015, Indictment.

III. SELECTION OF THE 2018/2022 WORLD CUP VENUES

Between 1984 and 2004 World Cup venues for FIFA World Cup Championships were selected separately, each chosen six years in advance.49 Following the 2004 decision to have the 2010 World Cup held in South Africa, however, procedures were changed to permit the FIFA Executive Committee to select World Cup venues for the 2018 and 2022 games.

45. M.V., supra note 44.


49. World Cup, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/World_Cup (last visited Feb 6, 2016).
the 2022 FIFA World Cup.\textsuperscript{42} Putin’s view of the American government’s self-image as the “world’s only Superpower” is well known, but it is, nevertheless, legitimate to consider the jurisdiction of the Department of Justice to indict FIFA officials and persons affiliated with FIFA when FIFA operates from Zurich, Switzerland as a Swiss non-governmental organization. A quick reading of the Indictment or the Superseding Indictment, however, makes clear that in this particular case the basis for jurisdiction was not merely the tenuous connection of wire transfers that sped fleetingly through banks in New York.\textsuperscript{43} There are FIFA offices in Miami, and United States citizens and residents are clearly identified in each of the indictments. Whatever stretches of jurisdiction have previously been asserted by the Department of Justice, a careful consideration of the facts alleged in the indictments establishes that the acts there described create a substantial basis for the exercise of traditional territorial jurisdiction.

C. Is FIFA a “Cesspit”? 

In dealing with the charge that the United States should not have intervened in FIFA’s supervision and management of the world’s most popular sport, an Economist article notes: “America has a long history of being tougher on white collar crime and corruption than other countries.”\textsuperscript{44}

\begin{itemize}
\item \textsuperscript{43} In two recent cases, however, one involving a non-U.S. company and the other two U.S. companies, the U.S. enforcement agencies went out of their way to assert that the FCPA’s territorial provisions, particularly as they apply to foreign companies, confer jurisdiction over foreign bank transfers whose only connection to the United States is the use of correspondent accounts at U.S. banks to clear foreign U.S. dollar transactions.
\item \textsuperscript{44} It doesn’t take much: Expansive jurisdiction in FCPA matters, SHEARMAN & STERLING LLP (March 2009), http://www.shearmans.com/~media/Files/NewsInsights/Publications/2009/03/It-Doesnt-Take-Much-Expansive-Jurisdiction-in-FC_PA_Files/View-Full-Text/Files/Attachment_1TO3D49EXexpansiveJurisdictioninFCPA Matters.pdf.
\item \textsuperscript{45} M.V., supra note 44.
\item \textsuperscript{47} BBC Staff, FIFA Corruption: Swiss banks ‘reported possible money laundering’, BBC NEWS (June 17, 2015), http://www.bbc.com/news/world/europe-33136918.
\item \textsuperscript{48} Sam Borden, Sepp Blatter and Other Top Officials Are Suspended, Deepening FIFA’s Turmoil, N.Y. TIMES (Oct. 8, 2015), http://www.nytimes.com/2015/10/09/sports/soccer/sepp-blatter-michel-platini-jerome-valcke-fifa-suspended.html?_r=0.
\item \textsuperscript{49} World Cup, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/World_Cup (last visited Feb 6, 2016).
\end{itemize}
Qatar does not have adequate number of football stadiums and could possibly present an attractive target for terrorists from the region.

B. FIFA's Reaction to Corruption Generally

An instantaneous explosion of media criticism followed the 2010 announcement of the selection of Russia and Qatar as future World Cup venues. The media crisis did not abate. As a result, FIFA finally took a number of "actions" which it highly publicized. It convened an Independent Governance Committee that included truly independent experts in international corporate governance, amended its organizational document, the FIFA Statutes, to empower the Congress of 209 Member Associations, and not the Executive Committee, to "vote on" future World Cup venues. FIFA also issued press statements in support of "reform" and revised its recently established Ethics Code and the structure of its Ethics Committee. The FIFA Ethics Code includes all the right words. Its Preamble states:

FIFA bears a special responsibility to safeguard the integrity and reputation of football worldwide. FIFA is constantly striving to protect the image of football, and especially that of FIFA, from jeopardy or harm as a result of illegal, immoral or unethical methods and practices.

The restructuring of the Ethics Committee established two new "chambers." An Investigatory Chamber was created, and Michael J. Garcia, a totally independent former United States Attorney for the Southern
Committee to award both the 2018 and the 2022 World Cups in 2010. The selection of these venues was announced by the twenty-four Member Executive Committee on December 2, 2010.

A. A Stunning Decision

The selection of Russia for the 2018 World Cup and Qatar for the 2022 World Cup "could reasonably be described as having stunned nearly everyone." An integral part of the selection process had been an exhaustive due diligence investigation of each of the nations' bids to host the 2018 and 2022 World Cups. All venues were ultimately rated "low risk" except for Qatar ("high risk") and Russia ("medium risk"). Nevertheless, Russia and Qatar were the venues selected.

While both Russia and Qatar have well-deserved cloudy reputations for honesty in business and government, the selection of Qatar raised even more questions than the selection of Russia. While Russia is the largest country in the world by land area, Qatar is number ranked 166, with an area slightly smaller than Connecticut. This sheikhdom, part of the United Arab Emirates, does not have a strong tradition of playing football, has no indigenous football fan base and its teams have never qualified for World Cup play. Daytime temperatures at the normal time of year for playing the World Cup exceed 120 degrees Fahrenheit. This is in addition to the fact that

50. See FIFA Statutes, supra note 22, at Art. 25.2(e).
51. Russia and Qatar awarded 2018 and 2022 FIFA World Cups, FIFA, http://www.fifa.com/worldcup/news/y-2010/m-12/news/russia-and-qatar-awarded-2018-and-2022-fifa-world-cups-134669.html. The FIFA Statutes have since been amended to expand the Executive Committee to twenty-five. Consistent with FIFA's perfect lack of understanding of anything to do with current standards of international corporate governance, the FIFA Statutes now permit a single female member of the Executive Committee, referred to therein as "the female Member." While other nominees to the Executive Committee must be nominated one month prior to the date of the Congress at which they may be elected, nominations for "the female member" must be notified four months in advance. FIFA Statutes, supra note 22, at Art. 24.2 & 24.3.

Qatar does not have adequate number of football stadiums and could possibly present an attractive target for terrorists from the region.

B. FIFA’s Reaction to Corruption Generally

An instantaneous explosion of media criticism followed the 2010 announcement of the selection of Russia and Qatar as future World Cup venues. The media crisis did not abate. As a result, FIFA finally took a number of “actions” which it highly publicized. It convened an Independent Governance Committee that included truly independent experts in international corporate governance, amended its organizational document, the FIFA Statutes, to empower the Congress of 209 Member Associations, and not the Executive Committee, to “vote on” future World Cup venues. FIFA also issued press statements in support of “reform” and revised its recently established Ethics Code and the structure of its Ethics Committee. The FIFA Ethics Code includes all the right words. Its preamble states:

FIFA bears a special responsibility to safeguard the integrity and reputation of football worldwide. FIFA is constantly striving to protect the image of football, and especially that of FIFA, from jeopardy or harm as a result of illegal, immoral or unethical methods and practices.

The restructuring of the Ethics Committee established two new "chambers." An Investigatory Chamber was created, and Michael J. Garcia, a totally independent former United States Attorney for the Southern
District of New York, was hired as its Chairman. Dr. Hans-Joachim Eckert, a German judge was hired as Chairman of the Adjudicatory Chamber.

C. The Garcia Report

Michael Garcia and the Investigatory Chamber conducted an eighteen month investigation into the 2018/2022 bidding process that in 2010 had resulted in the unlikely selection of Russia and Qatar.61 This was not a criminal investigation, as Garcia was asked only to determine whether the 2010 selection of Russia and Qatar as World Cup host nations had been compromised in some way. Once the Investigatory Chamber’s work had been completed, pursuant to the procedures established by the Ethics Committee, Garcia submitted a confidential 450-page Report of findings to the Adjudicatory Chamber of the FIFA Ethics Committee.62

Hans Eckert reviewed the Garcia Report and refused to make it public,63 but did produce a forty-two page summary.64 Eckert’s summary states that the Garcia investigation, together with a prior Ethics Committee investigation, “established a prima facie case that serious violations of bidding rules and the FIFA Code of Ethics have occurred.”65 The Eckert summary included a description of a previously reported incident where a Qatari businessman and FIFA official distributed envelopes containing $40,000 in cash to voting members of the FIFA Executive Committee.66

Notwithstanding this prima facie case and the stark details of the Qatari bribes, Eckert announced that the Ethics Committee had concluded that the selection of Russia and Qatar for the 2018 and 2022 World Cups was not the result of bribery and corruption.67 Eckert’s summary announcing this conclusion included this comment: “To assume . . . that envelopes of full of cash [$40,000] are given in exchange for votes for a World Cup host is naive.”68 Eckert’s conclusion on behalf of the Adjudicatory Chamber that the 2018/2022 selection process was not compromised is final and, from all appearances, the 2018 World Cup will take place in Russia and the 2022 World Cup will be held in Qatar.69

Michael Garcia immediately objected to Eckert’s conclusion and his summary of the Report’s findings.70 He demanded the publication of the entire Garcia Report. When Eckert refused, Garcia appealed. When his appeal was rejected he resigned in protest.71 Garcia disputed Eckert’s handling of the Investigatory Chamber’s Report, declared that Eckert’s statement on the Report contained, “materially incomplete and erroneous representations of facts and conclusions” and later concluded that, “no principled approach could justify the Eckert Decision’s edits, omissions, and additions.”72

London’s Independent notes in this connection—“FIFA has descended yet further into farce.”73

D. Chorade or Farce?

FIFA has a long, undistinguished history of involvement in scandals and allegations of bribery and corruption.74 Over the decades FIFA has regularly “responded” to public outrage over corruption allegations with various highly visible and entirely ineffective maneuvers. There have been

63. “Publishing the report in full would actually put the FIFA Ethics Committee and FIFA itself in a very difficult situation legally. What is more, we have to respect the personal rights of the people mentioned in the report, which in the case of full publication of the report would in all likelihood not be possible.” Id.
64. Eckert Statement, supra note 53.
65. Id. at 6.3.5.
68. Id. at 8.3.
73. Tom Peck, Eckert: FIFA summary was word for word, INDEPENDENT (Nov. 14, 2015), http://www.independent.co.uk/sport/football/news-and-comment/eckert-fifa-summary-was-word-for-word-9626063.html.
74. Reider Gordon, supra note 52; Miles, supra note 40; Roger Pielke Jr., How can FIFA be held accountable?, 16 SPORT MGMT. 255 (2013).
District of New York, was hired as its Chairman. Dr. Hans-Joachim Eckert, a German judge was hired as Chairman of the Adjudicatory Chamber.

C. The Garcia Report

Michael Garcia and the Investigatory Chamber conducted an eighteenth month investigation into the 2018/2022 bidding process that in 2010 had resulted in the unlikely selection of Russia and Qatar.61 This was not a criminal investigation, as Garcia was asked only to determine whether the 2010 selection of Russia and Qatar as World Cup host nations had been compromised in some way. Once the Investigatory Chamber’s work had been completed, pursuant to the procedures established by the Ethics Committee, Garcia submitted a confidential 450-page Report of findings to the Adjudicatory Chamber of the FIFA Ethics Committee.62

Hans Eckert reviewed the Garcia Report and refused to make it public, but did produce a forty-two page summary.63 Eckert’s summary states that the Garcia investigation, together with a prior Ethics Committee investigation, “established a prima facie case that serious violations of bidding rules and the FIFA Code of Ethics have occurred.”64 The Eckert summary included a description of a previously reported incident where a Qatari businessman and FIFA official distributed envelopes containing $40,000 in cash to voting members of the FIFA Executive Committee.65

Notwithstanding this prima facie case and the stark details of the Qatari bribes, Eckert announced that the Ethics Committee had concluded that the selection of Russia and Qatar for the 2018 and 2022 World Cups was not the result of bribery and corruption.66 Eckert’s summary announcing this conclusion included this comment: “To assume . . . that envelopes of full of cash [$40,000] are given in exchange for votes on a World Cup host is naïve.”67 Eckert’s conclusion on behalf of the Adjudicatory Chamber that the 2018/2022 selection process was not compromised is final and, from all appearances, the 2018 World Cup will take place in Russia and the 2022 World Cup will be held in Qatar.68

Michael Garcia immediately objected to Eckert’s conclusion and his summary of the Report’s findings.69 He demanded the publication of the entire Garcia Report. When Eckert refused, Garcia appealed. When his appeal was rejected he resigned in protest.70 Garcia disputed Eckert’s handling of the Investigatory Chamber’s Report, declared that Eckert’s statement on the Report contained, “materially incomplete and erroneous representations of facts and conclusions” and later concluded that, “no principled approach could justify the Eckert Decision’s edits, omissions, and additions.”71

London’s Independent notes in this connection—“FIFA has descended yet further into farce.”72

D. Charade or Farce?

FIFA has a long, undistinguished history of involvement in scandals and allegations of bribery and corruption.73 Over the decades FIFA has regularly “responded” to public outrage over corruption allegations with various highly visible and entirely ineffective maneuvers. There have been


63. “Publishing the report in full would actually put the FIFA Ethics Committee and FIFA itself in a very difficult situation legally. What is more, we have to respect the personal rights of the people mentioned in the report, which in the case of full publication of the report would in all likelihood not be possible.” Id.

64. Eckert Statement, supra note 53.

65. Id. at 6.3.5.


68. Id. at 8.3.


michael-garcia-erroneous-ethics-report.


73. Tom Peck, Eckert: FIFA summary was word for word, INDEPENDENT (Nov. 14, 2015), http://www.independent.co.uk/sport/football/news-and-comment/eckert-fifa-summary-was-word-for-
word-982663.html.

74. Reider Gordon, supra note 52; Miles, supra note 40; Roger Pielke Jr., How can FIFA be held accountable?, 16 SPORT MGMT. 255 (2013).
uncountable FIFA-organized investigations, statements, reforms, commissions, task forces, solutions committees and even an Independent Governance Committee. These have been advertised by FIFA as addressing such allegations. FIFA’s repeated displays of new window dressing have had no discernible impact on its pervasive culture of corruption.

FIFA’s highly successful campaign of action without impact continued as Sepp Blatter, who is 79, announced he would resign as President once a new FIFA President was elected at the February 26, 2016 FIFA Congress. He also announced that a new independent reform task force would be established. This group was to be “overseen by the independent [sic] bodies of FIFA, namely the Audit & Compliance, the Disciplinary and the Ethics Committees.” As the handling of the Garcia Report illustrated, FIFA’s many so-called reform activities appear to have been designed to get in each other’s way.

In August, Francois Carrard, who is 77 years old and was Director-General of the International Olympic Committee from 1989 to 2003, accepted the position as Chair of this latest task force, now labeled the FIFA 2016 Reform Committee. As initially reported, this Committee was to include two representatives nominated by each continental confederation of FIFA Members, plus two nominated by FIFA’s major commercial sponsors. Carrard later announced that the sponsors would not serve on the Reform Committee but would be part of a five-person “Advisory Board” to be selected by Carrard to “review his panel’s work.” Even this transparently absurd negation of good corporate governance for the management of inherent conflicts, however, has not been honored.

The FIFA Executive Committee met on December 2 and 3, 2015, to consider Carrard’s 2016 FIFA Reform Committee proposals. One day prior to this meeting, on Tuesday, December 1, five major sponsors of FIFA football found it necessary to publish an open letter to the FIFA Executive Committee which, quite politely, pointed out:

We want to emphasize to you the values and characteristics that we believe should be incorporated through the reforms. Transparency, accountability, respect for human rights, integrity, leadership and gender equality are crucial to the future of FIFA. Reforms can set the proper framework for these characteristics, but a cultural change is also needed.

This letter, carefully crafted not to offend FIFA and thus risk offering their competitors the opportunity to displace them in sponsoring the world’s most popular sport, makes perfectly clear that the sponsors themselves are not persuaded that there has been any meaningful independent input into the Reform Committee’s work.

We are aware of the positive work that the Reform Committee has been doing on governance reform, but we still believe any reforms should be subject to independent oversight. It has also become clear to us that such independent oversight needs to run long-term through the implementation and evolution of the reform process. We encourage you to become champions of this independent oversight as it will only enhance FIFA’s credibility.

If the sponsors believe they must state that they are merely “aware” of the work the Reform Committee has done, this surely means that these sponsors understand that they have had no substantive input to their work. The Reform Committee’s Report, dated December 2, 2015, assures us that the Committee “has also engaged with the commercial partners of FIFA, in particular, FIFA’s primary sponsors, and has carefully listened to their views on the subject of FIFA reform.”


83. Id.

84. Id.


86. Id.
uncountable FIFA-organized investigations, statements, reforms, commissions, task forces, solutions committees and even an Independent Governance Committee.75 These have been advertised by FIFA as addressing such allegations. FIFA’s repeated displays of new window dressing have had no discernible impact on its pervasive culture of corruption.

FIFA’s highly successful campaign of action without impact continued as Sepp Blatter, who is 79, announced he would resign as President once a new FIFA President was elected at the February 26, 2016 FIFA Congress.76 He also announced that a new independent reform task force would be established.77 This group was to be “overseen by the independent [sic] bodies of FIFA, namely the Audit & Compliance, the Disciplinary and the Ethics Committees.”78 As the handling of the Garcia Report illustrated, FIFA’s many so-called reform activities appear to have been designed to get in each other’s way.

In August, Francois Carrard, who is 77 years old and was Director-General of the International Olympic Committee from 1989 to 2003, accepted the position as Chair of this latest task force, now labeled the FIFA 2016 Reform Committee.79 As initially reported, this Committee was to include two representatives nominated by each continental confederation of FIFA Members, plus two nominated by FIFA’s major commercial sponsors.80 Carrard later announced that the sponsors would not serve on the Reform Committee but would be part of a five person “Advisory Board” to be selected by Carrard to “review his panel’s work.”81 Even this transparently absurd negation of good corporate governance for the management of inherent conflicts, however, has not been honored.

75. Pelke, supra note 74.
76. Borden, supra note 10.
81. Id.

The FIFA Executive Committee met on December 2 and 3, 2015, to consider Carrard’s 2016 FIFA Reform Committee proposals. One day prior to this meeting, on Tuesday, December 1, five major sponsors82 of FIFA football found it necessary to publish an open letter to the FIFA Executive Committee which, quite politely, pointed out:

We want to emphasize to you the values and characteristics that we believe should be incorporated through the reforms. Transparency, accountability, respect for human rights, integrity, leadership and gender equality are crucial to the future of FIFA. Reforms can set the proper framework for these characteristics, but a cultural change is also needed.83

This letter, carefully crafted not to offend FIFA and thus risk offering their competitors the opportunity to displace them in sponsoring the world’s most popular sport, makes perfectly clear that the sponsors themselves are not persuaded that there has been any meaningful independent input into the Reform Committee’s work.

We are aware of the positive work that the Reform Committee has been doing on governance reform, but we still believe any reforms should be subject to independent oversight. It has also become clear to us that such independent oversight needs to run long-term through the implementation and evolution of the reform process. We encourage you to become champions of this independent oversight as it will only enhance FIFA’s credibility.84

If the sponsors believe they must state that they are merely “aware” of the work the Reform Committee has done, this surely means that these sponsors understand that they have had no substantive input to their work. The Reform Committee’s Report, dated December 2, 2015,85 assures us that the Committee “has also engaged with the commercial partners of FIFA, in particular, FIFA’s primary sponsors, and has carefully listened to their views on the subject of FIFA reform.”86

83. Id.
84. Id.
86. Id.
FIFA has convincingly established that it is a master of public relations spin and meaningless, hypocritical statements of “reform.” Its press releases and publicly available documents read wonderfully. Madison Avenue should be envious. On the other hand, the Constitution of the Union of Soviet Socialist Republics (“USSR”) also read wonderfully.\(^{87}\) The facts belie FIFA press releases and public documents. Carrard’s platitudeous dog and pony PowerPoint presentation to FIFA’s Executive Committee on December 3 has a similar feel.\(^{88}\) The Financial Times has also deemed such FIFA moves as “farce.”\(^{89}\)

Mr. Blatter controls an awesome spin machine without a doubt that is worthy of a world class politician. The FIFA-selected members of the 2016 FIFA Reform Committee have made proposals, which, if accepted by the Executive Committee, will then be presented to the full FIFA Congress on February 26, 2015.\(^{90}\) Based upon prior decades of FIFA charades, we can certainly the corrupt culture of FIFA will continue to operate as before. It will be corruption as usual.

It would be pointless and unproductive to track the many additional carefully crafted, optimistic, enthusiastic, and genuinely meaningless press releases issued by FIFA over the decades in response to unceasing reports of scandals, bribes and corruption. Nor have the impressive names FIFA has hired or consulted had significant impact on how FIFA actually operates.\(^{91}\) Each such announcement, committee and outside expert has turned out to be nothing more than part of FIFA’s hypocritical attempt to make it appear it was serious about eliminating corruption.

As an association organized under Article 60 of the Swiss Civil Code,\(^{92}\) FIFA is entirely self-governed; it is not responsible to any public or independent entity or authority. Even worse, FIFA President Blatter has complete control over FIFA and has created an internal organization entirely subservient to him and his staff. According to one former FIFA vice president, no one knows how much Blatter pays himself or the Executive Committee Members.\(^{93}\) It is understood, however, that for Executive Committee Members first class travel for two, five star hotels and bespoke suits are among the perquisites of FIFA affiliation.\(^{94}\) This apparently buys a good deal of loyalty.

With a Congress of 209 member organizations and an Executive Committee designed by Sepp Blatter, there are, in fact, absolutely no governance controls, limits or constraints on Blatter. Blatter appears to administer FIFA’s billions the way Congressional Committee chairs dole out favors to keep lesser Congressmen in line. Blatter has successfully “bought” sufficient support to have been elected FIFA President five times since 1998.\(^{95}\)

E. A Perfect Corporate Governance Vacuum

The basic principles of modern corporate governance and corporate responsibility are unknown to Blatter and totally absent from FIFA, which enjoys a perfect corporate governance vacuum. In October 2015, the FIFA Ethics Committee, the risible entity with an embarrassing track record of handling the Garcia Report, was confronted with a Swiss criminal investigation into a $2,000,000 “disloyal payment” made from FIFA funds by Blatter as well as allegations that Blatter had entered into a contract with a FIFA vice president that was “unfavorable to FIFA.”\(^{96}\) The “disloyal” payment was incontrovertibly made to Michel Platini, the President of UEFA, the European football confederation.\(^{97}\) As a result the Committee

---


88. 2016 FIFA Reform Committee Report, supra note 85.

89. The Farce at FIFA that Shames Global Football, FINANCIAL TIMES (Nov. 13, 2014), http://www.ft.com/intl/cms/s/0/8309658f-60a1-11e4-ac52-00144feabcde0.htm#axzz3jIB8eqpS.


92. United States of America v. Jeffrey Webb et al. (Nov. 25, 2015), (No. 15-252 (s-1)); SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [CIVIL CODE] DEC. 10. 1907, SR 210, art. 60 (Switz.).
FIFA has convincingly established that it is a master of public relations spin and meaningless, hypocritical statements of "reform." Its press releases and publicly available documents read wonderfully. Madison Avenue should be envious. On the other hand, the Constitution of the Union of Soviet Socialist Republics ("USSR") also read wonderfully. The facts belie FIFA press releases and public documents. Carrard's platitudinous dog and pony PowerPoint presentation to FIFA's Executive Committee on December 3 has a similar feel. The Financial Times has also deemed such FIFA moves as "farce."

Mr. Blatter controls an awesome spin machine without a doubt that is worthy of a world class politician. The FIFA-selected members of the 2016 FIFA Reform Committee have made proposals, which, if accepted by the Executive Committee, will then be presented to the full FIFA Congress on February 26, 2015. Based upon prior decades of FIFA charades, we can be certain the corrupt culture of FIFA will continue to operate as before. It will be corruption as usual.

It would be pointless and unproductive to track the many additional carefully crafted, optimistic, enthusiastic, and genuinely meaningless press releases issued by FIFA over the decades in response to unceasing reports of scandals, bribes and corruption. Nor have the impressive names FIFA has hired or consulted had significant impact on how FIFA actually operates.

Each such announcement, committee and outside expert has turned out to be nothing more than part of FIFA's hypocritical attempt to make it appear it was serious about eliminating corruption.

As an association organized under Article 60 of the Swiss Civil Code, FIFA is entirely self-governed; it is not responsible to any public or independent entity or authority. Even worse, FIFA President Blatter has complete control over FIFA and has created an internal organization entirely subservient to him and his staff. According to one former FIFA vice president, no one knows how much Blatter pays himself or the Executive Committee Members. It is understood, however, that for Executive Committee Members first class travel for two, five star hotels and bespoke suits are among the perquisites of FIFA affiliation. This apparently buys a good deal of loyalty.

With a Congress of 209 member organizations and an Executive Committee designed by Sepp Blatter, there are, in fact, absolutely no governance controls, limits or constraints on Blatter. Blatter appears to administer FIFA's billions the way Congressional Committee chairs dole out favors to keep lesser Congressmen in line. Blatter has successfully "bought" sufficient support to have been elected FIFA President five times since 1998.

E. A Perfect Corporate Governance Vacuum

The basic principles of modern corporate governance and corporate responsibility are unknown to Blatter and totally absent from FIFA, which enjoys a perfect corporate governance vacuum. In October 2015, the FIFA Ethics Committee, the risible entity with an embarrassing track record of handling the Garcia Report, was confronted with a Swiss criminal investigation into a $2,000,000 "disloyal payment" made from FIFA funds by Blatter as well as allegations that Blatter had entered into a contract with a FIFA vice president that was "unfavorable to FIFA." The "disloyal" payment was incontrovertibly made to Michel Platini, the President of UEFA, the European football confederation. As a result the Committee...
temporarily banned the FIFA President from football activities for 90 days. They claim that Platini and Blatter have said, to no written agreement. They claim that Platini had worked for Blatter between 1998 and 2002 and that this arrangement with Blatter ended in 2002 when Platini became a member of the FIFA Executive Committee, also a paid position. In 2011, according to Blatter, Platini asked for additional funds stemming from his work eight years earlier, and Blatter authorized the payment by FIFA. It has been suggested that this payment, made with FIFA funds, may have been made to persuade Platini not to run against Blatter for FIFA President in 2011.

F. How Did We Get Here?

Swiss law establishes no effective means of insuring honest, effective, independent governance at FIFA. Given that FIFA has become a multi-billion dollar enterprise and in light of the facts set out in the Superseding Indictment, this is a genuine problem. As President, Blatter directs FIFA through its administrative staff, which is completely under his control, and through the occasional meetings of the Executive Committee. Blatter is answerable to no one. The mere concept of "corporate governance" is totally foreign to FIFA and certainly to Mr. Blatter. There are no controls or limits on how Blatter disburses FIFA's billions. While corporate governance standards have developed significantly since 1990, FIFA is entirely innocent of any limits on how Blatter operates. Indeed, as noted, a former FIFA vice president has charged that even the Executive Committee does not know how much Blatter pays himself in salary and benefits.

Blatter has recently demonstrated his complete lack of any conception of, or interest in, accepted standards of corporate governance, including the fiduciary duties FIFA officials owe to FIFA itself and to the millions of stakeholders of the Beautiful Game. In an interview in October 2015, shortly after the Swiss Attorney General had commenced its criminal investigation of Blatter and the Ethics Committee had suspended him from football for 90 days, Blatter characterized the suspension as "total nonsense...I put these people into the office, where they are now, and they don't even have the courage to listen." Blatter dug himself an even deeper hole by asserting that the Ethics Committee had the nerve to state that, "we [the Ethics Committee] are not at the service of the president, we are totally independent." Blatter then exclaimed, "This is wrong. They can be independent but they don't need to be against me." To be kind to one who so clearly wants to make it known he has no conception of his fiduciary duties as President, it appears that at age 79, Sepp Blatter has missed the developments in corporate governance internationally over the past twenty-five years. Indeed, it might be said that the Mafia, and perhaps even North Korea's Kim Jong-un, are subject to more effective corporate governance than FIFA and its President.

IV. IMMEDIATE PROSPECTS FOR FIFA—"SEVEN DWARVES AND NO SNOW WHITE"

Assuming Blatter resigns as he has promised, the Extraordinary FIFA Congress called for February 26, 2016, will elect his successor. There were initially seven serious candidates to succeed Blatter. Each has history with FIFA and, if one is looking for fundamental and dramatic change in the operations and culture of FIFA, these candidates are not inspiring. Indeed, the original list of seven was referred to as "Seven dwarves with no Snow White in sight." Of the original seven candidates, Musa Bility of Liberia has been disqualified by FIFA for an improper nomination. He is appealing.

Another, UEFA's President, Michel Platini, who had been widely expected to succeed Blatter, is currently under investigation by the Swiss Attorney General in connection with the $2,000,000 payment made by Blatter to Platini in 2011. As a result Platini too has been suspended from...
temporarily banned the FIFA President from football activities for 90 days. 98
The Platini $2,000,000 payment was made in 2011 pursuant, as both
Platini and Blatter have said, to no written agreement. 99 They claim that
Platini had worked for Blatter between 1998 and 2002 and that this
arrangement with Blatter ended in 2002 when Platini became a member of
the FIFA Executive Committee, also a paid position. 100 In 2011, according
to Blatter, Platini asked for additional funds stemming from his work eight
years earlier, and Blatter authorized the payment by FIFA. 101 It has been
suggested that this payment, made with FIFA funds, may have been made to
persuade Platini not to run against Blatter for FIFA President in 2011. 102

F. How Did We Get Here?

Swiss law establishes no effective means of insuring honest, effective,
independent governance at FIFA. Given that FIFA has become a multi-

billion dollar enterprise and in light of the facts set out in the Superseding
Indictment, this is a genuine problem. As President, Blatter directs FIFA
through its administrative staff, which is completely under his control, and
through the occasional meetings of the Executive Committee. Blatter is
answerable to no one. The mere concept of "corporate governance" is totally
foreign to FIFA and certainly to Mr. Blatter. There are no controls or limits
on how Blatter disburses FIFA's billions. While corporate governance
standards have developed significantly since 1990, FIFA is entirely innocent
of any limits on how Blatter operates. Indeed, as noted, a former FIFA vice
president has charged that even the Executive Committee does not know how
much Blatter pays himself in salary and benefits. 103

Blatter has recently demonstrated his complete lack of any conception of
or interest in, accepted standards of corporate governance, including the
fiduciary duties FIFA officials owe to FIFA itself and to the millions of
stakeholders of the Beautiful Game. 104 In an interview in October 2015,
shortly after the Swiss Attorney General had commenced its criminal
investigation of Blatter and the Ethics Committee had suspended him from

105.

2016] Bean 385

football for 90 days, Blatter characterized the suspension as "total nonsense
... I put these people into the office, where they are now, and they don't even
have the courage to listen." 105

Blatter dug himself an even deeper hole by asserting that the Ethics
Committee had the nerve to state that, "we [the Ethics Committee] are not at
the service of the president, we are totally independent." Blatter then
exclaimed, "This is wrong. They can be independent but they don't need to be
against me." 106

To be kind to one who so clearly wants to make it known he has no
conception of his fiduciary duties as President, it appears that at age 79, Sepp
Blatter has missed the developments in corporate governance internationally
over the past twenty-five years. Indeed, it might be said that the Mafia, and
perhaps even North Korea's Kim Jong-un, are subject to more effective
corporate governance than FIFA and its President.

IV. IMMEDIATE PROSPECTS FOR FIFA: "SEVEN DWARVES AND
NO SNOW WHITE"

Assuming Blatter resigns as he has promised, the Extraordinary FIFA
Congress called for February 26, 2016, will elect his successor. There were
initially seven serious candidates to succeed Blatter. Each has history with
FIFA and, if one is looking for fundamental and dramatic change in the
operations and culture of FIFA, these candidates are not inspiring. Indeed,
the original list of seven was referred to as "Seven dwarves with no Snow
White in sight." 107 Of the original seven candidates, Musa Bility of Liberia
has been disqualified by FIFA for an improper nomination. He is
appealing. 108

Another, UEFA's President, Michel Platini, who had been widely
expected to succeed Blatter, is currently under investigation by the Swiss
Attorney General in connection with the $2,000,000 payment made by
Blatter to Platini in 2011. 109 As a result Platini too has been suspended from

98. Conn UEFA, supra note 95.
99. Dunbar, supra note 97.
101. Id.
102. Draper, Harris, & Warshat, supra note 96.
103. Task Force, supra note 78.
104. Sam Borden, supra note 48.
109. Conn UEFA, supra note 95.
football by the Ethics Committee until early January. Platini still believes he can be elected in February and, so far as the $2,000,000 payment is concerned, he claims that he is “bulletproof”, which we know is not French for “innocent”.

The remaining currently eligible candidates for President are:

1. Prince Ali bin al-Hussein, 39, President of the Jordan Football Association, founder and president of the West Asian Football Federation and Former FIFA vice-president;
2. Jerome Champagne, 57, a former French diplomat, who worked for FIFA for eleven years as an executive and an advisor to president Sepp Blatter, before leaving in 2010;
3. Gianni Infantino, 45, General Secretary of UEFA since 2009;
4. Sheikh Salman bin Ebrahim al-Khalifa, 49, Asian Football Confederation president and FIFA vice-president; and
5. Tokyo Sexwale, 62, South African former government minister and a key member of the bidding team which brought the World Cup to Africa for the first time. The South African winning bid is described in the Superseding Indictment as having been secured by a $10,000,000 bribe.

Each of these men has history inside the corrupt FIFA ecosystem. FIFA’s major sponsors have called for “independent oversight” of FIFA operations, and there is no basis for hoping, much less believing, that without other changes, any of these candidates will institute the overdue process of bringing modern corporate governance to FIFA, its President, its continental confederations, or its Members. Independent oversight is a well-established and uncontroversial principle that has been applied for decades to business entities. This principle must now be applied to FIFA, a billion dollar enterprise.

V. CONCLUSION: WHAT IS TO BE DONE?

If all goes as planned the February 26, 2016, FIFA Extraordinary Congress will elect a new FIFA President, a man who will be fully familiar, and from all appearances, comfortable with the FIFA culture of corruption. We shall then have some marvelously phrased press releases, inevitably followed by business as usual throughout the FIFA empire. The breadth, depth, and pervasive nature of corruption in international football has been noted by Transparency International, the Financial Action Task Force, the United States Department of Justice’s Indictment and Superseding Indictment, Play the Game, a Danish NGO, Global Witness, TRACE, an international non-profit entity concerned with eliminating bribery in business, law review articles and innumerable articles in the popular press. All to no avail.

In 2002, Michel Zenn-Ruffinen, former FIFA General Secretary, issued a report detailing accusations of more than $500,000,000 in corruption and financial mismanagement, including false accounting practices. Following the release of the Superseding Indictment in December 2015, it became known that João Havelange, the FIFA President immediately prior to Blatter’s election in 1998, told the United States Federal Bureau of Investigation that Blatter, who was serving as secretary-general of FIFA at the time, was fully aware of payments made to top FIFA officials in exchange for a grant of television and marketing rights in the 1990’s.

110. Id.
113. Id.
114. The Coca-Cola Company, supra note 82.
119. See, e.g., Gibson, supra note 61.
football by the Ethics Committee until early January. Platini still believes he can be elected in February and, so far as the $2,000,000 payment is concerned, he claims that he is “bulletproof”, which we know is not French for “innocent”.

The remaining currently eligible candidates for President are:

1. Prince Ali bin al-Hussein, 39, President of the Jordan Football Association, founder and president of the West Asian Football Federation and Former FIFA vice-president;
2. Jerome Champagne, 57, a former French diplomat, who worked for FIFA for eleven years as an executive and an advisor to president Sepp Blatter, before leaving in 2010;
3. Gianni Infantino, 45, General Secretary of UEFA since 2009;
4. Sheikh Salman bin Ebrahim al-Khalifa, 49, Asian Football Confederation president and FIFA vice-president; and
5. Tokyo Sexwale, 62, South African former government minister and a key member of the bidding team which brought the World Cup to Africa for the first time. The South African winning bid is described in the Superseding Indictment as having been secured by a $10,000,000 bribe.

Each of these men has history inside the corrupt FIFA ecosystem. FIFA’s major sponsors have called for “independent oversight” of FIFA operations, and there is no basis for hoping, much less believing, that without other changes, any of these candidates will institute the overdue process of bringing modern corporate governance to FIFA, its President, its continental confederations, or its Members. Independent oversight is a well-established and uncontroversial principle that has been applied for decades to business

111. Id.
113. Id.
114. The Coca-Cola Company, supra note 82.

V. CONCLUSION: WHAT IS TO BE DONE?

If all goes as planned the February 26, 2016, FIFA Extraordinary Congress will elect a new FIFA President, a man who will be fully familiar, and from all appearances, comfortable with the FIFA culture of corruption. We shall then have some marvelously phrased press releases, inevitably followed by business as usual throughout the FIFA empire. The breadth, depth, and pervasive nature of corruption in international football has been noted by Transparency International, the Financial Action Task Force, the United States Department of Justice’s Indictment and Superseding Indictment, Play the Game, a Danish NGO, Global Witness, TRACE, an international non-profit entity concerned with eliminating bribery in business, law review articles and innumerable articles in the popular press. All to no avail.

In 2002, Michel Zen-Ruffinen, former FIFA General Secretary, issued a report detailing accusations of more than $500,000,000 in corruption and financial mismanagement, including false accounting practices. Following the release of the Superseding Indictment in December 2015, it became known that João Havelange, the FIFA President immediately prior to Blatter’s election in 1998, told the United States Federal Bureau of Investigation that Blatter, who was serving as secretary-general of FIFA at the time, was fully aware of payments made to top FIFA officials in exchange for a grant of television and marketing rights in the 1990’s.

119. See, e.g. Gibson, supra note 61.
A leading German periodical, Der Spiegel, has recently reported that the German World Cup organizing committee, which staged the 2006 World Cup, had a slush fund of $6,000,000 to secure votes for Germany as host.\textsuperscript{122} The article refers specifically to a “financial deal between Sepp Blatter and Franz Beckenbauer,”\textsuperscript{123} who led the German bidding Committee seeking to have Germany selected as the World Cup venue in 2006. Beckenbauer, the only person to win a FIFA World Cup both as a player and as a coach, admits that payments were made, but that they were a “mistake” and were not intended to buy votes.\textsuperscript{124}

Recent books on FIFA corruption have similarly had no impact on the closed and corrupt FIFA ecosystem. These include Foul!: The Secret World of FIFA: Bribes, Vote Rigging and Ticket Scandals,\textsuperscript{125} The Dirty Game: Uncovering the Scandal at FIFA,\textsuperscript{126} and The Ugly Game: The Corruption of FIFA and the Qatari Plot to Buy the World Cup, which is said to be based upon leaked FIFA emails.\textsuperscript{127}

Until the United States, a minor player in international football, commenced criminal actions in May 2015, corruption of all kinds in football was widely known and unchallenged throughout the world. Corruption within the international football ecosystem is an accepted aspect of the culture of FIFA. It is as normal as cigarette smoking in the United States in much of the 20th Century. FIFA’s culture of corruption is as broadly accepted today as slavery and male-only suffrage was in the 18th and much of the 19th Century.

The phrase “culture of corruption” well describes how pervasive corruption is within international football and how acceptable the football world finds this. This is hardly unique to football. Kickbacks and bribery in international football-corruption-scandal-sepp-blatter-knew-of-bribes-paid-for-football-tv-rights-his-predecessor-a6762831.html.


123. Nesha Starcevic, Beckenbauer and Blatter deal in question before 2006 WC, AP (Oct. 22, 2015, 5:07 PM), http://bigstory.ap.org/article/0a2a2a2a86&c=734b7b9d092e093b1f89d/german-football-bossagain-denies-world-cup-corruption.


international business were accepted as normal and legal until 1977, when the Foreign Corrupt Practices Act (“FCPA”) was enacted.\textsuperscript{128} The Superseding Indictment will certainly result in impressive fines, disgorgement of fairly large sums, and prison terms for assorted FIFA associated persons. This will profoundly affect those individuals but will have no impact on the culture within FIFA. The pervasiveness of resistance to any change in FIFA’s corrupt culture is made clear in this example. After two years of work the Independent Governance Committee submitted its Final Report to FIFA.\textsuperscript{129} The Committee expressed its concern over the negative reaction to its modest reform proposals from Members of UEFA, the most important of FIFA’s continental confederations.

However, the [Committee] was surprised and actually worried about the seriousness of some of the key opinion leaders in football, when a declaration of the Presidents and Secretaries of all 53 Members Associations of UEFA was published on January 24, 2013, which fell short of fundamental requirements of modern governance in essential parts.\textsuperscript{130} So long as FIFA officials know that they may react to allegations of

128. For example, under the Internal Revenue Code bribes were not excluded from deductible business expenses in the United States until 1969. See 26 U.S.C. Sec. 162(c)(1) added by the Tax Reform Act of 1969, P.L. 91-172, section 902 (b), (83 Stat. 710.).


A leading German periodical, Der Spiegel, has recently reported that the German World Cup organizing committee, which staged the 2006 World Cup, had a slush fund of $6,000,000 to secure votes for Germany as host.\textsuperscript{122} The article refers specifically to a "financial deal between Sepp Blatter and Franz Beckenbauer,"\textsuperscript{123} who led the German bidding Committee seeking to have Germany selected as the World Cup venue in 2006. Beckenbauer, the only person to win a FIFA World Cup both as a player and as a coach, admits that payments were made, but that they were a "mistake" and were not intended to buy votes.\textsuperscript{124}

Recent books on FIFA corruption have similarly had no impact on the closed and corrupt FIFA ecosystem. These include Foul!: The Secret World of FIFA: Bribes, Vote Rigging and Ticket Scandals,\textsuperscript{125} The Dirty Game: Uncovering the Scandal at FIFA,\textsuperscript{126} and The Ugly Game: The Corruption of FIFA and the Qatari Plot to Buy the World Cup, which is said to be based upon leaked FIFA emails.\textsuperscript{127}

Until the United States, a minor player in international football, commenced criminal actions in May 2015, corruption of all kinds in football was widely known and unchallenged throughout the world. Corruption within the international football ecosystem is an accepted aspect of the culture of FIFA. It is as normal as cigarette smoking in the United States in much of the 20th Century. FIFA's culture of corruption is as broadly accepted today as slavery and male-only suffrage was in the 18th and much of the 19th Century.

The phrase "culture of corruption" well describes how pervasive corruption is within international football and how acceptable the football world finds this. This is hardly unique to football. Kickbacks and bribery in

---


\textsuperscript{123} Nesha Starovic, Beckenbauer and Blatter deal in question before 2006 WC, AP (Oct. 22, 2015, 5:07 PM), http://bigstory.ap.org/article/8a2a29683f3c734a7b9f902e9f93b1f904/german-football-boss-denies-world-cup-corruption.


\textsuperscript{126} See generally, ANDREW JENNINGS, FOUL!: THE SECRET WORLD OF FIFA (2006).


International business were accepted as normal and legal until 1977, when the Foreign Corrupt Practices Act ("FCPA") was enacted.\textsuperscript{128}

The Superseding Indictment will certainly result in impressive fines, disgorgement of fairly large sums, and prison terms for assorted FIFA associated persons. This will profoundly affect those individuals but will have no important impact on the culture within FIFA. The pervasiveness of resistance to any change in FIFA's corrupt culture is made clear in this example. After two years of work the Independent Governance Committee submitted its Final Report to FIFA.\textsuperscript{129} The Committee expressed its concern over the negative reaction to its modest reform proposals from Members of UEFA, the most important of FIFA's continental confederations.

However, the Committee was surprised and actually worried about the seriousness of some of the key opinion leaders in football, when a declaration of the Presidents and Secretaries of all 53 Members Associations of UEFA was published on January 24, 2103, which fell short of fundamental requirements of modern governance in essential parts.\textsuperscript{130}

So long as FIFA officials know that they may react to allegations of
corruption by merely talking about change, they will continue to act with impunity as they extort payments in exchange for access to broadcast and marketing rights and votes for hosting FIFA events. This moral hazard, so obvious in FIFA’s past history, must be eliminated.

If started, the process of reforming FIFA will be a lengthy one. Our five decades of experience with the FCPA enacted to effect change in the accepted culture of extortion and bribery in the conduct of international business, has produced mediocre results. This gives a hint of the enormity of the FIFA corrupt culture problem and the decades it might take to instill FIFA with effective corporate governance.

Michael Garcia, the former head of the Investigative Committee of the FIFA Ethics Committee who resigned in disgust, has concluded that FIFA cannot be reformed from inside. An organization, NEW FIFA NOW, agrees, noting:

FIFA is one of the most discredited organizations in the world with serial allegations of corruption plaguing almost its every move off-the-field, symptomatic of a crisis of leadership, governance and accountability.

The Executive Committee’s decisions of December 2010 that saw Russia and Qatar win the rights to host the 2018 and 2022 World Cup tournaments respectively have been the focus of attention for more than four years. Yet these decisions follow a litany of scandals that have plagued the organization for decades.

David Beckham, English football’s leading personality, also condemns corruption at FIFA, labeling it “disgusting.” The FIFA website proudly displays “Milestones” of the FIFA Ethics Committee activities since July 2012. This document lists more than thirty corrupt football officials banned from participating in football activities for varying periods of from 90 days to life. These individuals come from more than twenty countries.


ranging from the United States, France, Germany and Spain to Brazil, Chad, India, Laos, Mongolia and New Caledonia. All this corrupt activity in just over three years. This record alone, without any intervention by the Justice Department, should have raised red flags, alerting FIFA and its honest stakeholders to the corrupt, hypocritical nature of the FIFA ecosystem.

Further evidence of the endemic, inbred culture of thoroughgoing corruption and hypocrisy throughout football would be superfluous in this Interim Essay. One small step football fans might hope for as they await fundamental change in FIFA’s culture is an amendment to the FCPA. At the moment this act criminalizes bribes paid to foreign officials, including officials of “public international organizations.” The President of the United States is authorized to add entities to the list of such international organizations, which already includes organizations such the United Nations and the World Trade Organization, as well as the International Fertilizer Development Center and the Pacific Salmon Commission.

If FIFA were added to this list, bribes paid to or extorted by FIFA officials would be subject to the provisions of the FCPA, and anyone with a connection to the United States paying such a bribe would be paying an FCPA “foreign official” and thus would be subject to the criminal provisions of the FCPA.

Any argument that a mere international sports organization should not be considered such a public international organization was answered by Blatter himself. In an interview during which he challenged the power of the FIFA Ethics Committee to suspend him from football, Blatter announced that only the FIFA Congress, and not the Ethics Committee, can remove him from office. The report of the interview continued: “Comparing himself to a state president, Blatter told Swiss broadcaster SRF: ‘If one wants to revoke an elected president, only parliament can ask for that.’” If Blatter sees himself as a Head of State, that is precisely the category of bribe taker the FCPA was designed to address.

While we wait for the next chapter in the FIFA Farce, it is certain that hundreds of millions of people will continue to play the “beautiful game,” no
corruption by merely talking about change, they will continue to act with impunity as they extort payments in exchange for access to broadcast and marketing rights and votes for hosting FIFA events. This moral hazard, so obvious in FIFA’s past history, must be eliminated.

If started, the process of reforming FIFA will be lengthy. One of our five decades of experience with the FCPA enacted to effect change in the accepted culture of extortion and bribery in the conduct of international business, has produced mediocre results. This gives a hint of the enormity of the FIFA corrupt culture problem and the decades it might take to instill FIFA with effective corporate governance.

Michael Garcia, the former head of the Investigative Committee of the FIFA Ethics Committee who resigned in disgust, has concluded that FIFA cannot be reformed from inside. An organization, NEW FIFA NOW, agrees, noting:

FIFA is one of the most discredited organizations in the world with serial allegations of corruption plaguing almost every move off-the-field, symptomatic of a crisis of leadership, governance and accountability. The Executive Committee’s decisions of December 2010 that saw Russia and Qatar win the rights to host the 2018 and 2022 World Cup tournaments respectively have been the focus of attention for more than four years. Yet these decisions fall a litany of scandals that have plagued the organization for decades.

David Beckham, English football’s leading personality, also condemns corruption at FIFA, labeling it “disgusting.” The website proudly displays “Milestones” of the FIFA Ethics Committee activities since July 2012. This document lists more than thirty corrupt football officials banned from participating in football activities for varying periods of from 90 days to life. These individuals come from more than twenty countries, ranging from the United States, France, Germany and Spain to Brazil, Chad, India, Laos, Mongolia and New Caledonia. All this corrupt activity in just over three years. This record alone, without any intervention by the Justice Department, should have raised red flags, alerting FIFA and its honest stakeholders to the corrupt, hypocritical nature of the FIFA ecosystem.

Further evidence of the endemic, inbred culture of thoroughgoing corruption and hypocrisy throughout football would be superfluous in this Interim Essay. One small step football fans might hope for as they await fundamental change in FIFA’s culture is an amendment to the FCPA. At the moment this act criminalizes bribes paid to foreign officials, including officials of “public international organizations.”

The President of the United States is authorized to add entities to the list of such international organizations, which already includes organizations such the United Nations and the World Trade Organization, as well as the International Fertilizer Development Center and the Pacific Salmon Commission.

If FIFA were added to this list, bribes paid to or extorted by FIFA officials would be subject to the provisions of the FCPA, and anyone with a connection to the United States paying such a bribe would be paying to an FCPA “foreign official” and thus would be subject to the criminal provisions of the FCPA.

Any argument that a mere international sports organization should not be considered such a public international organization was answered by Blatter himself. In an interview during which he challenged the power of the FIFA Ethics Committee to suspend him from football, Blatter announced that only the FIFA Congress, and not the Ethics Committee, can remove him from office. The report of the interview continued: “Comparing himself to a state president, Blatter told Swiss broadcaster SRF: ‘If one wants to revoke an elected president, only parliament can ask for that’. If Blatter sees himself as a Head of State, that is precisely the category of bribe taker the FCPA was designed to address.

While we wait for the next chapter in the FIFA Farce, it is certain that hundreds of millions of people will continue to play the “beautiful game,” no
matter how slow this reform process is and regardless of how ugly FIFA turns out to be. And FIFA will continue to operate with no accountability to anyone for anything.

VI. EPILOGUE

On February 26, 2016, Gianni Infantino, 45, General Secretary of UEFA since 2009 was elected President of FIFA. A number of “reforms” were also adopted. The next few years will make clear whether a totally corrupt organization can be reformed from within.

Any bets?

SAVING LIVES AND BUILDING SOCIETY: THE EUROPEAN MIGRATION AGENDA1

Dr. Catherine Tinker*

I. INTRODUCTION

The European Union is attempting to manage an extraordinary flow of migrants and refugees2 into Europe, exceeding 1,000,000 in 2015 alone, the


* J.S.D. and LL.M., N.Y.U. Law School; J.D. George Washington Univ. Chair, European Affairs Committee, New York City Bar Association and Adjunct Professor, Seton Hall University School of Diplomacy and International Relations. Dr. Catherine Tinker is the founder and United Nations representative of the Tinker Institute on International Law and Organizations (T.I.I.L.O.), an NGO accredited to ECOSOC since 1996 that is dedicated to research and teaching about international law and organizations. See www.tillo.org, last accessed on Dec. 23, 2015. The author wishes to thank Peter Daniel, Jasmin Abbasi, Kayleigh Adams, and Nicole Economou, students at Seton Hall University School of Diplomacy and International Relations and Peggy Chance, interns and fellows with T.I.I.L.O. in 2014 and 2015 and Anthony DiFlorio, School of Diplomacy and International Relations student at Seton Hall University, for their assistance with research at the United Nations and the public panels sponsored by the New York City Bar Association’s European Affairs Committee. Other than the contents of a letter dated 4th 22, 2015, from the New York City Bar Association to EU and UN officials in support of the European Migration Agenda, available at www.nybar.org/european-affairs, last accessed on Dec. 23, 2015, the comments in this article are personal to the author and do not reflect the official position of the New York City Bar Association or the European Affairs Committee.

2. Convention Relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 137. (A “refugee” under the classic international law definition is a person who is outside his/her state of "nationality or habitual residence" and applies for and is granted asylum in another state on the grounds that he or she is unable or unwilling to return due to a “well-founded fear of persecution” based on “race, religion, nationality, membership in a particular social group or political opinion.”), and G.A. Res. 2198 (XX), Protocol Relating to the Status of Refugees (Oct. 4, 1967), see also U.N.H.C.R., CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES, (Oct. 4, 1967),
matter how slow this reform process is and regardless of how ugly FIFA turns out to be. And FIFA will continue to operate with no accountability to anyone for anything.

VI. EPILOGUE

On February 26, 2016, Gianni Infantino, 45, General Secretary of UEFA since 2009 was elected President of FIFA. A number of "reforms" were also adopted. The next few years will make clear whether a totally corrupt organization can be reformed from within.

Any bets?
largest number of displaced persons (both externally and internally) since World War II. Two or three years ago, migration into Europe was perceived—if considered at all—to be a problem of a few Southern European states, principally Italy, Greece, Spain, Malta and Cyprus. Those states were facing boatloads of migrants and refugees attempting to cross the Mediterranean and land on their shores, with the intention, mostly thwarted, to pass on to Northern European states to seek a new life. Burden-sharing among the European Union as a whole was not in evidence, and once ashore, most migrants and those planning to apply for refugee status in Europe were stuck in whatever state where they first arrived.

Two developments changed this picture: first, in 2013, the conscience of the world was shocked when several hundred migrants drowned near Lampedusa, Italy, on a single ill-equipped and overloaded ship. Second, starting in 2014 and multiplying in 2015, over greater numbers of persons swept across borders, many through the Balkan route, by the thousands daily, overwhelming any border controls or efforts to make them wait in the first country of entry into the European Union. Untold thousands have continued to drown trying to cross the Mediterranean Sea—some within sight of Greek islands like Lesbos on rubber rafts, plywood or any reuppurposed object to escape wars, object—and religious—based violence, and extreme weather conditions, all resulting in lack of water, food and security in their home states. By the end of 2015, migration into Europe was widely understood to be an European Union—wide problem, indeed a global problem—for states, for European communities, for the people desperate enough to risk their lives and the lives of their children to reach Europe, seeking refuge and safety.

One of the most important principles under existing European Union law is the free movement of persons within the “Schengen Area.” However, under subsequent regulations, known as the “Dublin Regulations,” arriving migrants claiming to be refugees entitled to protection must file their applications for asylum in the state of arrival within the European Union and remain in that state until a final determination is made. Only if granted refugee status will a migrant be entitled to benefits, including the freedom to move within the borders of the Schengen Area and the right to legally work. Each member state of the European Union applies its own guidelines and policies for evaluating and deciding a person’s status as a “refugee” based on the classic definition in the 1951 Refugee Convention.


largest number of displaced persons (both externally and internally) since World War II. Two or three years ago, migration into Europe was perceived—if considered at all—to be a problem of a few Southern European states, principally Italy, Greece, Spain, Malta and Cyprus. Those states were facing boatloads of migrants and refugees attempting to cross the Mediterranean and land on their shores, with the intention, mostly thwarted, to pass on to Northern European states to seek a new life. Burden-sharing among the European Union as a whole was not in evidence, and once ashore, most migrants and those planning to apply for refugee status in Europe were stuck in whatever state where they first arrived.

Two developments changed this picture: first, in 2013, the conscience of the world was shocked when several hundred migrants drowned near Lampedusa, Italy, on a single ill-equipped and overloaded ship. Second, starting in 2014 and multiplying in 2015, ever greater numbers of persons swept across borders, many through the Balkan route, by the thousands daily, overwhelming any border controls or efforts to make them wait in the first country of entry into the European Union. Untold thousands have continued to drown trying to cross the Mediterranean Sea—some within sight of Greek islands like Lesbos on rubber rafts, plywood or any repurposed object to escape wars, gender—and religious—based violence, and extreme weather conditions, all resulting in lack of water, food and security in their home states. By the end of 2015, migration into Europe was widely understood to be an European Union—wide problem, indeed a global problem—for states, for European communities, for the people desperate enough to risk their lives and the lives of their children to reach Europe, seeking refuge and safety.

One of the most important principles under existing European Union law is the free movement of persons within the “Schengen Area.” However, under subsequent regulations, known as the “Dublin Regulations,” arriving migrants claiming to be refugees entitled to protection must file their applications for asylum in the state of arrival within the European Union and remain in that state until a final determination is made. Only if granted refugee status will a migrant be entitled to benefits, including the freedom to move within the borders of the Schengen Area and the right to legally work. Each member state of the European Union applies its own guidelines and policies for evaluating and deciding a person’s status as a “refugee” based on the classic definition in the 1951 Refugee Convention:


10. European Union: Council of the European Union, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2011, OJ L: 180/31-180/59; 29.6.2013, (EU) No. 604/2013, http://www.asylumlawdatabase.co.uk/en/content/dublin-iii-regulation-council-regulation-eu-no-604201326-june-2013-recast-dublin-iii (hereinafter The Dublin III Regulations); The Dublin III Regulations establish the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national or stateless person). The application of these regulations and the changes proposed in the European Migration Agenda to create a European Union-wide system of processing asylum applications and making decisions on refugee status, as well as the consequences of a denial, are discussed below.

of persecution based on his/her race, nationality, religion, membership in a particular social group, or political opinion. Migrants naturally seek to reach European states with more lenient applications of the standard before filing asylum applications to maximize their chances of success, creating further pressure to move northwards after arrival within the European Union. The Office of the United Nations High Commissioner for Refugees ("UNHCR") has noted that despite the long tradition of [European states] providing a safe haven to the persecuted, according to Eurostat figures, protection rates (refugee status and subsidiary protection) for the same groups of asylum-seekers vary considerably from one Member State [of the European Union] to another...[and] material conditions also vary widely. Whether and what kind of reception assistance is made available to asylum-seekers differs from country to country. In some European Union Member States, access to basic material support is so limited that many asylum-seekers end up sleeping in the streets.12

An attorney with the European Parliament’s Liaison Office to the United States Congress in Washington, D.C., has noted that “in order to deal with issues that have long been seen as internal affairs at the heart of their sovereignty, European Union Member States have agreed to develop a strong and multi-dimensional European Union response” and that the actual concept of an European Union migration policy is a fairly recent thing. Issues related to asylum, immigration and visa policy were integrated into the European Union law (which back

BRAZILIAN LAW 143, 143–169 (2015) (Other regions, notably Africa and Latin America, have criticized the outdated and limited definition provided in the 1951 treaty, and have expanded the definition of "refugee" to provide the possibility of international protection for people facing many modern forms of persecution in documents such as the OAU Convention and Cartagena Declaration); Key Migration Terms, supra note 2 (As discussed by the authors, the 1969 Organization of African Unity (OAU) Convention defines a refugee as any person compelled to leave his or her country “owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country or origin or nationality.” Similarly, the 1984 Cartagena Declaration states that refugees also include persons who flee their country “because their lives, security or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.”). 12. UNHCR, THE ROAD TO A COMMON EU ASYLUM SYSTEM, (Sept. 2010), http://www.unhcr.org/cgi-bin/lexis/vtx/home/opendoc?PDFviewer.html?did=46348095dd&query=the road to a common European Union asylum system (last visited Feb. 15, 2016); (according to the sheer numbers of new arrivals in Europe, especially in the last two years, has strained limited resources in many southern European states and meant that the conditions described in 2010 are still true in 2015 in many places; see also SAMANTHA VELLUTI, REFORMING THE COMMON EUROPEAN ASYLUM SYSTEM – LEGISLATIVE DEVELOPMENTS AND JUDICIAL ACTIVISM OF THE EUROPEAN COURTS (2013)).

II. THE EUROPEAN MIGRATION AGENDA OF 2015

In May, 2015, the European Union adopted the “European Migration Agenda” (hereinafter referred to as “the Agenda”) as a policy document and guide for action seeking, inter alia, a formula for voluntary burden-sharing or distribution of refugees and migrants entering the European Union among all European Union member states based on national GNP, numbers of refugees already received or granted asylum, employment rates and total population.15 The Agenda advances policy proposals to address some of the gaps in providing for orderly European Union-wide procedures and facilities for reception and screening of arriving migrants and refugees; for consistent decisions from one European state to another on interpretation of grounds for granting refugee status to individuals (permitting refugees to live, work and move about within the European Union or requiring those denied refugee status to leave, absent other humanitarian considerations), and for balancing needs for security with humanitarian obligations.16

Faced with resistance from some European Union states, parts of the Agenda are slowly being implemented, along with provisional or emergency measures. Initial screening of asylum applicants outside the European Union, with safe transport into the European Union for those deemed by the United Nations High Commission for Refugees to be likely to be granted asylum, has begun this year for a small number of migrants seeking refugee status in

13. Urszula Mojkowska, Remarks at European Affairs Committee of the New York City Bar Association with the European Union Studies Center of the CUNY Graduate Center panel discussion (Oct. 15, 2014); and written communication from Urszula Mojkowska to the author on November 6, 2015, with notes for a panel presentation on European Union law on migration and refugees in Europe, copy in the files of the author, quoted with permission for purposes of this publication.
14. European Agenda on Migration, supra note 1, at 1.
15. Id. at 4.
16. Id. at 3.
of persecution based on his/her race, nationality, religion, membership in a particular social group, or political opinion. Migrants naturally seek to reach European states with more lenient applications of the standard before filing asylum applications to maximize their chances of success, creating further pressure to move northwards after arrival within the European Union. The Office of the United Nations High Commissioner for Refugees ("UNHCR") has noted that despite the long tradition of [European states] providing a safe haven to the persecuted, according to Eurostat figures, protection rates (refugee status and subsidiary protection) for the same groups of asylum-seekers vary considerably from one Member State of the European Union to another. ... [and] material conditions also vary widely. Whether and what kind of reception assistance is made available to asylum-seekers differs from country to country. In some European Union Member States, access to basic material support is so limited that many asylum-seekers end up sleeping in the streets.\footnote{U.N.H.C.R., The Road to a Common EU Asylum System, (Sept. 2010), http://www.unhcr.org/cgi-bin/textheader/openpage?year=2009&full=true&query=the road to a common European Union asylum system (last visited Feb. 15, 2016); (according to which the sheer numbers of new arrivals in Europe, especially in the last two years, has strained limited resources in many southern European states and meant that the conditions described in 2010 are still true in 2015 in many places); see also Samantha Velluti, Reforming the Common European Asylum System—Legislative Developments and Judicial Activism of the European Courts (2013).}

An attorney with the European Parliament’s Liaison Office to the United States Congress in Washington, D.C., has noted that "in order to deal with issues that have long been seen as internal affairs at the heart of their sovereignty, European Union Member States have agreed to develop a strong and multi-dimensional European Union response" and that the actual concept of an European Union migration policy is a fairly recent thing. Issues related to asylum, immigration and visa policy were integrated into the European Union law (which back

II. THE EUROPEAN MIGRATION AGENDA OF 2015

In May, 2015, the European Union adopted the "European Migration Agenda"\footnote{Id.} (hereinafter referred to as "the Agenda") as a policy document and guide for action seeking, inter alia, a formula for voluntary burden-sharing or distribution of refugees and migrants entering the European Union among all European Union member states based on national GNP, numbers of refugees already received or granted asylum, employment rates and total population.\footnote{European Agenda on Migration, supra note 1, at 1.} The Agenda advances policy proposals to address some of the gaps in providing for orderly European Union-wide procedures and facilities for reception and screening of arriving migrants and refugees; for consistent decisions from one European state to another on interpretation of grounds for granting refugee status to individuals (permitting refugees to live, work and move about within the European Union or requiring those denied refugee status to leave, absent other humanitarian considerations), and for balancing needs for security with humanitarian obligations.\footnote{Id. at 4.}

Faced with resistance from some European Union states, parts of the Agenda are slowly being implemented, along with provisional or emergency measures. Initial screening of asylum applicants outside the European Union, with safe transport into the European Union for those deemed by the United Nations High Commission for Refugees to be likely to be granted asylum, has begun this year for a small number of migrants seeking refugee status in...
An extremely limited number of asylum applicants in limbo in Italy and Greece are being resettled to Northern European states, where their asylum applications will be processed and determined.

A. Issues

Issues remain about the ability of the European Union to institute prompt and standardized screening practices, to apply European Union-wide principles to asylum determinations, and to resettle significant numbers of migrants and refugees from one Member State to another. This challenges the basic concepts of the European Union itself and its constitutive principles of solidarity, subsidiarity and the free movement of people within the European Union. As a UNHCR report concluded in 2010, “[s]ystems that can swiftly and efficiently identify those in need of protection are more cost-effective in the long run.” This report was prior to the current influx of Syrians, Iraqis, Afghans, Somalis and others seeking protection in Europe in vast numbers in the last several years from wars in these and other regions. How European Union and other states respond to the sheer numbers of people on the move, seeking entry by whatever means possible into the European Union, may determine the future of the European Union project itself.

European Union law and international humanitarian and refugee law's failure to adequately manage the extraordinary flow of migrants and refugees into Europe in the last half of 2015 raises questions about the relevance and adequacy of the current legal and policy framework. The European Migration Agenda of 2015 and successive policy formulations and legislation will need to address questions such as:

1. Is the Dublin Regulation still in effect as thousands of people each week in 2015 have immediately moved beyond the states where they first entered the European Union to other states where they apply for political asylum as refugees? And will the planned review of the Dublin Regulation in 2016 lead to its repeal or significant revision based on current realities?

20. European Migration Agenda on Migration, supra note 1.

21. Id. at 6–7. Issues of legal entry into the European Union through regularized immigration system, such as business or student visas for those intending to stay, on the one hand; and the rise in organized crime involved in human smuggling and other criminal activity and issues of border management on the other hand, are addressed in the European Migration Agenda as well as issues of asylum and refugee status. Provisions applicable to these issues address various aspects discussed herein include: reducing the incentives for irregular migration and addressing the root causes behind irregular migration in non-European Union countries, dismantling smuggling and trafficking networks and defining actions for the better application of return policies; “saving lives and securing the external borders by better management of the external border . . . and improving the efficiency of border crossing”; and “developing a new policy on legal migration in view of the future demographic challenges the European Union is facing to attract workers that the European Union economy needs, particularly by facilitating entry and the recognition of qualifications.”

Europe. An extremely limited number of asylum applicants in limbo in Italy and Greece are being resettled to Northern European states, where their asylum applications will be processed and determined.

A. Issues

Issues remain about the ability of the European Union to institute prompt and standardized screening practices, to apply European Union-wide principles to asylum determinations, and to resettle significant numbers of migrants and refugees from one Member State to another. This challenges the basic concepts of the European Union itself and its constitutive principles of solidarity, subsidiarity and the free movement of people within the European Union. As a UNHCR report concluded in 2010, "[s]ystems that can swiftly and efficiently identify those who are in need of protection are more cost-effective in the long run." This report was prior to the current influx of Syrians, Iraqis, Afghans, Somalis and others seeking protection in Europe in vast numbers in the last several years from wars in these and other regions. How European Union and other states respond to the sheer numbers of people on the move, seeking entry by whatever means possible into the European Union, may determine the future of the European Union project itself.

European Union law and international humanitarian and refugee law's failure to adequately manage the extraordinary flow of migrants and refugees into Europe in the last half of 2015 raises questions about the relevance and adequacy of the current legal and policy framework. The European Migration Agenda of 2015 and successive policy formulations and legislation will need to address questions such as:

1. Is the Dublin Regulation still in effect as thousands of people each week in 2015 have immediately moved beyond the states where they first entered the European Union to other states where they apply for political asylum as refugees? And will the planned review of the Dublin Regulation in 2016 lead to its repeal or significant revision based on current realities?

20. European Agenda on Migration, supra note 1.

21. Id. at 6-7. Issues of legal entry into the European Union through regularized immigration systems, such as business or student visas for those intending to stay, on the one hand; and the rise in organized crime involved in human smuggling and other criminal activity and issues of border management on the other hand, are addressed in the European Migration Agenda as well as issues of asylum and refugee status. Provisions applicable to these issues apart from ones discussed herein include:

'reducing the incentives for irregular migration and addressing the root causes behind irregular migration in non-European Union countries, dismantling smuggling and trafficking networks and defining actions for the better application of return policies'; 'saving lives and securing the external borders by better management of the external border . . . and improving the efficiency of border crossing'; and 'developing a new policy on legal migration in view of the future demographic challenges the European Union is facing to attract workers that the European Union economy needs, particularly by facilitating entry and the recognition of qualifications.'

“Migration management” has been defined by the International Organization on Migration (“IOM”), an inter-governmental organization, as a
term used to encompass numerous governmental functions within
a national system for the orderly and humane management for
cross-border migration, particularly managing the entry and
presence of foreigners within the borders of the State and the
protection of refugees and others in need of protection. It refers to
a planned approach to the development of policy, legislative and
administrative responses to key migration issues. 23

Key features of the European Migration Agenda which attempt to
advance "migration management" are set out in four levels of action "for an
European Union migration policy which is fair, robust and realistic. When
implemented, they will provide the European Union with a migration policy
which respects the right to seek asylum, responds to the humanitarian
challenge, provides a clear European Framework for a common migration
policy, and stands the test of time." 24 An annex to the Agenda gives a number of
migrants each Member State is asked to accept for resettlement and
relocation. 25

B. The Dublin Regulation

The most recent “Dublin regulation” (OJ (L 180) of June 29, 2013)
requires the European Union Member State where individuals first enter the
European Union seeking asylum to process their applications; further,
asylum applicants cannot move elsewhere within the European Union until a
determination is made on their status as refugees, with some recent
exceptions for family reunification requests in the case of unaccompanied
children who have relatives elsewhere in the European Union. 26 The
preference of migrants themselves who are seeking recognition as refugees
for the state where they wish to apply has not been recognized as dispositive.
The European Commission has a legislative proposal being considered by the
Parliament on:

| a permanent European Union system of relocation in emergency situations to be inserted into the Dublin Regulation . . . which
| foresees triggering the emergency response mechanism under

---

23. Key Migration Terms, supra note 2.
24. European Agenda on Migration, supra note 1, at 7.
25. Id. at 19–22.
26. Id. at 13.

---

27. Mogilowska, supra note 13.
28. European Agenda on Migration, supra note 1, at 13.
29. Id. at 13–14.
"Migration management" has been defined by the International Organization on Migration ("IOM"), an inter-governmental organization, as a term used to encompass numerous governmental functions within a national system for the orderly and humane management for cross-border migration, particularly managing the entry and presence of foreigners within the borders of the State and the protection of refugees and others in need of protection. It refers to a planned approach to the development of policy, legislative and administrative responses to key migration issues.²³

Key features of the European Migration Agenda which attempt to advance "migration management" are set out in four levels of action "for an European Union migration policy which is fair, robust and realistic. When implemented, they will provide the European Union with a migration policy which respects the right to seek asylum, responds to the humanitarian challenge, provides a clear European Framework for a common migration policy, and stands the test of time."²⁴ An annex to the Agenda gives a number of migrants each Member State is asked to accept for resettlement and relocation.²⁵

B. The Dublin Regulation

The most recent "Dublin regulation" (OJ L 180 of June 29, 2013) requires the European Union Member State where individuals first enter the European Union seeking asylum to process their applications; further, asylum applicants cannot move elsewhere within the European Union until a determination is made on their status as refugees, with some recent exceptions for family reunification requests in the case of unaccompanied children who have relatives elsewhere in the European Union.²⁶ The preference of migrants themselves who are seeking recognition as refugees for the state where they wish to apply has not been recognized as dispositive. The European Commission has a legislative proposal being considered by the Parliament on:

a permanent European Union system of relocation in emergency situations to be inserted into the Dublin Regulation ... which foresees triggering the emergency response mechanism under

²³. Key Migration Terms, supra note 2.
²⁴. European Agenda on Migration, supra note 1, at 7.
²⁵. Id. at 19–22.
²⁶. Id. at 13.

Article 78(3) of the Treaty [TFEU], which enables a distribution mechanism for persons in need of international protection within the European Union ... when a mass influx emerges ... The European Parliament has repeatedly called for amending the existing Dublin Regulation in order to include a permanent, binding system of distribution of asylum seekers among the twenty-eight Member States, using a fair, compulsory allocation key, while taking into account the prospects of integration and the needs and specific circumstances of asylum seekers themselves.²⁷

If the Parliament is considering some recognition of the rights of asylum seekers to choose the state where they wish to apply for refugee status, existing law firmly requires applications in the first state of entry, as discussed.

Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (OJ L 180, 29.6.2013, p. 31). The United Kingdom and Ireland have notified their wish to take part in the adoption and application of this Regulation. Denmark participates in the Dublin system through a separate international agreement it has concluded with the European Union in 2006. The criteria for establishing responsibility run, in hierarchical order, from family considerations, to recent possession of visa or residence permit in a Member State, to whether the applicant has entered European Union irregularly, or regularly.²⁸

The application of the Dublin regulations has resulted in some individuals having been housed for several years in detention centers or camps in states such as Italy, Greece, and now Bulgaria, for example, absent prompt processing of their applications or hope of a decision which would allow a refugee to live, work and travel anywhere within the European Union. The Dublin regulations may have been suspended de facto due to events in Europe in summer and fall, 2015, as unprecedented numbers of refugees and migrants at risk crossed primarily through Turkey and the Balkans and Eastern Europe towards the borders of the European Union, and certain states allowed them to transit en route to their preferred state of asylum application, generally Austria, Germany, Sweden or Norway, which opened their borders at least temporarily to increasing numbers of people seeking refuge.²⁹

²⁸. European Agenda on Migration, supra note 1, at 13.
²⁹. Id. at 13–14.
In part to address the inequity between member states of the European Union and to protect the rights of asylum applicants under the principle of solidarity, the European Agenda on Migration attempts to create a fair system of burden-sharing within the European Union for receiving numbers of refugees. Funds are available through the European Union Asylum Migration and Integration Fund and “countries particularly affected by an influx of migrants and asylum seekers may also request assistance as appropriate from the European Union civil protection mechanism.”

C. Return

The European Migration Agenda also recognizes that return will be necessary in some cases for individuals currently inside the European Union. Not every person is eligible to remain within the European Union, including those who are determined to be ineligible for refugee status. Even persons who otherwise meet the definition of a “refugee” in the 1951 Convention discussed above may be excluded by a state from international protection as “undeserving” under certain conditions such as “serious criminal acts” according to the 1951 Refugee Convention. In addition, third countries need to “fulfil their international obligation to take back their own nationals residing irregularly in Europe” and Member States have to apply the Return Directive. The Commission will give priority to monitoring implementation of the Directive, with a more swift return system going hand-in-hand with the respect of the procedures and standards that allow Europe to ensure a humane and dignified treatment of returnees and a proportionate use of coercive measures, in line with fundamental rights and the principle of non-refoulement. The implementation of the European Union rules on the return of irregular migrants is now being assessed thoroughly in the framework of the Schengen Evaluation Mechanism, and a ‘Return Handbook’ will support Member States with common guidelines, best practice and recommendations.

35. For an analysis of case law and the reliance on the European Charter of Fundamental Rights regarding the application of the Returns Directive see Diego Acoza Areaza, The Charter, Detention and possible regularization of migrants in an irregular situation under the Returns Directive: Mahdi, Case C-146/14 PJU, Mahdi, Judgment of the Court of Justice (Third Chamber), 52 COMMON MCT. L. REV. 1361, 1361-1378 (2015) (according to which “Directive 2008/115 lays down procedures for returning migrants who find themselves in an irregular situation. This legislation, better known as the Returns Directive, is possibly the most controversial one in the area of migration policy.”)

36. Humanitarian alternatives based on principles of customary law or jus cogens principles of international law, such as non-refoulement, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 14 U.N.T.S. 85, may be available to protect those denied refugee status from return to a country of origin or former residence under certain circumstances, including the particularly vulnerable status of an individual, such as a child, or threat of gender-based violence; see Tinker & Sartoretto, supra note 11 (according to which “the principle of non-refoulement has partially mitigated state sovereignty and has granted protection to individuals who do not possess refugee status: Non-refoulement has acquired a jus cogens nature, especially when it comes to protection and prevention of torture, by virtue of Art. 3 of the Convention Against Torture,”) accord Jean Allain, The jus cogens Nature of Non-Refoulement, 13 INT'L J. OF REFUGEE L. 533, 533–48 (2003); see also Canedo Trindade, A. A., International Law for Human Rights: Towards a New jus Gentium-General Course on Public International Law – Part II, 317 Recueil des Cours de l’Academie de Droit International de la Haye (2005). In such circumstances, so-called “subsidiary protections” which grant temporary authorization to remain in the receiving state with limited rights, often for a period of three to five years renewable if the conditions are on-going, may be available. See Directive 2011/95, on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, 2011 OJ (L 337) 9 (according to which it creates a subsidiary protection system); see Jane McAdam, The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime, 1(3) INT'L J. OF REFUGEE L. 461, 466-469 (2005); see also Charter of Fundamental Rights of the European Union, Dec. 18, 2000, OJ (C 346) 1, art. 19(2) and Eur. Conv. on H. R., Art. 3, 13. The principle of non-refoulement was cited in a decision of the European Court of Human Rights preventing the return of an applicant for asylum to Greece, the state where he first entered the European Union, where detention conditions were not adequate to protect his rights; see 2 M.S.S. v. Belgium and Greece, App. No. 30696/09, 55 Eur. Ct. H.R. 2, (Jan. 21, 2011).
In part to address the inequity between member states of the European Union and to protect the rights of asylum applicants under the principle of solidarity, the European Agenda on Migration attempts to create a fair system of burden-sharing within the European Union for receiving numbers of refugees. Funds are available through the European Union Asylum Migration and Integration Fund and “countries particularly affected by an influx of migrants and asylum seekers may also request assistance as appropriate from the European Union civil protection mechanism.”

C. Return

The European Migration Agenda also recognizes that return will be necessary in some cases for individuals currently inside the European Union. Not every person is eligible to remain within the European Union, including those who are determined to be ineligible for refugee status. Even persons who otherwise meet the definition of a “refugee” in the 1951 Convention discussed above may be excluded by a state from international protection as “undeserving” under certain conditions such as “serious criminal acts” according to the 1951 Refugee Convention. In addition, third countries need to “fulfil their international obligation to take back their own nationals residing irregularly in Europe” and Member States have to apply the Return Directive. The Commission will give priority to monitoring implementation of the Directive, with a more swift return system going hand-in-hand with the respect of the procedures and standards that allow Europe to ensure a humane and dignified treatment of returnees and a proportionate use of coercive measures, in line with fundamental rights and the principle of non-refoulement. The implementation of the European Union rules on the return of irregular migrants is now being assessed thoroughly in the framework of the Schengen Evaluation Mechanism, and a ‘Return Handbook’ will support Member States with common guidelines, best practice and recommendations.

30. Id. at 6.
31. Id. at 12. (according to which “Strengthening the Common European Asylum System also means a more effective approach to abuses. Too many requests are unfounded: in 2014, 55% of the asylum requests resulted in a negative decision and for some nationalities almost all asylum requests were rejected, hampering the capacity of Member States to provide swift protection to those in need.”)
33. Directive 2008/115, of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008 O.J. (L 348) 98-107; (the United Kingdom and Ireland did not “opt-in” to this Directive and are therefore not bound by it and not subject to its application). European Agenda on Migration, supra note 1, at 10 n.22.
34. European Agenda on Migration, supra note 1, at 9–10.

Thus, the European Migration Agenda does recognize the right of Member States to exclude some persons seeking international protection. At the same time, it also recognizes the obligations of the European Union and its Member States to uphold international human rights and humanitarian law. Consistent with international protection for individuals who may face torture if returned to their country of origin but who cannot establish the specific individualized fear of persecution required under the 1951 Refugee Convention, under limited circumstances subsidiary protection may be available on a temporary basis to some individuals.

35. For an analysis of case law and the reliance on the European Charter of Fundamental Rights regarding the application of the Returns Directive see Diego Acosta Aracena, The Charter, detention and possible regularization of migrants in an irregular situation under the Returns Directive: Mahal, Case C-146/14 PPU, Mahal, Judgment of the Court of Justice (Third Chamber), 52 Common M.L. Rev. 1361, 1361-1378 (2015) (according to which “Directive 2008/115 lays down procedures for returning migrants who find themselves in an irregular situation. This legislation, better known as the Returns Directive, is possibly the most controversial one in the area of migration policy.”)
36. Humanitarian alternatives based on principles of customary law or jus cogens principles of international law, such as non-refoulement, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 14 U.N.T.S. 85, may be available to protect those denied refugee status from return to a country of origin or former residence under certain circumstances, including the particularly vulnerable status of an individual, such as a child, or threat of gender-based violence; see Tinker & Sartoreto, supra note 11 (according to which “the principle of non-refoulement has partially mitigated state sovereignty and has granted protection to individuals who do not possess refugee status. Non-refoulement has acquired a jus cogens nature, especially when it comes to protection and prevention of torture, by virtue of Art. 3 of the Convention Against Torture.”) accord Jean Allain, The jus cogens Nature of Non-Refoulement, 13 Int’l J. of Refugee L. 533, 533–38 (2001); see also Cançado Trindade, A. A., International Law for Humankind: Towards a New jus Gentium-General Course on Public International Law - Part II, 317 Recueil des Cours de l’Academie de Droit International de la Haye (2005). In such circumstances, so-called “subsidiary protections” which grant temporary authorization to remain in the receiving state with limited rights, often for a period of three to five years renewable if the conditions are on-going, may be available. See Directive 2011/95, on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, 2011 OJ (L 337) 9 (according to which it creates a subsidiary protection system); see Jane McAdam, The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime, 17(3) Int’l J. of Refugee L. 461, 466-469 (2005); see also Charter of Fundamental Rights of the European Union, Dec. 18, 2000, OJ (C 364) 1, art. 19(2) and Eur. Conv. on H. R., Art. 3, 13. The principle of non-refoulement was cited in a decision of the European Court of Human Rights preventing the return of an applicant for asylum to Greece, the state where he first entered the European Union, where detention conditions were not adequate to protect his rights; see 2 M.S.S. v. Belgium and Greece, App. No. 30696/09, 53 Eur. Ct. H.R. 2., (Jan. 21, 2011).
D. The Four Pillars of the Agenda

“Strengthening the common asylum policy” as one of the “four pillars” of the Agenda is based on the recognition that:

with the increases in the flows of asylum seekers, the European Union’s asylum policies need to be based on solidarity towards those needing international protection as well as among the European Union Member States, whose full application of the common rules must be ensured through systematic monitoring.37

The “four pillars” of the Agenda to manage migration better in the medium-term are:

1. Reducing the incentives for irregular migration;
2. Managing the border better to save lives and secure external borders;
3. Completing the Common European Asylum System to fulfill Europe’s duty to protect; and
4. Implementing a new policy on legal migration.38

In addition, the Agenda identifies three other long-term steps to consider:

1. The completion of the Common European Asylum System;
2. A shared management of the European border; and
3. A new model of legal migration.39

With the assistance of the United Nations High Commissioner for Refugees, the effort to monitor provision of international legal protection for persons of interest is being coordinated with the European Union. Additional cooperation is needed from third states, civil society, donor states and individuals, and intergovernmental organizations to address the challenges posed.

III. A RESPONSE IN SUPPORT OF THE AGENDA

A series of public panels was presented by the New York City Bar Association40 through its European Affairs Committee41 in 2014 and 2015, and a letter of support for the European Migration Agenda was sent to European Union and United Nations officials in July, 2015.42 The European Affairs Committee considered existing European Union and humanitarian law and its adequacy to provide for the effective reception, processing and

---

37. European Agenda on Migration, supra note 1, at 12. (The full text of the Agenda elaborates on the measures needed, at 12–14, including Commission guidance in “improved standards on reception conditions and asylum procedures” for member states, “fingerprinting of migrants in full respect of fundamental rights, backed up by practical cooperation and exchange of best practices,” the use of the European Asylum Support Office (EASO) as a “clearing house of national Country of Origin Information”; training and a “new network of reception authorities” as a “foundation for pooling reception places in times of emergency”, all of which may contribute to more uniform decisions on asylum applications.)

38. Id. at 6–13.

39. Id. at 14–17.

40. See About the New York City Bar Association, N.Y. CITY BAR, http://www.nycbar.org/about-us/overview-about-us (last visited Feb. 15, 2016) (The Association of the Bar of the City of New York (City Bar), founded in 1870, is a voluntary association of some 24,000 lawyers and law students. Its current president is Debra Raskin, who began her two-year term in May, 2014. The New York City Bar has a longstanding commitment to international law, human rights worldwide, and fair and humane policies on equity and justice in issues such as migration law and policy.)

41. See European Affairs Committee, N.Y. CITY BAR, http://www.nycbar.org/european-affairs (last visited Feb. 15, 2016). The European Affairs Committee focuses on policies and laws within affecting Europe institutional and legal aspects of the European Union; and European Union policies on issues at the United Nations. Members are lawyers from major law firms in the city, governmental and non-governmental organizations, in-house counsel, solo practitioners, law professors and students. The European Affairs Committee invites guest speakers who are heads of government, diplomats, lawyers from the European Commission and Parliament, United Nations Secretariat legal staff, judges and lawyers is international and European Union tribunals and courts, and attorneys from non-governmental organizations. In January, 2015, the European Affairs Committee presented a continuing legal education program entitled “European Union Law for NYC Practitioners: Focus on Employment and Environmental Law” at the NYC Bar Association. The European Affairs Committee of the NYU Alumni has been studying the issue of migration into Europe and refugees for several years, offering public panels at the bar association and at CUNY Graduate Center featuring diplomats, academics and lawyers examining the issues from different perspectives. The co-organizer of events in 2014 and 2015 with Dr. Tinker was Dr. Patricia Nobbe, Associate Director of the European Union Studies Center at CUNY Graduate Center. The European Union Studies Center (EUSC), founded in 1993, is located at the Graduate Center, the main doctoral-granting institution for the City University of New York. The EUSC’s mission is to bring together scholars, practitioners and interested lay people for study and exchange around the idea of the European Union and its challenges. The website of the EUSC at <eurosmatters.org> posts videos of the panels on migration organized with the NYC Bar Association’s European Affairs Committee on October 15, 2014, and October 6, 2015; see European Union Studies Center, THE GRADUATE CENTER, CUNY, http://www.gc.cuny.edu/Page-Elements/Academics-Research-Centers-Initiatives/Centers-and-Institutes/European-Union-Studies-Center (last visited Feb. 20, 2016).

42. Letter from Debra L. Raskin, President, New York City Bar, to H.E. Donald Tusk, President, European Council (July 22, 2015), http://www2.nycbar.org/pdf/report/uploads/7_20072947-SupportforEuropeanCommissionProposalsforaCommonEuropeanMigrationAgenda.pdf. The author wishes to thank the co-chairs of the subcommittee on migration of the European Affairs Committee, Colleen Hobson, associate at Davis Polk and Wardwell L.L.C and Mary Pennisi, associate at Morgan Lewis and Bockius L.L.P, and other members of the European Affairs Committee who contributed to research and drafting the letter in support of the European Migration Agenda dated July 22, 2015.
D. The Four Pillars of the Agenda

“Strengthening the common asylum policy” as one of the “four pillars” of the Agenda is based on the recognition that:

with the increases in the flows of asylum seekers, the European Union’s asylum policies need to be based on solidarity towards those needing international protection as well as among the European Union Member States, whose full application of the common rules must be ensured through systematic monitoring.37

The “four pillars” of the Agenda to manage migration better in the medium-term are:

1. Reducing the incentives for irregular migration;
2. Managing the border better to save lives and secure external borders;
3. Completing the Common European Asylum System to fulfill Europe’s duty to protect; and
4. Implementing a new policy on legal migration.38

In addition, the Agenda identifies three other long-term steps to consider:

1. The completion of the Common European Asylum System;
2. A shared management of the European border; and
3. A new model of legal migration.39

With the assistance of the United Nations High Commissioner for Refugees, the effort to monitor provision of international legal protection for persons of interest is being coordinated with the European Union. Additional cooperation is needed from third states, civil society, donor states and individuals, and intergovernmental organizations to address the challenges posed.

III. A RESPONSE IN SUPPORT OF THE AGENDA

A series of public panels was presented by the New York City Bar Association40 through its European Affairs Committee41 in 2014 and 2015, and a letter of support for the European Migration Agenda was sent to European Union and United Nations officials in July, 2015.42 The European Affairs Committee considered existing European Union and humanitarian law and its adequacy to provide for the effective reception, processing and

---

40. See About the New York City Bar Association, N.Y. CITY BAR, http://www.nycbar.org/about-us/overview-about-us (last visited Feb. 15, 2016) (The Association of the Bar of the City of New York (City Bar), founded in 1870, is a voluntary association of some 24,000 lawyers and law students. Its current president is Debra Raskin, who began her two-year term in May, 2014. The New York City Bar has a longstanding commitment to international law, human rights worldwide, and fair and humane policies on equity and justice in issues such as migration law and policy.)

41. See European Affairs Committee, N.Y. CITY BAR, http://www.nycbar.org/european-affairs (last visited Feb. 15, 2016). The European Affairs Committee focuses on policies and laws within and affecting Europe institutional and legal aspects of the European Union; and European Union policies on issues at the United Nations. Members are lawyers from major law firms in the city, governmental and non-governmental organizations, in-house counsel, solo practitioners, law professors and students. The European Affairs Committee invites guest speakers who are heads of governments, diplomats, lawyers from the European Commission and Parliament, United Nations Secretariat legal staff, judges and lawyers in international and European Union tribunals and courts, and attorneys from non-governmental organizations. In January, 2015, the European Affairs Committee presented a continuing legal education program entitled “European Union Law for NYC Practitioners: Focus on Employment and Environmental Law” at the NYC Bar Association. The European Affairs Committee of the NYCBA has been studying the issue of migration into Europe and refugees for several years, offering public panels at the bar association and at CUNY Graduate Center featuring diplomats, academics and lawyers examining the issues from different perspectives. The co-organizer of events in 2014 and 2015 with Dr. Tinker was Dr. Patrizia Nobbe, Associate Director of the European Union Studies Center at CUNY Graduate Center. The European Union Studies Center (EUSC), founded in 1993, is located at the Graduate Center, the main doctoral-granting institution for the City University of New York. The EUSC’s mission is to bring together scholars, practitioners and interested lay people for study and exchange around the idea of the European Union and its challenges. The website of the EUSC at <euromatters.org> posts videos of the panels on migration organized with the NYC Bar Association’s European Affairs Committee on October 15, 2014, and October 6, 2015; see European Union Studies Center, THE GRADUATE CENTER, CUNY, http://www.gc.cuny.edu/Programs/Europolitics/Elements/Academics-Research-Centers-Initiatives/Centers-and-Institutes/European-Union-Studies-Center (last visited Feb. 20, 2016).

42. Letter from Debra L. Raskin, President, New York City Bar, to H.E. Donald Tusk, President, European Council (July 22, 2015), http://www2.nycbar.org/pdf/report/uploads/7_20072947-SupportforEuropeanCommissionProposalsforaCommonEuropeanMigrationAgenda.pdf. The author wishes to thank the co-chairs of the subcommittee on migration of the European Affairs Committee, Colleen Hobson, associate at Davis Polk & Wardwell L.L.C and Mary Pennisi, associate at Morgan Lewis and Bockius L.L.P, and other members of the European Affairs Committee who contributed to research and drafting the letter in support of the European Migration Agenda dated July 22, 2015.
integration of millions of people entering Europe outside legal channels. Based on the comments of experts on these panels, it is clear that the situation requires a coordinated response from around the globe from many states, international organizations, civil society and other stakeholders to address the root causes and drivers of migration.

For the immediate future, however, the European Union is faced with a great challenge to absorb a million new arrivals through "irregular channels" in 2015 alone, in addition to those already arrived and those still to come, determine who is eligible to remain in Europe as a "refugee" (with rights and benefits) or who will be denied refugee status (with return to the state of nationality or origin, absent other humanitarian grounds to remain in Europe).\(^{43}\)

While attempting to regularize procedures under European Union regulations and directives as well as national laws and policies in Member States of the European Union, the increased numbers of migrants and refugees are straining capacities in locations throughout Europe to provide basic necessities for the new arrivals, programs to aid their integration into the European societies where many will make their new home, and the ability to continue regular processes of governance in communities throughout Europe facing new challenges. Demands for legal and humanitarian responses to the refugee crisis, heightened by the continuing armed conflict in Syria, Iraq, Afghanistan and elsewhere and by the lack of food and water security in many areas, suggest that it is time to review what European Union and international legal instruments currently provide. In coming years, the European Union will be further challenged to realize the promise of community and fundamental rights for those already there, while integrating newer arrivals into a unified common European society.

How the values and principles of the European Union match the concepts of international humanitarian and refugee law, and how European Union institutions and legislation could encourage prompt determinations of refugee status and develop better, more uniform means of reception and integration into society for refugees, are still questions to be explored. The European Affairs Committee and the New York City Bar Association determined to support a uniform and generous European Union policy and procedures to extend protection to vulnerable people eligible for refugee status or subsidiary protection in Europe. Support for efforts to find global solutions to the problems that have uprooted so many from their homes, recognizing that the many complexities and unique circumstances allow for no simple solutions, led the committee to note that:

\(^{43}\) Affine, supra note 36.

the Commission’s proposals in the Agenda outline only first steps and temporary solutions, with additional proposals needed to resolve the complexities of the issues surrounding migration into Europe today and in years ahead. We believe the reforms in the Agenda are likely to lead to a safer and stronger Europe. Such reforms should extend basic human rights protections to those arriving within the European Union awaiting a decision on their applications for asylum and have as a goal strengthening common bonds within the European Union while respecting concerns for security and the rule of law in the area of migration.\(^{44}\)

The following summarizes the lines of inquiry explored and the changing questions in response to developments over the critical years of 2014 and 2015 in this area.

Panelists at a public program at the NYC Bar Association sponsored by the European Affairs Committee and nine other international law committees of the NYC Bar Association with the European Union Studies Center at CUNY Graduate Center on October 15, 2014,\(^{45}\) outlined the current legal and public policy responses on a European Union and state level and their effectiveness in addressing the humanitarian crisis. The experiences of both Italy as a receiving state and the Seychelles as a future sending state of refugees into Europe were explored by their diplomatic representatives from the United Nations. Panelists discussed which steps should be taken to improve policy capacities, including gauging the potential of international cooperation, inter-European challenges and the potential for a European Union common policy on migration.\(^{46}\)

Several questions raised on October 15, 2014\(^{47}\) are still unresolved, including:

---

44. Raskin, supra note 42.

45. The Future of Migration into Europe, N.Y. CITY BAR, https://services.nybar.org/IMIS/Events/Event_Display.asp?EventKey=EUR101514 (Oct 15, 2014) (Panelists on October 15, 2014 were: H.E. Inigo Lambertini, Deputy Permanent Representative of Italy to the United Nations, H.E. Ronald Jumeau of the Seychelles, Ambassador for Climate Change and Small Island Developing States Issues; former Permanent Representative of the Seychelles to the United Nations; Professor Martin Schain, NYU Department of Politics, Editor of Comparative European Politics; Urszula Mojewska, attorney, European Parliament, Washington, D.C. liaison office to the United States Congress; Professors Fabio Costa Monzini and Laura Sartoretto, attorneys, UFRGS Law School, Porto Alegre, Brazil, co-directors of treaty revision project on international refugee law with the Office of the United Nations High Commissioner of Refugees and regional law reform program. Moderator was Dr. Catherine Tinker, European Affairs Committee chair, NYC Bar Association.)

46. Id.

47. Id.
integration of millions of people entering Europe outside legal channels. Based on the comments of experts on these panels, it is clear that the situation requires a coordinated response from around the globe from many states, international organizations, civil society and other stakeholders to address the root causes and drivers of migration.

For the immediate future, however, the European Union is faced with a great challenge to absorb a million new arrivals through "irregular channels" in 2015 alone, in addition to those already arrived and those still to come, determine who is eligible to remain in Europe as a "refugee" (with rights and benefits) or who will be denied refugee status (with return to the state of nationality or origin, absent other humanitarian grounds to remain in Europe).

While attempting to regularize procedures under European Union regulations and directives as well as national laws and policies in Member States of the European Union, the increased numbers of migrants and refugees are straining capacities in locations throughout Europe to provide basic necessities for the new arrivals, programs to aid their integration into the European societies where many will make their new home, and the ability to continue regular processes of governance in communities throughout Europe facing new challenges. Demands for legal and humanitarian responses to the refugee crisis, heightened by the continuing armed conflict in Syria, Iraq, Afghanistan and elsewhere and by the lack of food and water security in many areas, suggest that it is time to review what European Union and international legal instruments currently provide. In coming years, the European Union will be further challenged to realize the promise of community and fundamental rights for those already there, while integrating newer arrivals into a unified common European society.

How the values and principles of the European Union match the concepts of international humanitarian and refugee law, and how European Union institutions and legislation could encourage prompt determinations of refugee status and develop better, more uniform means of reception and integration into society for refugees, are still questions to be explored. The European Affairs Committee and the New York City Bar Association determined to support a uniform and generous European Union policy and procedures to extend protection to vulnerable people eligible for refugee status or subsidiary protection in Europe. Support for efforts to find global solutions to the problems that have uprooted so many from their homes, recognizing that the many complexities and unique circumstances allow for no simple solutions, led the committee to note that:

43. Allain, supra note 36.

44. Razin, supra note 42.

45. The Future of Migration into Europe, N.Y. CITY BAR, https://services.nybar.org/ BMIS/Events/Event_Display.aspx?EventKey=EUR101514 (Oct 15, 2014) (Panelists on October 15, 2014 were: H.E. Inigo Lambertini, Deputy Permanent Representative of Italy to the United Nations; H.E. Ronald Jumesu, Ambassador for Climate Change and Small Island Developing States Issues; former Permanent Representative of the Seychelles to the United Nations; Professor Martin Schain, NYU Department of Politics, Editor of Comparative European Politics; Urszula Mojkowska, attorney, European Parliament, Washington, D.C. liaison office to the United States Congress; Professors Fabio Costi Moncini and Laura Sartoretti, attorneys, UFRGS Law School, Porto Alegre, Brazil, co-directors of treaty revision project on international refugee law with the Office of the United Nations High Commissioner of Refugees and regional law reform program. Moderator was Dr. Catherine Tinker, European Affairs Committee chair, NYC Bar Association.)

46. Id.

47. Id.
1. What are current responses to migration into Europe under international human rights law, European Union law and policy, and European states’ law and policy? What is the role of regional and international cooperation?
2. What challenges do different migrant groups into the European Union face? What rights do migrants into Europe have, and what laws may need to be changed?
3. What are the political realities? What is the theory, versus the practice?
4. Who holds responsibility: governments, regional organizations, civil society?
5. What future responses to migration and large-scale dislocation are needed? 58

A year later, another panel on October 6, 2015, 49 entitled “Europe’s Failures, Europe’s Chance: Urgent Solutions for Refugees” discussed migration into Europe with additional questions concerning the role of the United Nations High Commissioner for Refugees in screening applicants for asylum in Europe in the initial stage, assisting European states to identify those persons with a likely claim for refugee status when reviewed and granted by states. Panelists also contributed reflections from the Italian perspective as refugees and migrants are now spreading across the continent, and academic reflections on incentivizing northern European states to accept more refugees regardless of the Dublin regulations. 50

Additional questions were presented to this panel, including:

1. How has the flow of migrants and refugees changed in 2014-2015?
2. What has been proposed and accomplished regarding “burden-sharing” within the European Union and what more needs to be done?
3. What steps have been taken to screen applicants for asylum or to process influxes of people surging across borders prior to

48. Id.
49. The Future of Migration into Europe—Europe’s Failures and Europe’s Chance: Urgent Solutions for Refugees, N.Y. City Bar, https://services.ycbar.org/DMS/Events/Event_Display.aspx?EventKey=EUR1000515&WebsiteKey=f71612d-524c-488c-a5f7-0d16ac7b3114 (Oct. 6, 2015) [Panelists on October 6, 2015 were: Professor Peter Schuck, Yale Law School; I.I.E. Inigo Lambertini, Deputy Permanent Representative of Italy to the United Nations; and Ninette Kelley, Director of the New York Office, United Nations High Commissioner of Refugees; moderator was Professor Tania Domi, Columbia University, with introductory remarks by John Torpey, Director of the Ralph Bunche Institute on the United Nations at the Graduate Center of the City University of New York (CUNY). The event was organized and co-sponsored by the European Affairs Committee of the NYC Bar Association with Dr. Patrizia Nobile of the European Union Studies Center of the Graduate Center of CUNY.]
50. Id.

2016] Tinker

or immediately upon entry into the European Union? Are standard border control practices of fingerprinting, performing identity or criminal history checks, or verifying countries of origin of individuals possible given the sheer numbers and desperate plight of those now crossing into the European Union?
4. Have these realities overcome European Union law like the Dublin regulations, necessitating repeal or major revision of the rules restricting free movement of persons within the “Schengen Area” of the European Union? In other words, has the situation changed the rules as Member States of the European Union accept refugees passing through other European Union Member States prior to any processing or determination of their claims for asylum?
5. What is the international community doing, and is it sufficient?
6. What effect does the 1951 Refugee Convention have on the situation in Europe today, and what is the role of the United Nations High Commissioner for Refugees in processing asylum applications and determining who has a likely success of recognition as a refugee? 51

A third panel organized by the European Affairs Committee of the NYC Bar Association on November 6, 2015, 52 featured European Union officials responsible for determining future action and implementation of rules on refugees and migrants, as well as a representative of the United Nations High Commissioner for Human Rights. Experts on the European Union, European Union law, and international human rights and humanitarian law discussed measures contained in the new European Union “European Migration

51. Id.
52. AM. BRANCH INT’L. LAW ASSN & INT’L. LAW STUDENTS ASSN, INTERNATIONAL LAW WEEKEND NOV. 5-7, 2015, 11 (2015). (Panel consisting of: Dr. Lucio Gussetti, the director of the section of the European Legal Service which includes migration and refugees; Dr. Stephan Marquardt of the External Action Service of the European Union Directorate of Foreign and Defense Policy; and United Nations Assistant Secretary-General Ivan Simonovic, Director of the NY Office of the United Nations High Commissioner for Human Rights. The moderator was Dr. Catherine Tinker, chair of the European Affairs Committee of the NYC Bar Association, with the participation of Coleen Hobson, co-chair of the European Affairs Committee’s Subcommittee on Migration. The panel discussed measures contained in the new European Union “European Migration Agenda” and related provisional measures. Adopted in response to the worsening humanitarian crisis, these policies respond to ever-greater numbers of people fleeing war, violence, effects of climate change and other dangers and attempting to enter the European Union across the Mediterranean Sea or the Balkan route. Once inside the European Union, many of these “irregular” migrants face new forms of exploitation by smugglers and organized crime: indeterminate delays in processing asylum applications, and even detention with uncertainties due to variations in legal and policy standards in Member State laws related to migrants and refugees.)
1. What are current responses to migration into Europe under international human rights law, European Union law and policy, and European states‘ law and policy? What is the role of regional and international cooperation?

2. What challenges do different migrant groups into the European Union face? What rights do migrants into Europe have, and what laws may need to be changed?

3. What are the political realities? What is the theory, versus the practice?

4. Who holds responsibility: governments, regional organizations, civil society?

5. What future responses to migration and large-scale dislocation are needed?

A year later, another panel on October 6, 2015, entitled “Europe’s Failures, Europe’s Chance: Urgent Solutions for Refugees” discussed migration into Europe with additional questions concerning the role of the United Nations High Commissioner for Refugees in screening applicants for asylum in Europe at the initial stage, assisting European states to identify those persons with a likely claim for refugee status when reviewed and granted by states. Panelists also contributed reflections from the Italian perspective as refugees and migrants are now spreading across the continent, and academic reflections on incentivizing northern European states to accept more refugees regardless of the Dublin regulations.

Additional questions were presented to this panel, including:

1. How has the flow of migrants and refugees changed in 2014-2015?

2. What has been proposed and accomplished regarding “burden-sharing” within the European Union and what more needs to be done?

3. What steps have been taken to screen applicants for asylum or to process influxes of people surging across borders prior to

or immediately upon entry into the European Union? Are standard border control practices of fingerprinting, performing identity or criminal history checks, or verifying countries of origin of individuals possible given the sheer numbers and desperate plight of those now crossing into the European Union?

4. Have these realities overcome European Union law like the Dublin regulations, necessitating repeal or major revision of the rules restricting free movement of persons within the “Schengen Area” of the European Union? In other words, has the situation changed the rules as Member States of the European Union accept refugees passing through other European Union Member States prior to any processing or determination of their claims for asylum?

5. What is the international community doing, and is it sufficient?

6. What effect does the 1951 Refugee Convention have on the situation in Europe today, and what is the role of the United Nations High Commissioner for Refugees in processing asylum applications and determining who has a likely success of recognition as a refugee?

A third panel organized by the European Affairs Committee of the NYC Bar Association on November 6, 2015, featured European Union officials responsible for determining future action and implementation of rules on refugees and migrants, as well as a representative of the United Nations High Commissioner for Human Rights. Experts on the European Union, European Union law, and international human rights and humanitarian law discussed measures contained in the new European Union “European Migration

51. Id.

52. AM. BRANCH INT’L LAW ASSN. & INT’L LAW STUDENTS ASSN., INTERNATIONAL LAW WEEKEND NOV. 5-7, 2015, 11 (2015). (Panel consisting of: Dr. Lucio Gueretti, the director of the section of the European Legal Service which includes migration and refugees; Dr. Stephan Marquardt of the External Action Service of the European Union Directorate of Foreign and Defense Policy; and United Nations Assistant Secretary-General Ivan Simonovic, Director of the NY Office of the United Nations High Commissioner for Human Rights. The moderator was Dr. Catherine Tinker, chair of the European Affairs Committee of the NYC Bar Association, with the participation of Colleen Hobson, co-chair of the European Affairs Committee’s Subcommittee on Migration. The panel discussed measures contained in the new European Union “European Migration Agenda” and related provisional measures. Adopted in response to the worsening humanitarian crisis, these policies respond to ever-greater numbers of people fleeing war, violence, effects of climate change and other dangers and attempting to enter the European Union across the Mediterranean Sea or the Balkan route. Once inside the European Union, many of these “irregular” migrants face new forms of exploitation by smugglers and organized crime, indeterminate delays in processing asylum applications, and even detention with uncertainties due to variations in legal and policy standards in Member State laws related to migrants and refugees.)
Agenda" and related provisional measures for where Europe—and the rest of the globe—is headed.53

This panel addressed more detailed questions of European law and policy, including:

1. What efforts have been made by the European Commission in the implementation of the European Migration Agenda of May 2015, and is it working? What else remains to be done?
2. How are member states of the European Union responding to the calls for resettlement quotas and funding to third states to try to keep people from entering the European Union and address root causes in countries of origin?
3. Is the sheer force of numbers pouring into Europe breaking down the basic principles of the European Union itself, including the free movement of peoples in the Schengen Accords and the principles of solidarity?
4. What is the big picture and the consequences and effects on the basic human rights of the persons fleeing persecution and violence?54

The questions raised in all three panels are highly relevant, remain unresolved, and may encourage further discussion and consideration of the issues. The challenges are no longer limited to one receiving state in Southern Europe or one sending state in the Middle East or one transit state in North Africa or the Balkans or Eastern Europe. Events in 2015 have shown how quickly situations develop, how closely the world is linked today and how much coordinated effort is needed on a regional and international basis, reasons why answers to the questions posed continue to change in response to new events. Coordination and cooperation is needed to explore and support local communities’ actions and attitudes to find solutions to the reception of vast numbers of people becoming part of the new norm in Europe, reflecting changes in all parts of the globe.

IV. CONCLUSION

Donald Tusk, President of the European Council, chairing an emergency session of the Council in Brussels on September 23, 2015, warned that "The greatest tide of refugees and migrants is yet to come,"55 predicting that instead of thousands there will be millions of refugees and migrants entering Europe in the coming years and that a strategy needs to be devised, including closing the borders of the European Union. By November of 2015, he added: "We need to correct our policy of open doors and windows."56

To address the anticipated continuation of huge numbers of migrants and refugees entering Europe for years to come, a number of steps need to be considered respecting international refugee and humanitarian law, with new policy choices to be made within the European Union and its Member States and new legislation. These include choices on how best to:

1. Develop adequate and prompt screening procedures for migrants to be uniformly applied along all borders of the European Union or at centralized screening locations, once it is determined whether the borders of the European Union itself and of its Member States are going to be open or closed.
2. Decide what criteria will be applied to applicants for asylum and develop uniform standards to be applied throughout the European Union, with the European Assistance and Support Office ("EASO") reporting on human rights conditions and other factors in the countries of origin of asylum applicants as a factual basis to assist states in determining the validity of claims of well-founded fear of persecution or generalized violence.
3. Consider broadening the classic definition of "refugee" from the 1951 Refugee Convention and its protocol currently applied by the European Union and its Member States to include generalized violence, conflict and other drivers of contemporary displacement, along the lines of the expanded definition of "refugee" already adopted in Africa and Latin America.
4. Close detention centers or significantly improve conditions for those awaiting determination on existing claims for refugee status and those whose applications have not been completed yet, or provide more secure environments for vulnerable populations such as women, children and the elderly, to guarantee greater respect for the aspirations and human rights of the occupants and create conditions conducive to security and future integration.
5. Increase efforts to assist individual states throughout Europe in developing their own policies and programs for education, job training, culture and language classes for migrants and refugees, and other measures leading toward integration into

53. Id.
54. Id.
entering Europe in the coming years and that a strategy needs to be devised, including closing the borders of the European Union. By November of 2015, he added: “We need to correct our policy of open doors and windows.”

To address the anticipated continuation of huge numbers of migrants and refugees entering Europe for years to come, a number of steps need to be considered respecting international refugee and humanitarian law, with new policy choices to be made within the European Union and its Member States and new legislation. These include choices on how best to:

1. Develop adequate and prompt screening procedures for migrants to be uniformly applied along all borders of the European Union or at centralized screening locations, once it is determined whether the borders of the European Union itself and of its Member States are going to be open or closed.
2. Decide what criteria will be applied to applicants for asylum and develop uniform standards to be applied throughout the European Union, with the European Assistance and Support Office (“EASO”) reporting on human rights conditions and other factors in the countries of origin of asylum applicants as a factual basis to assist states in determining the validity of claims of well-founded fear of persecution or generalized violence.
3. Consider broadening the classic definition of “refugee” from the 1951 Refugee Convention and its protocol currently applied by the European Union and its Member States to include generalized violence, conflict and other drivers of contemporary displacement, along the lines of the expanded definition of “refugee” already adopted in Africa and Latin America.
4. Close detention centers or significantly improve conditions for those awaiting determination on existing claims for refugee status and those whose applications have not been completed yet, or provide more secure environments for vulnerable populations such as women, children and the elderly, to guarantee greater respect for the aspirations and human rights of the occupants and create conditions conducive to security and future integration.
5. Increase efforts to assist individual states throughout Europe in developing their own policies and programs for education, job training, culture and language classes for migrants and refugees, and other measures leading toward integration into

---

53. Id.
54. Id.
society, as well as programs to aid local communities in building an inclusive society in Europe.

Decisions on these questions are crucial in the long process of saving lives and building society. Steps such as these, inherent in the European Migration Agenda and other proposals still to come, will ease the transition for those from other languages, cultures and traditions and create better understanding in host states of the value of contributions from new arrivals—and those already in Europe for some time whose status might become regularized—in reinvigorating the European economy and society. Indeed, "migration is both an opportunity and a challenge for the European Union."57

The European Migration Agenda is a step towards the realization of a common migration policy agenda for the European Union which, together with the common asylum policy, will serve as the basis of a coordinated response by the European Union and its Member States to the influx of people into Europe.58

As noted in the European Migration Agenda,

A clear and well implemented framework for legal pathways to entrance in the European Union (both through an efficient asylum and visa system) will reduce push factors towards irregular stay and entry, contributing to enhance security of European borders as well as safety of migratory flows.

The European Union must continue to offer protection to those in need. It must also recognize that the skills needed for a vibrant economy cannot always immediately be found inside the European Union labour market or will take time to develop. Migrants who have been legally admitted by Member States should not be faced with reluctance and obstruction—they should be given every assistance to integrate in their new communities. This should be seen as central to the values Europeans should be proud of and should project to partners worldwide.

But by the same token, the European Union needs to draw the consequences when migrants do not meet the criteria to stay. Unsuccessful asylum claimants who try to avoid return, visa overstayers, and migrants living in a permanent state of irregularity constitute a serious problem. This corrodes confidence in the system. It offers strong arguments for those looking to criticize or stigmatize migration. It makes it harder to integrate those migrants staying in the European Union as of right.59

Europe, despite the many challenges faced by the economic struggles of recent years and the need for decent jobs for all in the region, is still a beacon to the rest of the world for its history, tradition, and principles embodied in the basic documents and legislation of the European Union. As European society opens up to new populations, the need for integration and inclusion will increase, bringing further enrichment to European culture and institutions. At the same time, legitimate concerns for internal security and control of external borders must be respected, and those who do not qualify as "refugees" or who are ineligible for subsidiary protection must expect to be returned to their countries of origin.

The New York City Bar Association in its letter in support of the European Migration Agenda concluded that:

Longer-term changes in the system for receiving and processing asylum applicants in a more humane, consistent and transparent manner are necessary. A better structure for dealing with those seeking refuge inside the European Union who are in clear need of protection, and assisting in their integration into European society, is essential. Furthermore, the Commission [on European Affairs] is of the opinion that the Agenda's focus on European Union-wide standards and procedures, rather than the current differentiated approaches in Member States, is both consistent with and necessary to address a problem that cannot be solved at the Member State level. Such a solution is consistent with the principles of solidarity, subsidiarity, proportionality, and fair sharing of responsibility... reforms [in the Agenda] should extend basic human rights protections to those arriving within the European Union awaiting a decision on their applications for asylum and have as a goal strengthening common bonds within the European Union while respecting concerns for security and the rule of law in the area of migration.60

No effort by Europe alone can resolve the many challenges facing every continent as people are threatened by armed conflict, terrorism, extreme weather events, dramatic and widespread food and water insecurity, and other conditions driving people to seek refuge far from their homes. The European Agenda on Migration is one step toward implementation of European Union-wide policies. More questions remain than answers. The challenge to the European Union is to pursue solutions.

57. EC, supra note 22; see generally INTERNATIONAL ORGANIZATION FOR MIGRATION, www.iom.int (last visited Feb. 15, 2016) (IOM has articulated the benefits migrants bring to their new states, including entrepreneurship and needed changes in demographics for ageing populations.)


59. European Agenda on Migration, supra note 1, at 6-7.

60. Raskin, supra note 42.
society, as well as programs to aid local communities in building an inclusive society in Europe.

Decisions on these questions are crucial in the long process of saving lives and building society. Steps such as these, inherent in the European Migration Agenda and other proposals still to come, will ease the transition for those from other languages, cultures and traditions and create better understanding in host states of the value of contributions from new arrivals—and those already in Europe for some time whose status might become regularized—in reviving the European economy and society. Indeed, "migration is both an opportunity and a challenge for the European Union." 57

The European Migration Agenda is a step towards the realization of a common migration policy agenda for the European Union which, together with the common asylum policy, will serve as the basis of a coordinated response by the European Union and its Member States to the influx of people into Europe. 58

As noted in the European Migration Agenda,

A clear and well-implemented framework for legal pathways to entrance in the European Union (both through an efficient asylum and visa system) will reduce push factors towards irregular stay and entry, contributing to enhance security of European borders as well as safety of migratory flows.

The European Union must continue to offer protection to those in need. It must also recognize that the skills needed for a vibrant economy cannot always be found inside the European Union labour market or will take time to develop. Migrants who have been legally admitted by Member States should not be faced with reluctance and obstruction—they should be given every assistance to integrate in their new communities. This should be seen as central to the values Europeans should be proud of and should project to partners worldwide.

But by the same token, the European Union needs to draw the consequences when migrants do not meet the criteria to stay. Unsuccessful asylum claimants who try to avoid return, visa overstayers, and migrants living in a permanent state of irregularity constitute a serious problem. This corrodes confidence in the system. It offers strong arguments for those looking to criticize or stigmatize migration. It makes it harder to integrate those migrants staying in the European Union as of right. 59

Europe, despite the many challenges faced by the economic struggles of recent years and the need for decent jobs for all in the region, is still a beacon to the rest of the world for its history, tradition, and principles embodied in the basic documents and legislation of the European Union. As European society opens up to new populations, the need for integration and inclusion will increase, bringing further enrichment to European culture and institutions. At the same time, legitimate concerns for internal security and control of external borders must be respected, and those who do not qualify as "refugees" or who are ineligible for subsidiary protection must expect to be returned to their countries of origin.

The New York City Bar Association in its letter in support of the European Migration Agenda concluded that:

Longer-term changes in the system for receiving and processing asylum applicants in a more humane, consistent and transparent manner are necessary. A better structure for dealing with those seeking refuge inside the European Union who are in clear need of protection, and assisting in their integration into European society, is essential. Furthermore, the Committee [on European Affairs] is of the opinion that the Agenda's focus on European Union-wide standards and procedures, rather than the current differentiated approaches in Member States, is both consistent with fundamental rights in the European Union and necessary to address a problem that cannot be solved at the Member State level. Such a solution is consistent with the principles of solidarity, subsidiarity, proportionality, and fair sharing of responsibility... reforms [in the Agenda] should extend basic human rights protections to those arriving within the European Union awaiting a decision on their applications for asylum and have as a goal strengthening common bonds within the European Union while respecting concerns for security and the rule of law in the area of migration. 60

No effort by Europe alone can resolve the many challenges facing every continent as people are threatened by armed conflict, terrorism, extreme weather events, dramatic and widespread food and water insecurity, and other conditions driving people to seek refuge far from their homes. The European Agenda on Migration is one step toward implementation of European Union-wide policies. More questions remain than answers. The challenge to the European Union is to pursue solutions.

57. EC, supra note 22, see generally INTERNATIONAL ORGANIZATION FOR MIGRATION, www.iom.int (last visited Feb. 15, 2016) (IOM has articulated the benefits migrants bring to their new states, including entrepreneurship and needed changes in demographics for ageing populations.)


59. European Agenda on Migration, supra note 1, at 6–7.

60. Raskin, supra note 42.
Finally, in the words of the European Migration Agenda itself, "All actors: Member States, European Union institutions, International Organizations, civil society, local authorities and third countries need to work together to make a common European migration policy a reality." 61

LOSS AND DAMAGE AND THE 21ST CONFERENCE OF THE PARTIES TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

Dr. Wil Burns*

I. OVERVIEW ............................................................................. 415
II. LOSS AND DAMAGE UNDER THE UNFCCC ......................... 419
III. THE FUTURE OF LOSS AND DAMAGE IN INTERNATIONAL CLIMATE POLICYMAKING........................................... 426
A. Develop A Substantive Framework to Address Climate Displacement ............................................................................. 426
B. Provide the Necessary Funding to Make Micro-insurance a Viable Loss and Damage Instrument......................................................... 429
C. Develop A Framework for Stocktaking on Loss and Damage...... 430
D. Revisit the Issue of Liability and Compensation in the Future...... 431
IV. CONCLUSION............................................................................. 433

I. OVERVIEW

The early focus of the Parties to the United Nations Framework Convention on Climate Change ("UNFCCC")1 was on programs and policies to reduce greenhouse gas emissions and emissions from land-use and forestry,2 commonly referred to as mitigation. By the middle of the decade of 2000-2010, it also became increasingly obvious that the feeble efforts by the world community to reduce emissions necessitated a substantive commitment to adaptation, defined by the UNFCCC as efforts to moderate potential damages from climate change, or to leverage potential benefits.3

However, during the last decade there was also increasing recognition that even full-throated support of mitigation and adaptation programs are likely to prove insufficient to avert serious adverse impacts in many of the

* Ph.D. International Environmental Law from University of Wales-Cardiff School of Law. Dr. Burns is currently a Co-Director of the Washington Climate Geoengineering Consortium, a scholarly initiative of American University.


61. European Agenda on Migration, supra note 1.
Finally, in the words of the European Migration Agenda itself, “All actors: Member States, European Union institutions, International Organizations, civil society, local authorities and third countries need to work together to make a common European migration policy a reality.”

LOSS AND DAMAGE AND THE 21ST CONFERENCE OF THE PARTIES TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

Dr. Wil Burns*

I. OVERVIEW.................................................415
II. LOSS AND DAMAGE UNDER THE UNFCCC..........................419
III. THE FUTURE OF LOSS AND DAMAGE IN INTERNATIONAL CLIMATE POLICYMAKING.................................426
   A. Develop A Substantive Framework to Address Climate Displacement.................................426
   B. Provide the Necessary Funding to Make Micro-insurance a Viable Loss and Damage Instrument.................................429
   C. Develop A Framework for Stocktaking on Loss and Damage..............430
   D. Revisit the Issue of Liability and Compensation in the Future........431
IV. CONCLUSION.................................................433

I. OVERVIEW

The early focus of the Parties to the United Nations Framework Convention on Climate Change (“UNFCCC”) was on programs and policies to reduce greenhouse gas emissions and emissions from land-use and forestry, commonly referred to as mitigation. By the middle of the decade of 2000-2010, it also became increasingly obvious that the reckless efforts by the world community to reduce emissions necessitated a substantive commitment to adaptation, defined by the UNFCCC as efforts to moderate potential damages from climate change, or to leverage potential benefits.

However, during the last decade there was also increasing recognition that even full-throated support of mitigation and adaptation programs are likely to prove insufficient to avert serious adverse impacts in many of the

* Ph.D. International Environmental Law from University of Wales-Cardiff School of Law. Dr. Burns is currently a Co-Director of the Washington Climate Geomengineering Consortium, a scholarly initiative of American University.


61. European Agenda on Migration, supra note 1.
world’s most climatically vulnerable States. The emissions reduction pledges made by the Parties to the UNFCCC to date, designated Intended Nationally Determined Contributions ("INDCs"), currently put the world on track for temperature increases of between 2.7°C–3.7°C by 2100. Moreover, given the fact that a substantial portion of the carbon dioxide emitted into the atmosphere will remain resident for tens to hundreds of thousands of years, manifestations of climate change, including temperatures and sea level rise may continue to rise for many centuries, or millennia, beyond the point of emissions stabilization. This is far above the dangerous climatic thresholds of 1.5°C–2.0°C identified by scientists and policymakers. Moreover, even dramatic deepening of emissions reductions commitments would not likely help the world to avoid passing critical thresholds at this point. There are also clear limitations to adaptation responses to climate change in terms of minimizing potential impacts. These include cost constraints that preclude


Without additional mitigation efforts beyond those in place today, and even with adaptation, warming by the end of the 21st Century will lead to high to very high risk of severe, widespread and irreversible impact globally. Some risks of climate change, such as risks to unique and threatened systems and risks associated with extreme weather events, are moderate to high at temperatures 1°C to 2°C above pre-industrial levels.


world’s most climatically vulnerable States. The emissions reduction pledges made by the Parties to the UNFCCC to date, denominated Intended Nationally Determined Contributions (“INDCs”), currently put the world on track for temperature increases of between 2.7°–3.7°C by 2100. Moreover, given the fact that a substantial portion of the carbon dioxide emitted into the atmosphere will remain resident for tens to hundreds of thousands of years, manifestations of climate change, including temperatures and sea level rise may continue to rise for many centuries, or millennia, beyond the point of emissions stabilization. This is far above the dangerous climatic thresholds of 1.5°–2.0°C identified by scientists and policymakers. Moreover, even dramatic deepening of emissions reductions commitments would not likely help the world to avoid passing critical thresholds at this point. There are also clear limitations to adaptation responses to climate change in terms of minimizing potential impacts. These include cost constraints that preclude


Without additional mitigation efforts beyond those in place today, and even with adaptation, warming by the end of the 21st Century will lead to high to very high risk of severe, widespread and irreversible impacts globally... Some risks of climate change, such as risks to unique and threatened systems and risks associated with extreme weather events, are moderate to high at temperatures 1°C to 2°C above pre-industrial levels.


11. Current knowledge on relevant methodologies and data requirements as well as lessons learned and gaps identified at different levels, in assessing the risk of loss and damage associated with the adverse effects of climate change, UNFCCC, Technical Paper, FCCC/TP/2012/1 (May 12, 2012), at 9, http://www.unfccc.int/resource/docs/2012/tp03/pdf (last visited Dec. 29, 2015); Rosi Verheyen, Tackling Loss & Damage, A New Role for the Climate Regime, LOSS AND DAMAGE, 1, 5 (2012), http://www.lossanddamage.net/download/6877.pdf.


Loss and damage encompasses an array of potential economic impacts, such as damage to infrastructure from coastal erosion and flooding, declines in crop production, or loss of fisheries. Moreover, it includes non-economic damages, such as loss of biodiversity and ecosystem services, loss of culture and sovereignty, and decline of indigenous knowledge. There are also both spatial and temporal scales to loss and damage. Currently, the majority of loss and damage associated with climate change is occurring at the local level. However, in the future, it is possible that critical global tipping points will be exceeded, manifesting itself in impacts of a potentially "inconceivable magnitude." Loss and damage also has a temporal component, encompassing both impacts from extreme events (such as heat waves, drought and flooding), as well as slow-onset events with the potentially greatest impacts, including salinization, rising sea levels, desertification, and retreat of glaciers.

There has been very little detailed research to date to quantify potential loss and damage costs over this century and beyond. However, the estimates that have been made are truly daunting. One recent study by the NGO Action Aid pegged the mean cost of loss and damage at $275 trillion between 2000 and 2200. The African Climate Policy Center of the United National Economic Commission for Africa’s assessment of potential loss and damage on the continent concluded that these impacts could reduce GDP in many sectors between 1% (under a “2°C World”) up to 5% (in a “4°C World.”) Overall, Parry concluded that loss and damage may ultimately account for two-thirds of all potential impacts in all sectors.

II. LOSS AND DAMAGE UNDER THE UNFCCC

The concept of loss and damage has a long pedigree in international climate negotiations. In 1991, during the negotiations for the UNFCCC, Vanuatu, on behalf of the Alliance of Small Island States (“AOSIS”), called for the establishment of an insurance pool to assist small island States to cope with the impacts of rising sea levels; however, this proposal was not picked up in the treaty’s text. At the 13th Conference of the Parties in 2007, the Parties adopted the “Bali Action Plan” calling for, “enhanced action on adaptation, including, inter alia, consideration of:

1. Risk management and risk reduction strategies, including risk sharing and transfer mechanisms such as insurance;
2. Disaster reduction strategies and means to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change.

At the 14th Conference of the Parties (“COP”) to the UNFCCC, AOSIS advanced a proposal for a “Multi-Window Mechanism to Address Loss and Damage.” This included an Insurance Component to help developing countries with potentially severe loss and damage associated with extreme weather events, such as hurricanes or drought, a Rehabilitation/Compensatory component to provide partial or total payouts for loss and damage associated with progressive negative impacts of climate change such as sea level rise and damage to ocean ecosystems, and a Risk
Loss and damage encompasses an array of potential economic impacts, such as damage to infrastructure from coastal erosion and flooding,\(^\text{14}\) declines in crop production,\(^\text{15}\) or loss of fisheries.\(^\text{16}\) Moreover, it includes non-economic damages, such as loss of biodiversity and ecosystem services,\(^\text{17}\) loss of culture and sovereignty,\(^\text{18}\) and decline of indigenous knowledge.\(^\text{19}\)

There are also both spatial and temporal scales to loss and damage. Currently, the majority of loss and damage associated with climate change is occurring at the local level. However, in the future, it is possible that critical global tipping points will be exceeded, manifesting itself in impacts of a potentially "inconceivable magnitude."\(^\text{20}\) Loss and damage also has a temporal component, encompassing both impacts from extreme events (such as heat waves, drought and flooding), as well as slow-onset events with the potentially greatest impacts, including salinization, rising sea levels, desertification, and retreat of glaciers.\(^\text{21}\)

There has been very little detailed research to date to quantify potential loss and damage costs over this century and beyond.\(^\text{22}\) However, the estimates that have been made are truly daunting. One recent study by the NGO Action Aid pegged the mean cost of loss and damage at $275 trillion between 2000 and 2200.\(^\text{23}\) The African Climate Policy Center of the United National Economic Commission for Africa’s assessment of potential loss and damage on the continent concluded that these impact could reduce GDP in many sectors between 1% (under a “2°C World”) up to 5% (in a “4°C World”).\(^\text{24}\)


\(^{18}\) Nishat, supra note 13, at 24.


\(^{20}\) Forming the Loss and Damage debate, supra note 13, at 3; Rachel James et al., *Characterizing Loss and Damage from Climate Change*, 4 NATURE CLIMATE CHANGE 938, 938 (2014).


\(^{23}\) Id. at 11.

\(^{24}\) Overall, Parry concluded that loss and damage may ultimately account for two-thirds of all potential impacts in all sectors.\(^\text{25}\)

II. LOSS AND DAMAGE UNDER THE UNFCCC

The concept of loss and damage has a long pedigree in international climate negotiations. In 1991, during the negotiations for the UNFCCC, Vanuatu, on behalf of the Alliance of Small Island States (“AOSIS”), called for the establishment of an insurance pool to assist small island states to cope with the impacts of rising sea levels;\(^\text{26}\) however, this proposal was not picked up in the treaty’s text. At the 13th Conference of the Parties in 2007, the Parties adopted the “Bali Action Plan” calling for, *inter alia,* “[e]nhanced action on adaptation, including, *inter alia,* consideration of:

1. Risk management and risk reduction strategies, including risk sharing and transfer mechanisms such as insurance;

2. Disaster reduction strategies and means to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change.\(^\text{27}\)

At the 14th Conference of the Parties (“COP”) to the UNFCCC, AOSIS advanced a proposal for a “Multi-Window Mechanism to Address Loss and Damage.”\(^\text{28}\) This included an Insurance Component to help developing countries with potentially severe loss and damage associated with extreme weather events, such as hurricanes or drought,\(^\text{29}\) a Rehabilitation/Compensatory component to provide partial or total payouts for loss and damage associated with progressive negative impacts of climate change such as sea level rise and damage to ocean ecosystems,\(^\text{30}\) and a Risk


\(^{30}\) Id. at 1 & 5.

\(^{31}\) Id. at 1 & 7.
Management Component to support and promote risk assessment and provide critical operation to ensure operation of the other components. However, this proposal was not taken up by the Parties to the UNFCCC either in 2008, or after it was re-tabled as a submission in 2012.

Impetus to address loss and damage grew with the decision by the Parties at the 16th COP in 2010 to launch a work program "to consider ... approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change." The program was placed under the rubric of the Cancun Adaptation Framework, which was also established at the 16th COP. It was contemplated that the UNFCCC's Subsidiary Body on Implementation would formulate the work program, which would consist of a series of workshops and expert meetings. At the 17th COP, the Parties agreed to explore a range of potential options to address loss and damage, including an international mechanism, and to consider recommendations at its next session. At the 18th COP the Parties agreed to establish an institutional mechanism to address loss and damage at its next session in Warsaw.

While there was a consensus to establish a loss and damage mechanism at the 19th COP in Warsaw, its characterization and scope were hotly contested. Developing State Parties pressed to establish the Mechanism as an independent institution, rather than seat it under the Cancun Adaptation Framework. This position was resisted by developed State Parties. Some of them contended that the concepts of loss and damage and adaptation cannot be separated, and thus should be considered together. Other developed States contended that establishment of a third pillar under the UNFCCC would further increase the complexity of the regime. Many developed countries also feared that creation of an independent mechanism might open the door to the imposition of liability for climate-related impacts by decoupling the concept from adaptation responses.

Ultimately, a compromise was reached in the drafting of the Warsaw International Mechanism for Loss and Damage ("WIM"), which was adopted in a decision by the Parties at the 19th Conference of the Parties. While the Parties agreed to establish the WIM under the Cancun Adaptation Framework, it also provided for its review, "including its structure, mandate and effectiveness," at the 22nd Conference of the Parties in 2016.

By its terms, the WIM was established to address climate change-related damage and loss, both in terms of extreme weather and slow-onset events in vulnerable developing countries. The WIM is tasked with three primary functions, reflecting both functional modes of action (action approaches) and systemic modes of actions (signaling areas of concern):
Management Component to support and promote risk assessment and provide critical operation to ensure operation of the other components. However, this proposal was not taken up by the Parties to the UNFCCC either in 2008, or after it was re-tabled as a submission in 2012.

Impetus to address loss and damage grew with the decision by the Parties at the 16th COP in 2010 to launch a work program “to consider . . . approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change.” The program was placed under the rubric of the Cancun Adaptation Framework, which was also established at the 16th COP. It was contemplated that the UNFCCC’s Subsidiary Body on Implementation would formulate the work program, which would consist of a series of workshops and expert meetings. At the 17th COP, the Parties agreed to explore a range of potential options to address loss and damage, including an international mechanism, and to consider recommendations at its next session. At the 18th COP the Parties agreed to establish an institutional mechanism to address loss and damage at its next session in Warsaw.

While there was a consensus to establish a loss and damage mechanism at the 19th COP in Warsaw, its characterization and scope were hotly contested. Developing State Parties pressed to establish the Mechanism as an independent institution, rather than seat it under the Cancun Adaptation Framework. This position was resisted by developed State Parties. Some of them contended that the concepts of loss and damage and adaptation cannot be separated, and thus should be considered together. Other developed States contended that establishment of a third pillar under the UNFCCC would further increase the complexity of the regime. Many developed countries also feared that creation of an independent mechanism might open the door to the imposition of liability for climate-related impacts by decoupling the concept from adaptation responses.

Ultimately, a compromise was reached in the drafting of the Warsaw International Mechanism for Loss and Damage (“WIM”), which was adopted in a decision by the Parties at the 19th Conference of the Parties. While the Parties agreed to establish the WIM under the Cancun Adaptation Framework, it also provided for its review, “including its structure, mandate and effectiveness,” at the 22nd Conference of the Parties in 2016.

By its terms, the WIM was established to address climate change-associated loss and damage, both in terms of extreme weather and slow-onset events in vulnerable developing countries. The WIM is tasked with three primary functions, reflecting both functional modes of action (action approaches) and systemic modes of actions (signaling areas of concern):

---

31. Id. at 2.

32. Verheyen, supra note 11, at 4.


34. Id. ¶ 13. The overarching purpose of the Cancun Adaptation Framework is to reduce climatic vulnerability and strengthen resilience of developing countries. It includes five clusters, including implementation, support, institutions, principles and stakeholder engagement. Cancun Adaptation Framework, UNFCCC, at http://www.unfccc.int/adaptation/items/5852.pdf (last visited Jan. 1, 2016).

35. UNFCCC, supra note 1, at art. 10.

36. Id.


39. Submission by Norway, 11 November 2013, institutional arrangements under the UNFCCC for approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity. UNFCCC, at 1, http://www.unfccc.int/files/adaptation/application/pdf/norway_1.pdf (last visited Dec. 29, 2015).


43. Id. ¶ 1.

44. Id. ¶ 15.

45. Id. ¶ 1.

46. Schäfer & Kretz, supra note 2, at 9-10.
1. “Enhancing knowledge and understanding of comprehensive risk management approaches to address loss and damage.” Methods to facilitate this will include seeking to address gaps in knowledge and expertise to address loss and damage, collection, sharing, management and use of relevant data and information and a collation of best practices, challenges and lessons learned.47

2. “Strengthening dialogue, coordination, coherence and synergies among relevant stakeholders.” This function is to be effectuated by spearheading and coordinating assessment and implementation of approaches to address loss and damage, and to foster dialogue, coordination and synergies among pertinent stakeholders, institutions and key processes and initiatives.48

3. “Enhancing action and support, including finance, technology and capacity building.” This should include providing technical support and guidance to those seeking to address loss and damage, information and recommendations to the Conference of the Parties on how to reduce risks and manifestations of loss and damage, and efforts to mobilize expertise, financial support, technology and capacity-building.49

The WIM also established an Executive Committee, accountable to the Conference of the Parties to the UNFCCC,50 with annual reporting responsibilities to its Subsidiary Body for Scientific and Technological Advice,51 and Subsidiary Body for Implementation.52 The Executive Committee was tasked by the Parties with development of an initial two-year work plan to effectuate the Mechanism’s functions.53 At its 20th Conference of the Parties, the Parties approved the WIM Executive Committee’s initial two-year work plan.54 Moreover, the Parties fleshed out terms of the Committee, including qualifications of members, composition and terms of office.55

The Executive Committee released its initial two-year work plan in 2014.56 The work plan was comprised of nine action areas, including how loss and damage impact vulnerable populations; enhancement of knowledge of risk management approaches, such as insurance and social protection; enhanced data on slow onset events; enhancement of knowledge of climate’s impact on migration, displacement and human mobility, and development of a proposed five-year work plan to be considered by the Parties at the 22nd Conference of the Parties.57 The Executive Committee released its report of the work at its first meeting and its aftermath at the 21st Conference of the Parties in Paris.58 The Committee outlined its course of work to date on the two-year work plan, including, efforts to enhance understanding of the impacts of loss and damage, efforts to collaborate with key stakeholders, including disaster risk management and humanitarian organizations, and efforts to raise awareness of non-economic loss and damage and channels for collaboration.59

However, the future application of loss and damage principles within the UNFCCC was complicated by the effort of many parties to incorporate some form of it into an agreement to address climate change beyond 2020. At the 17th Conference of the Parties in 2011, the Parties acknowledged the need to strengthen the UNFCCC to avert the specter of passing critical temperature thresholds.60 To effectuate this, they agreed to establish a negotiating process, denominated the Durban Platform for Enhanced Action, “to develop a protocol, another legal/instrument or an agreed outcome with legal force under the Convention applicable to all Parties.”61 The proposed agreement was slated to be adopted at the 21st COP in Paris, and to come

47. UNFCCC, COP19, supra note 42, at Decision 2/CP.19, ¶ 5(a).
48. Id. at Decision 2/CP.19, ¶ 5(b).
49. Id. at Decision 2/CP.19, ¶ 5(c).
50. Id. at Decision 2/CP.19, ¶ 2.
51. UNFCCC, supra note 1, at art. 9.
52. UNFCCC, COP19, supra note 42, at Decision 2/CP.19, ¶ 3.
53. Id.
55. Id. ¶ 4-7.
57. Id. at Annex II.
58. Id.
59. Id. ¶ 21-23.
60. UNFCCC Durban, supra note 37, at Decision 1/CP.17, Preamble, http://www.unfccc.int/resource/docs/2011/cop17/cng09a01.pdf#page=2 (last visited Nov. 27, 2015).
61. Id. ¶ 2.
fleshed out terms of the Committee, including qualifications of members, composition and terms of office.\textsuperscript{55}

The Executive Committee released its initial two-year work plan in 2014.\textsuperscript{56} The work plan was comprised of nine action areas, including how loss and damage impact vulnerable populations; enhancement of knowledge of risk management approaches, such as insurance and social protection; enhanced data on slow onset events; enhancement of knowledge of climate’s impact on migration, displacement and human mobility, and development of a proposed five-year work plan to be considered by the Parties at the 22nd Conference of the Parties.\textsuperscript{57} The Executive Committee released its report of the work at its first meeting and its aftermath at the 21st Conference of the Parties in Paris.\textsuperscript{58} The Committee outlined its course of work to date on the two-year work plan, including, efforts to enhance understanding of the impacts of loss and damage, efforts to collaborate with key stakeholders, including disaster risk management and humanitarian organizations, and efforts to raise awareness of non-economic loss and damage and channels for collaboration.\textsuperscript{59}

However, the future application of loss and damage principles within the UNFCCC was complicated by the effort of many parties to incorporate some form of it into an agreement to address climate change beyond 2020. At the 17th Conference of the Parties in 2011, the Parties acknowledged the need to strengthen the UNFCCC to avert the specter of passing critical temperature thresholds.\textsuperscript{60} To effectuate this, they agreed to establish a negotiating process, denominated the Durban Platform for Enhanced Action, "to develop a protocol, another legal/instrument or an agreed outcome with legal force under the Convention applicable to all Parties."\textsuperscript{61} The proposed agreement was slated to be adopted at the 21st COP in Paris, and to come

\begin{footnotesize}
\begin{enumerate}
\item "Enhancing knowledge and understanding of comprehensive risk management approaches to address loss and damage." Methods to facilitate this will include seeking to address gaps in knowledge and expertise to address loss and damage, collection, sharing, management and use of relevant data and information and a collation of best practices, challenges and lessons learned.\textsuperscript{47}
\item "Strengthening dialogue, coordination, coherence and synergies among relevant stakeholders." This function is to be effectuated by spearheading and coordinating assessment and implementation of approaches to address loss and damage, and to foster dialogue, coordination and synergies among pertinent stakeholders, institutions and key processes and initiatives.\textsuperscript{48}
\item "Enhancing action and support, including finance, technology and capacity building." This should include providing technical support and guidance to those seeking to address loss and damage, information and recommendations to the Conference of the Parties on how to reduce risks and manifestations of loss and damage, and efforts to mobilize expertise, financial support, technology and capacity-building.\textsuperscript{49}
\end{enumerate}

The WIM also established an Executive Committee, accountable to the Conference of the Parties to the UNFCCC,\textsuperscript{50} with annual reporting responsibilities to its Subsidiary Body for Scientific and Technological Advice,\textsuperscript{51} and Subsidiary Body for Implementation.\textsuperscript{52} The Executive Committee was tasked by the Parties with development of an initial two-year work plan to effectuate the Mechanism’s functions.\textsuperscript{53}

At its 20th Conference of the Parties, the Parties approved the WIM Executive Committee’s initial two-year work plan.\textsuperscript{54} Moreover, the Parties

\begin{footnotesize}
\begin{enumerate}
\item UNFCCC, COP19, supra note 42, at Decision 2/CP.19, § 5(a).
\item Id. at Decision 2/CP.19, § 5(b).
\item Id. at Decision 2/CP.19, § 5(c).
\item Id. at Decision 2/CP.19, § 2.
\item UNFCCC, supra note 1, at art. 9.
\item UNFCCC, COP19, supra note 42, at Decision 2/CP.19, § 3.
\item Id.
\item Id. ¶ 4-7.
\item Id. at Annex II.
\item Id.
\item Id. ¶ 21-23.
\item Id. ¶ 2.
\end{enumerate}
\end{footnotesize}
into effect in 2020.\textsuperscript{62} This process culminated in the adoption of the Paris Agreement at COP21.\textsuperscript{63}

Many developing countries fought to include a loss and damage provision in the Paris Agreement, believing that this would increase the issue’s saliency in the years to come, while many developed countries sought to exclude it.\textsuperscript{64} As a consequence, loss and damage arguably became “one of the most fraught issues in the international climate negotiations.”\textsuperscript{65} Ultimately, developing countries deleted references to liability or compensation from their proposal, eliminating the strongest point of contention with developed countries.\textsuperscript{66} The decision by the United States to drop its opposition to including loss and damage in the draft of the Paris Agreement’s text may have been decisive in paving the way for inclusion in the final version prior to the 21st Conference of the Parties.\textsuperscript{67} However, several different options remained in the latter stages of the negotiations for the text of the Paris Agreement, including simply acknowledging the importance of loss and damage, or seeking to flesh out specific potential responses.\textsuperscript{68} Moreover, some Parties advocated the establishment of a new standalone international mechanism to address loss and damage under the

\begin{quote}
62. Id. ¶ 4.

63. Adoption of the Paris Agreement, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (2015), http://unfccc.int/resource/docs/2015/cop21/eng/09r01.pdf, (hereinafter Paris Agreement). The Paris Agreement, inter alia, calls for “[h]olding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels . . .” Id. at art. 2(1)(a). Further, to aim to peak greenhouse gas emissions “as soon as possible . . . and to undertake rapid reductions thereafter in accordance with best available scientific, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century . . .” Id. at art. 4(1).


rubric of the Paris Agreement, while others supported serving the new agreement through the Warsaw International Mechanism.\textsuperscript{69}

The Parties to the UNFCCC ultimately decided to include a provision on loss and damage in the Paris Agreement. However, they opted not to establish a discrete loss and damage mechanism, but rather to make the existing WIM “subject to the authority and guidance” of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (“CMP”).\textsuperscript{70} The decision of the Parties adopting the Paris Agreement also expressly provided that the loss and damage provision of the Agreement would “not involve or provide a basis for any liability or compensation.”\textsuperscript{71} This provision was critical for engendering support by developed countries, who for the most part opposed creation of potential legal remedies for climatic impacts.\textsuperscript{72}

The Paris Agreement sets forth a number of potential areas for facilitation and cooperation in the context of loss and damage, including establishment of early warning systems, emergency preparedness, responses to slow onset and irreversible events, comprehensive risk assessment and management, establishment of risk insurance facilities, addressing of non-economic losses, and strategies to enhance resilience of human institutions and ecosystems.\textsuperscript{73} The Parties also requested that the WIM Executive Committee establish an information clearinghouse for insurance and risk transfer mechanisms,\textsuperscript{74} as well as a task force to address climate-related population displacement.\textsuperscript{75} Finally, the Agreement authorized the CMP to enhance and strengthen the WIM in the future.\textsuperscript{76}

\begin{quote}
69. Id.

70. Paris Agreement, supra note 63, at art. R(2).

71. Id. ¶ 52.


73. Paris Agreement, supra note 63, at art. R(4).

74. Id. ¶ 49.

75. Id. ¶ 50.

76. Id. at art. R(2).

into effect in 2020.\textsuperscript{62} This process culminated in the adoption of the Paris Agreement at COP21.\textsuperscript{63}

Many developing countries fought to include a loss and damage provision in the Paris Agreement, believing that this would increase the issue’s saliency in the years to come, while many developed countries sought to exclude it.\textsuperscript{64} As a consequence, loss and damage arguably became "one of the most fraught issues in the international climate negotiations.\textsuperscript{65} Ultimately, developing countries deleted references to liability or compensation from their proposal, eliminating the strongest point of contention with developed countries.\textsuperscript{66} The decision by the United States to drop its opposition to including loss and damage in the draft of the Paris Agreement’s text may have been decisive in paving the way for inclusion in the final version prior to the 21st Conference of the Parties.\textsuperscript{67} However, several different options remained in the latter stages of the negotiations for the text of the Paris Agreement, including simply acknowledging the importance of loss and damage, or seeking to flush out specific potential responses.\textsuperscript{68} Moreover, some Parties advocated the establishment of a new standalone international mechanism to address loss and damage under the

---

62. Id. ¶4.

63. Adoption of the Paris Agreement, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (2015), http://unfccc.int/resource/docs/2015/cop21/eng/0901.pdf, (hereinafter Paris Agreement). The Paris Agreement, inter alia, calls for “[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels . . .” Id. at art. 2(1)(a). Further, it aims to peak greenhouse gas emissions “as soon as possible . . . and to undertake rapid reductions thereafter in accordance with best available scientific, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century . . .” Id. at art. 4(1).


III. THE FUTURE OF LOSS AND DAMAGE IN INTERNATIONAL CLIMATE POLICYMAKING

The focus of the WIM’s Executive Committee to date has been on enhancing knowledge about loss and damage. This is assuredly a critical priority given substantial information gaps, including the need for detailed localized risk assessments, assessment of risk management options, and developing better methodologies for assessing non-economic climatic impacts. 77 However, as several negotiators for developing countries on the loss and damage issue observed recently, the key now is turning words “into concrete action.” 78 As the Parties prepare to review the WIM at COP22 in Morocco, 79 I will outline in the following sections some ways that I believe that the concept of loss and damage could be fruitfully operationalized.

A. Develop A Substantive Framework to Address Climate Displacement

Manifestations of climate change, including sea-level rise, extreme weather events, and drought and water scarcity have already resulted in the displacement of an estimated 26 million people globally. 80 It has been projected that the total number of so-called “climate refugees” could swell to 200 million or more by 2050, or more than twenty times those currently protected by the United Nation’s High Commissioner for Refugees. 81 Beyond the human tragedy of this plight, displacement of this magnitude could also lead to international conflict of an unprecedented scale, 82 as well as economic instability. 83

Population displacement was recognized as a key element for consideration in negotiation of a loss and damage provision in the Paris Agreement. 84 The G77 advocated for inclusion of a “climate change displacement coordination facility” in the Paris Agreement, 85 including potential provisions for emergency relief, organized migration and planned relocation, and compensation measures for those were displaced. 86 However, as indicated above, the Parties in their decision adopting the Paris Agreement opted for far more tepid language, merely calling for a task force to make recommendations on how to address climate-related population displacement. 87

Given the pressing, and steadily growing, threat of climate displacement, the Parties should immediately consider the following measures:

1. Facilitate national acceptance of displaced persons. While some populations displaced by climate change may ultimately be able to return to their homes, most ultimately will not. 88 Moreover, the Intergovernmental Panel on Climate Change has recognized that in some cases migration may constitute “an effective adaptation strategy.” 89 The WIM Task Force should recommend standards for State acceptance of displaced populations,

78. Juan P. Hoffmaister et al., Warsaw International Mechanism for Loss and Damage: Moving From Polarizing Discussions Towards Addressing the Emerging Challenges Faced by Developing Countries, LOSS AND DAMAGE (Jan. 6, 2014), http://www.lossanddamage.net/0950.
79. Huq & De Souza, supra note 72.
81. Frank Biermann & Ingrid Boss, Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees, 10(1) GLOBAL ENVTL. POL. 60, 72 (Feb. 2010).
83. Mariya Gromilova & Nicola Jüger, Climate change induced displacement and international law, RESEARCH HANDBOOK ON CLIMATE CHANGE ADAPTATION LAW 71 (Jonathan Verschuuren, ed. 2013).
84. Report of the Conference of the Parties on its Eighteenth Session, Decision 3CP.18, supra note 38, ¶ 7(a)(iv).
87. Paris Agreement, supra note 63, ¶ 50.
88. Biermann & Boss, supra note 81, at 75.
III. THE FUTURE OF LOSS AND DAMAGE IN INTERNATIONAL CLIMATE POLICYMAKING

The focus of the WIM’s Executive Committee to date has been on enhancing knowledge about loss and damage. This is assuredly a critical priority given substantial information gaps, including the need for detailed localized risk assessments, assessment of risk management options, and developing better methodologies for assessing non-economic climatic impacts. However, as several negotiators for developing countries on the loss and damage issue observed recently, the key now is turning words “into concrete action.” As the Parties prepare to review the WIM at COP22 in Morocco, I will outline in the following sections some ways that I believe that the concept of loss and damage could be fruitfully operationalized.

A. Develop A Substantive Framework to Address Climate Displacement

Manifestations of climate change, including sea-level rise, extreme weather events, and drought and water scarcity have already resulted in the displacement of an estimated 26 million people globally. It has been projected that the total number of so-called “climate refugees” could swell to 200 million or more by 2050, or more than twenty times those currently protected by the United Nation’s High Commissioner for Refugees. Beyond the human tragedy of this plight, displacement of this magnitude...
perhaps based on a formula that reflects the principle of common but differentiated responsibilities, such as historical levels of greenhouse gas emissions or GDP;

2. Develop guidelines for providing financial assistance to developing States to ameliorate displacement and facilitate re-settlement of displaced peoples. The WIM Task Force should be tasked with developing recommendations to provide technical assistance to developing countries, and perhaps NGOs, to help prevent displacement and to develop resettlement programs. That should include incorporation of such plans into National Adaptation Plans of Action\textsuperscript{90} to help facilitate funding for such programs;

3. Develop a proposal for international recognition of climate refugees. As Glahn observed, there are currently no international treaties, protocols or guidelines that provide protection for climate refugees, including the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, which extends protection and assistance only to those fleeing "persecution."\textsuperscript{91} Formal recognition of interests of climate refugees would imbue them with pertinent protections under international law, including a right to self-determination, as well as help to mobilize resources

\textsuperscript{90} National Adaptation Plans ("NAPAs") are designed to enable developing country Parties to, \textit{inter alia}, identify medium and long-term adaptation needs, as well as strategies and programs to implement such needs. \textit{Report of the Conference of the Parties on its eighteenth session, held in Doha from 26 November to 8 December 2012, Decision 12/CP.18, UNFCCC}, \url{http://www.unfccc.int/resource/docs/2012/cop18/eng/06a02.pdf?Symbol=3} (last visited Jan. 1, 2016).

\textsuperscript{91} Benjamin Glahn, \textit{Climate Refugees? Addressing the International Legal Gap}, INT'L BAR ASS'N (Jun. 11, 2009), \url{http://www.ibanet.org/Article/Detail.aspx?ArticleId=651C02C1-3C27-4A3E-B4C4-7E350EBF0442}; see also, Ioane Teitiota v. The Chief Executive of the Ministry of Business Innovation and Employment, CIV-2013-4043528 [2013] NZHIC 3125, 26 November 2013 (Explaining that the High Court of New Zealand rejected the claim of a resident of Kiribati that he should be accorded refugee status in New Zealand under the Refugee Convention, on the grounds that sea-level rise might ultimately render his home nation uninhabitable. The court held that this would broaden the scope of refugees beyond what appeared to be contemplated in the Convention. There are regional agreements that might provide protections for climate refugees. For example, the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa includes in its definition of protected peoples, any person compelled to leave his or her country because of "... events seriously disturbing public order in either part or the whole of his country of origin or nationality." Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention), Organization of African Unity 1969, 1001 UNTS 45, at art. 1(2). See also, Cartagena Declaration on Refugees, adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama on 22 Nov. 1984, at sec. III(l)(3) (protecting peoples, inter alia, under "circumstances have seriously disturbed public order.

\textit{Burns}

\textbf{B. Provide the Necessary Funding to Make Micro-insurance a Viable Loss and Damage Instrument}

The decision adopting the Paris Agreement, the Agreement’s section on loss and damage, and the Executive Committee of the WIM have suggested that insurance could be an important element of minimizing loss and damage.\textsuperscript{92} Indeed, many commentators and policymakers have touted the potential role of "micro-insurance." In exchange for small regular premium payments, micro-insurance policies have the potential to protect low-income people against specific threats, include climate-related perils such as crop losses and flood damage to infrastructure.\textsuperscript{93} In the context of loss and damage, insurance can serve as an effective risk transfer mechanism that protects the economic viability of households including "the ability to earn a livelihood and securing material assets."\textsuperscript{95} As Mechler and Linnerooth-Bayer explain:


\textsuperscript{93} Paris Agreement, supra note 63, at § 49 & art. 8(4)(f); \textit{Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts}, supra note 56, at 8.


\textsuperscript{95} Christoph Bal, Koko Warner & Sonja Butzengeiger, \textit{Insuring the Uninsurable: Design Options for a Climate Change Funding Mechanism}, \textit{6 CLIMATE POL'Y} 637, 638 (2007).
perhaps based on a formula that reflects the principle of common but differentiated responsibilities, such as historical levels of greenhouse gas emissions or GDP;

2. Develop guidelines for providing financial assistance to developing States to ameliorate displacement and facilitate re-settlement of displaced peoples. The WIM Task Force should be tasked with developing recommendations to provide technical assistance to developing countries, and perhaps NGOs, to help prevent displacement and to develop resettlement programs. That should include incorporation of such plans into National Adaptation Plans of Action\textsuperscript{90} to help facilitate funding for such programs;

3. Develop a proposal for international recognition of climate refugees. As Glahn observed, there are currently no international treaties, protocols or guidelines that provide protection for climate refugees, including the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, which extends protection and assistance only to those fleeing "persecution.\textsuperscript{91}" Formal recognition of interests of climate refugees would imbue them with certain protections under international law, including a right to self-determination, as well as help to mobilize resources

\textsuperscript{90} National Adaptation Plans ("NAPAs") are designed to enable developing country Parties to, inter alia, identify medium and long-term adaption needs, as well as strategies and programs to implement such needs. Report of the Conference of the Parties on its eighteenth session, held in Doha from 26 November to 8 December 2012, Decision 12/CP.18, UNECC, http://www.unfccc.int/resource/docs/2012/cop18/eng/08a02.pdf\#page=3 (last visited Jan. 1, 2016).

\textsuperscript{91} Benjamin Glahn, "Climate Refugees": Addressing the International Legal Gap, INT'L BAR ASS'N (Jun. 11, 2009), http://www.ibanet.org/Article/Detail.aspx?ArticleId=851CO213-3C27-4AE3-B4C4-7E350EB0F442; see also, Joane Titiota v. The Chief Executive of the Ministry of Business Innovation and Employment, CIV-2013-4043528 [2013] NZHIC 3125, 26 November 2013 (Explain that the High Court of New Zealand rejected the claim of a resident of Kiribati that he should be accorded refugee status in New Zealand under the Refugee Convention, on the grounds that sea-level rise might ultimately render his home nation uninhabitable. The court held that this would broaden the scope of refugees beyond what appeared to be contemplated in the Convention. There are regional agreements that might provide protections for climate refugees. For example, the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa includes in its definition of protected peoples, any person compelled to leave his or her country because of "... events seriously distributing public order in either part or the whole of his country of origin or nationality." Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention), Organization of African Unity 1969, 10001 UNTS 45, at art. 1(2). See also Cartagena Declaration on Refugees, adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama on 22 Nov. 1984, at sec. 11(3) (protecting peoples, inter alia, under "circumstances have seriously disturbed public order.")

\begin{footnotesize}
\begin{itemize}
\item B. Provide the Necessary Funding to Make Micro-insurance a Viable Loss and Damage Instrument

The decision adopting the Paris Agreement, the Agreement’s section on loss and damage, and the Executive Committee of the WIM have suggested that insurance could be an important element of minimizing loss and damage.\textsuperscript{92} Indeed, many commentators and policymakers have touted the potential role of "micro-insurance." In exchange for small regular premium payments, micro-insurance policies have the potential to protect low-income people against specific threats, include climate-related perils such as crop losses and flood damage to infrastructure.\textsuperscript{93} In the context of loss and damage, insurance can serve as an effective risk transfer mechanism that protects the economic viability of households including "the ability to earn a livelihood and securing material assets." As Mechler and Linneroth-Bayer explain:

\textsuperscript{92} Glahn, supra note 91; see generally, Lana Goral, Climate Change and State Responsibility—Migration as a Remedy, LUND UNIVERSITY 1, 18–22 (Autumn 2014) (unpublished A.M. thesis, Lund University) (on the file with Lund University Libraries), http://uph.lub.lu.se/bitstream/handle/11250/270514/4905454-fileId=5010730.

\textsuperscript{93} Paris Agreement, supra note 63, at ¶ 49 & art. 8(4)(c); Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts, supra note 56, at 8.


\textsuperscript{95} Christoph Bals, Koko Warner & Sonja Butzengenger, Insuring the Uninsurable: Design Options for a Climate Change Funding Mechanism, 6 CLIMATE POLY 637, 638 (2007).
\end{itemize}
\end{footnotesize}
Micro-insurance can break the “cycle of poverty” by providing low-income households, farmers, and businesses with access to post-disaster liquidity, thus securing their livelihoods and providing for reconstruction. As insured households and farms are more creditworthy, insurance can also promote investments in productive assets and higher-risk/higher-yield crops.  

Unfortunately, the limited experience with micro-insurance to date indicates that it may not be commercially viable without national or international subsidies. One of the priorities of the WIM Executive Committee should thus be to determine the amount of financial assistance that would be essential to launch a global micro-insurance program, as well as to explore potential avenues of finance.

C. Develop A Framework for Stocktaking on Loss and Damage

One of the most salutary provisions of the Paris Agreement is Article 14, which provides for a global stocktaking every five years of the Agreement’s implementation in several contexts, including the ambition of Party mitigation and adaptation commitments, mobilization and provision of support and response to the latest reports of the Intergovernmental Panel on Climate Change. As several commentators have noted, the stocktaking process could ensure the Agreement’s dynamism and durability, helping it to respond to emerging science and technological innovation, as well as driving the Parties to more ambitious future commitments.

At the current time, the stocktaking process does not explicitly encompass the Paris Agreement’s loss and damage provision. The Ad Hoc Working Group on the Paris Agreement, which has been tasked with identifying the contours of the stocktaking process, should include provisions for engaging in stocktaking of the loss and damage provision to ensure its optimal development. This might include organization of ministerial-level stocktaking forums in conjunction with pertinent institutional bodies, such as the biennial Global Platform for Disaster Risk Reduction or the Intergovernmental Panel on Climate Change, in conjunction with its formulation of its assessment reports.

D. Revisit the Issue of Liability and Compensation in the Future

As indicated above, the contentious issue of potential liability and compensation for loss and damage threatened to scupper inclusion of a loss and damage provision in the Paris Agreement. This resulted in language in the decision adopting the Agreement expressly excluding liability and compensation. However, this would not preclude a future decision by the Parties reversing this position, or an amendment to Article 8 of the Paris Agreement to authorize liability and compensation. There would certainly be ample authority under international law to support this position. The UNFCCC’s Preamble recognizes “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States.

---


98. Paris Agreement, supra note 63, at art. 14. “The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the ‘global stocktake’).” Id. at art. 14(1).

99. Id. ¶ 100.


102. Paris Agreement, supra note 63, ¶ 100.


105. Huq & De Souza, supra note 72.
Micro-insurance can break the "cycle of poverty" by providing low-income households, farmers, and businesses with access to post-disaster liquidity, thus securing their livelihoods and providing for reconstruction. As insured households and farms are more creditworthy, insurance can also promote investments in productive assets and higher-risk/higher-yield crops.96

Unfortunately, the limited experience with micro-insurance to date indicates that it may not be commercially viable without national or international subsidies.97 One of the priorities of the WIM Executive Committee should thus be to determine the amount of financial assistance that would be essential to launch a global micro-insurance program, as well as to explore potential avenues of finance.

C. Develop A Framework for Stocktaking on Loss and Damage

One of the most salutary provisions of the Paris Agreement is Article 14, which provides for a global stocktaking every five years of the Agreement’s implementation in several contexts, including the ambition of Party mitigation and adaptation commitments, mobilization and provision of support and response to the latest reports of the Intergovernmental Panel on Climate Change.98 As several commentators have noted, the stocktaking process could ensure the Agreement’s dynamism and durability, helping it to respond to emerging science and technological innovation,99 as well as driving the Parties to more ambitious future commitments.100

At the current time, the stocktaking process does not explicitly encompass the Paris Agreement’s loss and damage provision. The Ad Hoc Working Group on the Paris Agreement, which has been tasked with identifying the contours of the stocktaking process,101 should include provisions for engaging in stocktaking of the loss and damage provision to ensure its optimal development. This might include organization of ministerial-level stocktaking forums in conjunction with pertinent institutional bodies, such as the biennial Global Platform for Disaster Risk Reduction,102 or the Intergovernmental Panel on Climate Change, in conjunction with its formulation of its assessment reports.103

D. Revisit the Issue of Liability and Compensation in the Future

As indicated above, the contentious issue of potential liability and compensation for loss and damage threatened to scupper inclusion of a loss and damage provision in the Paris Agreement. This resulted in language in the decision adopting the Agreement expressly excluding liability and compensation.104 However, this would not preclude a future decision by the Parties reversing this position, or an amendment to Article 8 of the Paris Agreement to authorize liability and compensation. There would certainly be ample authority under international law to support this position. The UNFCCC’s Preamble recognizes “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States.”105

---


98. Paris Agreement, supra note 63, at art. 14. "The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the "global stocktake")." Id. at art. 14(1).

99. Id. ¶ 100.


102. Paris Agreement, supra note 63, ¶ 100.


105. Hug & De Souza, supra note 72.
or of areas beyond the limits of national jurisdiction.\textsuperscript{106} This provision embodies the principle known as the “no-harm rule,” which while general and vague in nature,\textsuperscript{107} is recognized as customary international law.\textsuperscript{108} Non-fulfillment of the obligations associated with this rule, in turn, gives rise to State responsibility and a duty to compensate affected States for the damage inflicted.\textsuperscript{109} In the context of climate-attributable loss and damage, this could give rise to a duty to compensate or make reparation.\textsuperscript{110}

Moreover, as Doelle contends, the establishment of a liability and compensation regime could provide an equitable metric for assessing responsibility for unmitigated impacts by individual States.\textsuperscript{111} Additionally, it could facilitate creation of a mechanism to reduce said liability through a system of credits for mitigation and adaptation efforts by individual Parties.\textsuperscript{112} This could provide the kind of price signals that are critical for the Parties to the Paris Agreement to meet the treaty’s objectives.

Of course, it must be acknowledged that there would be a number of imposing challenges in formulating a climate liability regime under the rubric of Paris’s loss and damage provision. One issue would be the impossibility of linking an individual State’s emissions to specific climatic damages, the element of State responsibility known as “specific causation.”\textsuperscript{113} This is a consequence of, \textit{inter alia}, “the complex and synergetic effect of the diverse pollutants and polluters and the non-linearity of climate change . . .”\textsuperscript{114} Should the Parties opt for a liability regime, however, there are a number of

\begin{itemize}
\item \textsuperscript{106} UNFCCC, supra note 1, at Preamble.
\item \textsuperscript{107} Christina Veigt, \textit{State Responsibility for Climate Change Damages}, 77 \textit{NORDIC J. INT’L L.} 1, 8 (2008); RODA VERHEYEN, \textit{CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW} 146 (2005).
\item \textsuperscript{108} Id. at 146;\textsuperscript{110} Opinion on the Legality of the Threat of the Use of Nuclear Weapons, Report, 1996 I.C.J. Reps. 95, at 222, ¶ 29 (July 8); Case concerning the Gabčíkovo-Nagymoros Project (Hungary v. Slovakia), Judgment, 1997 I.C.J. Reps. 19, at 41, ¶ 53 (Sept. 25).
\item \textsuperscript{111} Id. at 1114; Sompong Sucharitkul, \textit{Responsibility and Liability for Environmental Damage Under International Law}, \textit{GOLDEN GATE UNIVERSITY SCHOOL OF LAW} (1996), at 4, http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1669&context=pubs (last visited Jan. 13, 2016); Verheyen, supra note 107, at 162.
\item \textsuperscript{113} Id.
\item \textsuperscript{115} Veigt, supra note 107, at 15; see also, Rob Dollink, \textit{Sharing the Burden of Financing Adaptation to Climate Change}, 19 \textit{GLOBAL ENVTL. CHANGE} 411, 413 (2009).
\item \textsuperscript{116} The Paris Agreement: Historic Breakthrough in Spite of Shortcomings, supra note 100.
\end{itemize}

potential equitable approaches to address this issue that can ensure compensation for affected States. This could include apportioning liability on the basis of past and/or current emissions,\textsuperscript{115} or imposition of some form of joint and several liability.

\section*{IV. Conclusion}

While the Paris Agreement has been heralded by some commentators as a “historic breakthrough”\textsuperscript{116} and a “foundation for ambitious climate change mitigation,”\textsuperscript{117} the reality is that many of the world’s most vulnerable States are likely to face extremely serious impacts from climate change over the course of this century and beyond. The loss and damage initiative under the UNFCCC provides a framework for potentially reducing these impacts substantially. How these provisions are operationalized over the course of the next decade will speak volumes about the Parties’ commitment to equity and justice.

\begin{itemize}
\item \textsuperscript{116} Voigt, supra note 107, at 20.
\item \textsuperscript{117} Voigt, supra note 107, at 20.
\end{itemize}
or of areas beyond the limits of national jurisdiction.106 This provision embodies the principle known as the "no-harm rule," which while general and vague in nature,107 is recognized as customary international law.108 Non-fulfillment of the obligations associated with this rule, in turn, gives rise to State responsibility and a duty to compensate affected States for the damage inflicted.109 In the context of climate-attributable loss and damage, this could give rise to a duty to compensate or make reparation.110

Moreover, as Doole contends, the establishment of a liability and compensation regime could provide an equitable metric for assessing responsibility for unmitigated impacts by individual States.111 Additionally, it could facilitate creation of a mechanism to reduce said liability through a system of credits for mitigation and adaptation efforts by individual Parties.112 This could provide the kind of price signals that are critical for the Parties to the Paris Agreement to meet the treaty's objectives.

Of course, it must be acknowledged that there would be a number of imposing challenges in formulating a climate liability regime under the rubric of Paris's loss and damage provision. One issue would be the impossibility of linking an individual State's emissions to specific climatic damages, the element of State responsibility known as "specific causation."113 This is a consequence of, inter alia, "the complex and synergetic effect of the diverse pollutants and polluters and the non-linearity of climate change . . ."114 Should the Parties opt for a liability regime, however, there are a number of potential equitable approaches to address this issue that can ensure compensation for affected States. This could include apportioning liability on the basis of past and/or current emissions,115 or imposition of some form of joint and several liability.

IV. CONCLUSION

While the Paris Agreement has been heralded by some commentators as a "historic breakthrough"116 and a "foundation for ambitious climate change mitigation,"117 the reality is that many of the world's most vulnerable States are likely to face extremely serious impacts from climate change over the course of this century and beyond. The loss and damage initiative under the UNFCCC provides a framework for potentially reducing these impacts substantially. How these provisions are operationalized over the course of the next decade will speak volumes about the Parties' commitment to equity and justice.

106. UNFCCC, supra note 1, at Preamble.
108. Id. at 146; Opinion on the Legality of the Threat of the Use of Nuclear Weapons, Report, 1996 I.C.J. Reps. 95, at 222, ¶ 29 (July 8); Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, 1997 I.C.J. Reps. 19, at 41, ¶ 53 (Sept. 25).
110. Id. at 1114; Sompong Sucharitkul, Responsibility and Liability for Environmental Damage Under International Law, GOLDEN GATE UNIVERSITY SCHOOL OF LAW (1996), at 4, http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1669&context=pubs (last visited Jan. 13, 2016); Verheyen, supra note 107, at 162.
112. Id.
114. Voigt, supra note 107, at 15; see also, Rob Dellink, Sharing the Burden of Financing Adaptation to Climate Change, 19 GLOBAL ENVTL. CHANGE 411, 413 (2009).
115. Voigt, supra note 107, at 20.
116. The Paris Agreement: Historic Breakthrough in Spite of Shortcomings, supra note 100.
EMERGING INTERNATIONAL TRENDS AND PRACTICES IN GUARDIANSHIP LAW FOR PEOPLE WITH DISABILITIES

Robert Dinerstein,∗ Esme Grant Grewal,** & Jonathan Martinis***

I. INTRODUCTION ........................................................................................................436
   A. Definition and Background of Adult Guardianship Law ......................... 436
   B. Recent International Developments in Adult Guardianship Law ............ 437
      1. The Hague Convention on the International Protection of Adults ....... 437
      2. The Convention on the Rights of Persons with Disabilities ............. 438
      3. The Yokohama Declaration ................................................................. 439
II. SUPPORTED DECISION-MAKING AS AN ALTERNATIVE TO GUARDIANSHIP ............................ 440
   A. Definition of Supported decision-making and its Relationship to Guardianship ................................................................. 440
   B. Supported decision-making in Practice .................................................. 442
III. THE CRPD’S APPROACH TO GUARDIANSHIP AND SUPPORTED DECISION-MAKING ................................. 443
   A. Article 12 .............................................................................................. 443
   B. Interpreting Article 12: General Comment No 1 and the Committee on Persons with Disabilities’ Consideration of States Parties Reports ................................................................. 445
      1. General Comment No 1 on Article 12 and Legal Capacity .............. 446
      2. The Committee’s Consideration of States Parties Reports ............. 448
IV. SUPPORTED DECISION-MAKING IN THE UNITED STATES ........................................ 452
    A. Advancing Rights and Models First Identified in International Law ......... 452
V. CONCLUSION ....................................................................................................... 460

* Professor of Law and Associate Dean for Experiential Education, American University, Washington College of Law.
** Senior Director of Government Relations, American Network of Community Options and Resources (ANCOR).
*** Senior Director for Law and Policy, The Burton Blatt Institute at Syracuse University.
I. INTRODUCTION

A. Definition and Background of Adult Guardianship Law

The concept of adult guardianship has existed for hundreds of centuries in the international sphere and dates back to ancient Greek and Roman times and English common law. An example of this concept is the legal terminology of parens patriae, which is Latin for “father of his country” and represents the doctrine that government is the ultimate guardian of people who cannot care for themselves, including people with disabilities. As a result of the longstanding principle that adults could have other adults legally appointed to make legal decisions on their behalf, countries across the globe have integrated the concept of adult guardianship into their national and provincial legal systems with a focus on adults with disabilities of all ages as well as a growing class of elderly adults.

The legal construct of adult guardianship allows a court system to appoint decision-making powers to another person on behalf of an individual with a disability or elderly person to provide protections to that individual based on a theory of their inability to make sound legal decisions. In recent decades, the system of guardianship has been challenged for its ability to effectively protect and fulfill the rights of the individual whom it serves, and further for its lack of oversight and broad coverage. In countries like the United States, the adult legal guardianship system is managed individually by its fifty states, with various standards and legal processes in place. These complicated variances are further challenged by emerging disability rights law that has developed globally at a rapid pace in the past several decades. On the other hand, guardianship law has in many circumstances played an important role in achieving its goal of protecting an individual’s rights when that individual may not be fully aware of the consequences of a legal decision to be made.

This article seeks to explore the recent history of guardianship in international law as well as developments that have occurred as a result of international diplomacy and discourse. Using the United States as an example, we will explain how international advancements and concepts have influenced one country’s approach to adult guardianship law. Although this article does not seek to take a position on legal guardianships nor their alternatives, we aim to promote additional dialogue and thought on this topic in the hopes that it will have a positive impact on international policy and development for the more than one billion people with disabilities around the world.

B. Recent International Developments in Adult Guardianship Law

Although, as aforementioned, adult guardianship has existed in legal frameworks around the world for centuries, it is only within the past several decades that there have been proposals to make significant changes to its application. In fact, many of the formal conversations concerning altered approaches to adult guardianship have occurred in the 21st century alone. In order to understand current legal developments in adult guardianship, it is important to understand three key international agreements that have set the tone for evolution in future lawmaking regarding guardianship law.

1. The Hague Convention on the International Protection of Adults

The 2000 Hague Convention on the International Protection of Adults sets out standards, for the first time in modern history, for how nation states handle issues of adults and their property in international disputes when the adult may not have the legal capacity to protect his or her interests. Guardianship is one key scenario that the Hague Convention lays out in Article 3 as a primary reason for its coverage. The treaty was enacted in January 2000, but its origins are more than a century old, based on the 1905 Convention Relating to Deprivation of Civil Rights and Similar Measures of Protection. The Hague Convention updates and replaces this previous treaty and establishes clear boundaries determining which nation state’s laws are in play when a specific international situation arises concerning an individual with established incapacity and guardianship.

One example, In re PO, describes the case of a woman who moved from England to Scotland due to the decisions several of her children made on her behalf. Although three of her children agreed to her move to Scotland, a...
1. INTRODUCTION

A. Definition and Background of Adult Guardianship Law

The concept of adult guardianship has existed for hundreds of centuries in the international sphere and dates back to ancient Greek and Roman times and English common law. An example of this concept is the legal terminology of *pars pro patriae*, which is Latin for “father of his country” and represents the doctrine that government is the ultimate guardian of people who cannot care for themselves, including people with disabilities. As a result of the longstanding principle that adults could have other adults legally appointed to make legal decisions on their behalf, countries across the globe have integrated the concept of adult guardianship into their national and provincial legal systems with a focus on adults with disabilities of all ages as well as a growing class of elderly adults.

The legal construct of adult guardianship allows a court system to appoint decision-making powers to another person on behalf of an individual with a disability or elderly person to provide protections to that individual based on a theory of their inability to make sound legal decisions. In recent decades, the system of guardianship has been challenged for its ability to effectively protect and fulfill the rights of the individual whom it serves, and further for its lack of oversight and broad coverage. In countries like the United States, the adult legal guardianship system is managed individually by its fifty states, with various standards and legal processes in place. These complicated variances are further challenged by emerging disability rights law that has developed globally at a rapid pace in the past several decades. On the other hand, guardianship law has in many circumstances played an important role in achieving its goal of protecting an individual’s rights when that individual may not be fully aware of the consequences of a legal decision to be made.

This article seeks to explore the recent history of guardianship in international law as well as developments that have occurred as a result of international diplomacy and discourse. Using the United States as an example, we will explain how international advancements and concepts have influenced one country’s approach to adult guardianship law. Although this article does not seek to take a position on legal guardianship nor their alternatives, we aim to promote additional dialogue and thought on this topic in the hopes that it will have a positive impact on international policy and development for the more than one billion people with disabilities around the world.

B. Recent International Developments in Adult Guardianship Law

Although, as aforementioned, adult guardianship has existed in legal frameworks around the world for centuries, it is only within the past several decades that there have been proposals to make significant changes to its application. In fact, many of the formal communications concerning altered approaches to adult guardianship have occurred in the 21st century alone. In order to understand current legal developments in adult guardianship, it is important to understand three key international agreements that have set the tone for evolution in future lawmaking regarding guardianship law.

1. The Hague Convention on the International Protection of Adults

The 2000 Hague Convention on the International Protection of Adults sets out standards, for the first time in modern history, for how nation states handle issues of adults and their property in international disputes when the adult may not have the legal capacity to protect his or her interests. Guardianship is one key scenario that the Hague Convention lays out in Article 3 as a primary reason for its coverage. The treaty was enacted in January 2000, but its origins are more than a century old, based on the 1905 Convention Relating to Deprivation of Civil Rights and Similar Measures of Protection. The Hague Convention updates and replaces this previous treaty and establishes clear boundaries determining which nation state’s laws are in play when a specific international situation arises concerning an individual with established incapacity and guardianship.

One example, *In re PO*, describes the case of a woman who moved from England to Scotland due to the decisions several of her children made on her behalf. Although three of her children agreed to her move to Scotland, a

---


7. Id. at art. 48.

fourth child filed suit arguing that their mother should remain in England.9 In order to determine whether English or Scottish law applied, the court looked at the question of habitual residence described in Article 5 of the Hague Convention. Section S(2) of the Hague Convention establishes that in the case of a change of the adult's habitual residence to another contracting state to the Convention, the authorities of the state of the new habitual residence have jurisdiction.10 Thus, in the case at hand, Scottish law applied as to determinations of the validity of the guardianship decisions.11

Interestingly, habitual residence is not defined by the Convention. But in making the determination that Scottish law applied, the Court considered that the mother, PO, was happily settled in her current residence and that she did not express an interest in moving back to England.12 Such considerations preview the process of supported decision-making ("SDM") that will be discussed in forthcoming sections of this article.

In sum, the Hague Convention not only established international jurisdiction as to guardianship laws, but also began to apply a new set of considerations and a modern approach when making such determinations.

2. The Convention on the Rights of Persons with Disabilities

Perhaps the most well-known instrument of disability rights law in the world, the Convention on the Rights of Persons with Disabilities ("CRPD") established a roadmap for implementing disability rights within a national legal framework.13 The drafting of the CRPD began in the United Nations in 2001 with participation of various states parties and civil societies, including leading members of the disability community from around the globe. The content of the treaty ranged broadly to include, among other things, access to transportation, employment, community living, recreation, health, voting, and education.14 The CRPD ultimately entered into force on May 3, 2008, and has been ratified by 162 countries, with its impact ranging from development of new laws meeting the treaty's rule of law standard to inclusion of disability rights in national constitutions for the first time.15

---

9. Id.
11. Keene, supra note 8, at 8.
12. Id.
14. Id. at arts. 9, 27, 19, 30, 25, 29, & 24.

---

Notably, one key provision took advocates and state parties' representatives a relatively long time to finalize during the preliminary treaty negotiations.16 What ultimately became Article 12 in the treaty was an article addressing the right of people with disabilities to have "equal recognition before the law."17 This section set out that "State Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with other in all aspects of life."18 It also noted that some people would need support to exercise their legal capacity, and provided that States Parties be required to provide access to such support.19

This article will discuss article 12 of the CRPD in greater detail in forthcoming sections. Importantly, this section of the Convention reflects a tension between the relatively new concept of SDM—one way that people with disabilities can receive support for their legal capacity—and the long-standing practice of guardianship, with the interplay between the concepts heralding a new era of thinking about adult guardianship law in the world.20

3. The Yokohama Declaration

One of the more recent developments in international trends in guardianship is the Yokohama Declaration. This international declaration, unlike the previous agreements discussed, was not a formal agreement between nations but exists in the hopes that individual countries will adopt its underlying principles. The Yokohama Declaration on Adult Guardianship emerged from the October 2010 First World Congress on Adult Guardianship law which took place in Yokohama, Japan.21 The World Congress is made up of hundreds of delegates comprising academics, attorneys, court officials, judges, disability advocates, government officials, guardians and fiduciaries from twenty countries.22

---

17. CRPD, supra note 13, at art. 12.
18. Id. at art. 12, ¶ 2.
19. Id. at art. 12, ¶ 3.
22. World Congress on Adult Guardianship, 34 BIFOCAL 6 (2013).
Notably, one key provision took advocates and state parties’ representatives a relatively long time to finalize during the preliminary treaty negotiations. What ultimately became Article 12 in the treaty was an article addressing the right of people with disabilities to have “equal recognition before the law.” This section set out that “State Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with other in all aspects of life.” It also noted that some people would need support to exercise their legal capacity, and provided that States Parties be required to provide access to such support.

This article will discuss Article 12 of the CRPD in greater detail in forthcoming sections. Importantly, this section of the Convention reflects a tension between the relatively new concept of SDM—one way that people with disabilities can receive support for their legal capacity—and the longstanding practice of guardianship, with the interplay between the concepts heralding a new era of thinking about adult guardianship laws in the world.

3. The Yokohama Declaration

One of the more recent developments in international trends in guardianship is the Yokohama Declaration. This international declaration, unlike the previous agreements discussed, was not a formal agreement between nations but exists in the hopes that individual countries will adopt its underlying principles. The Yokohama Declaration on Adult Guardianship emerged from the October 2010 First World Congress on Adult Guardianship law which took place in Yokohama, Japan. The World Congress is made up of hundreds of delegates comprising academics, attorneys, court officials, judges, disability advocates, government officials, guardians and fiduciaries from twenty countries.

17. CRPD, supra note 13, at art. 12.
18. Id. at art 12, ¶ 2.
19. Id. at art 12, ¶ 3.
22. World Congress on Adult Guardianship, 34 BIJOFAC 6 (2013).
The Yokohama Declaration affirms the principles of the Hague Convention and CRPD and was instigated by the sense that many countries had not integrated modern thinking in regards to decision-making for individuals found to lack mental capacity. It vocally supported new methods of applying guardianship law including the use of “substituted proxy decision-making” or, as this article will discuss further, “supported decision-making.” The declaration urges countries to enact legislation that respects and follows an adult’s wishes, values and beliefs to the greatest possible extent and ultimately will not result in harm to the adult. Ultimately, this declaration has emphasized the need for more dialogue on the application of adult guardianship law and development of solutions to ensure that it is being applied in a person-centered, situation-specific manner.

Together, the Hague Convention, CRPD, and Yokohama Declaration represent a body of work by civil societies and nation states to address the need to revisit the model of adult guardianship law that has existed internationally for centuries. With the rapid development of disability rights laws around the world in the past three decades alone, paired with the growing population of people with disabilities and the aging community globally, this discussion has created an impetus for a wave of legal modification. In the following sections, this article will describe more fully the result of these interchanges, how guardianship law has changed as a result of international diplomacy, and, finally, how those changes have reverberated into domestic policies.

II. SUPPORTED DECISION-MAKING AS AN ALTERNATIVE TO GUARDIANSHIP

A. Definition of Supported decision-making and its Relationship to Guardianship

The basic problem that modern adult guardianship attempts to address is how to enable individuals who may lack mental or cognitive capacity to participate in decision-making related to critical areas in their lives, such as where and with whom to live; with whom to have a personal relationship (intimate or otherwise); what kinds of health care services use; what kinds of financial arrangements (opening bank accounts, purchasing goods) into which to enter; and what kinds of work and activities in which to engage, to name just some such areas. Because it is believed that the adult cannot make these decisions on his or own, the guardian acts as a surrogate decision maker to make decisions “for” the allegedly incapacitated adult, bounded, in theory, by a standard of decision-making, called substituted judgment, that entails making the decision that the individual would make if he or she had the capacity to do so. Plenary guardianship entails the guardian making all decisions for the individual; limited guardianship seeks to identify only those specific areas in which the individual needs decision-making assistance. Because guardianship takes away a substantial liberty right of the adult individual, the right to make decisions, a court should not grant an order seeking guardianship unless it is the least restrictive alternative available to meet the person’s need for decision-making assistance.

Guardianship has been the subject of significant reforms in recent years. "Important as these reforms of guardianship have been, however, they still accept the predominance of a legal regime that locates decision-making in the surrogate or guardian and not in the individual being assisted." Unlike guardianship, SDM (which is one way in which supports can be provided) "retains the individual as the primary decision maker, while recognizing that the individual with a disability may need assistance—and perhaps a great deal of it—in making and communicating a decision." The move from substitute decision-making to SDM is nothing less than a paradigm shift in the way we think about the decision-making capabilities of people with disabilities.

How then should we define SDM. As one of us has written elsewhere:

Supported decision-making can be defined as a series of relationships, practices, arrangements and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual’s life.

23. Yokohama Declaration, supra note 21, at 1 (1)(6).
25. See e.g., Robert Dinerstein, Implementing Legal Capacity Under Article 12 of the UN
27. Dinerstein, supra note 25, at 10.
28. CRPD, supra note 13, at art. 12(3). Although Article 12 (3) is often assumed to call for supported decision-making, it actually provides only that states provide people with disabilities “with the support they may require in exercising their legal capacity.” Thus, supported decision-making is one form of support but is not co-extensive with it.
30. Id.; Glen, supra note 26, at 10.
The Yokohoma Declaration affirms the principles of the Hague Convention and CRPD and was instigated by the sense that many countries had not integrated modern thinking in regards to decision-making for individuals found to lack mental capacity. It vocally supported new methods of applying guardianship law including the use of "substituted proxy decision-making" or, as this article will discuss further, "supported decision-making." The declaration urges countries to enact legislation that respects and follows an adult's wishes, values and beliefs to the greatest possible extent and ultimately will not result in harm to the adult. Ultimately, this declaration has emphasized the need for more dialogue on the application of adult guardianship law and development of solutions to ensure that it is being applied in a person-centered, situation-specific manner.

Together, the Hague Convention, CRPD, and Yokohoma Declaration represent a body of work by civil societies and nation states to address the need to revisit the model of adult guardianship law that has existed internationally for centuries. With the rapid development of disability rights laws around the world in the past three decades alone, paired with the growing population of people with disabilities and the aging community globally, this discussion has created an impetus for a wave of legal modification. In the following sections, this article will describe more fully the result of these interchanges, how guardianship law has changed as a result of international diplomacy, and, finally, how those changes have reverberated into domestic policies.

II. SUPPORTED DECISION-MAKING AS AN ALTERNATIVE TO GUARDIANSHIP

A. Definition of Supported decision-making and its Relationship to Guardianship

The basic problem that modern adult guardianship attempts to address is how to enable individuals who may lack mental or cognitive capacity to participate in decision-making related to critical areas in their lives, such as where and with whom to live; with whom to have a personal relationship (intimate or otherwise); what kinds of health care services use; what kinds of financial arrangements (opening bank accounts, purchasing goods) into which to enter; and what kinds of work and activities in which to engage, to name just some such areas. Because it is believed that the adult cannot make these decisions on his or own, the guardian acts as a surrogate decision maker to make decisions "for" the allegedly incapacitated adult, bounded, in theory, by a standard of decision-making, called substituted judgment, that entails making the decision that the individual would make if he or she had the capacity to do so. Plenary guardianship entails the guardian making all decisions for the individual; limited guardianship seeks to identify only those specific areas in which the individual needs decision-making assistance. Because guardianship takes away a substantial liberty right of the adult individual, the right to make decisions, a court should not grant an order seeking guardianship unless it is the least restrictive alternative available to meet the person's need for decision-making assistance.

Guardianship has been the subject of significant reforms in recent years. "Important as these reforms of guardianship have been, however, they still accept the predominance of a legal regime that locates decision-making in the surrogate or guardian and not in the individual being assisted." Unlike guardianship, SDM (which is one way in which supports can be provided) retains the individual as the primary decision maker, while recognizing that the individual with a disability may need assistance—and perhaps a great deal of it—in making and communicating a decision.

The move from substitute decision-making to SDM is nothing less than a paradigm shift in the way we think about the decision-making capabilities of people with disabilities. How then should we define SDM. As one of us has written elsewhere:

Supported decision-making can be defined as a series of relationships, practices, arrangements and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual's life.


26. See id. at 9-10; Kristen Booth Glen, Supported Decision-Making and the Human Right of Legal Capacity, 31(1) INCLUSION 1, 3-4 (March 2015).
27. Dinerstein, supra note 25, at 10.
28. CRPD, supra note 13, at art. 12(3). Although Article 12 (3) is often assumed to call for supported decision-making, it actually provides only that states provide people with disabilities "with the support they may require in exercising their legal capacity." Thus, supported decision-making is one form of support but it is not co-extensive with it.
30. Id.; Glen, supra note 26, at 10.
At its most general level, SDM can simply mean that an individual has a person or group of people on whom he or she can rely (if the individual so chooses) to assist the individual in making and communicating his or her decisions to others. It need not be subject to any formal written agreement nor ratified by a court or government agency. Alternatively, SDM can involve a formal relationship—such as, for example, the Representation Agreements used in British Columbia, Canada\(^\text{32}\) or the SDM form used by the District of Columbia Public Schools to memorialize the decision-making relationship between a student receiving special education services and his supporter(s)\(^{13}\)—that is filed and made available to others who may come into contact with the individual. Especially when the individual being supported has significant cognitive disabilities such as the supporter is functioning more as a facilitator than as mere advisor,\(^{34}\) and is interpreting the individual’s will and preferences to others, such formal acknowledgment may be necessary for third parties to be willing to rely upon the decision being communicated by the person and his or her supporters.

B. Supported decision-making in Practice

For a concept that has taken the disability world by storm, SDM is still in its infancy in terms of its adoption and use.\(^{35}\) Canada, specifically the province of British Columbia, was the first state entity to adopt the concept. (Other Canadian provinces have followed.)\(^{36}\) Prior to the CRPD’s adoption in 2006 (and its entry into force in 2008), Sweden and certain states in

Germany also had adopted their own versions of SDM as an alternative to guardianship.\(^{37}\) Subsequently, States (or provinces or pilot projects within) such as Israel, Ireland, parts of Australia and New Zealand, the Czech Republic, Norway, and Bulgaria among others, have either adopted or have indicated an intention to explore adoption of, SDM.\(^{38}\)

In many of these countries, the recognition of SDM is closely tied to CRPD Article 12’s ringing declarations that “persons with disabilities have the right to recognition everywhere as persons before the law,” and that they “enjoy legal capacity on an equal basis with others in all aspects of life.”\(^{39}\) The inherent legal capacity of all individuals provides a critical underpinning to the concept of SDM, and a clear challenge to guardianship and other forms of surrogate decision-making that focus on mental capacity and its limitations rather than legal capacity.

III. THE CRPD’S APPROACH TO GUARDIANSHIP AND SUPPORTED DECISION-MAKING

A. Article 12

“As Amita Dhanda and others have documented, Article 12 was one of the most hotly contested articles to be considered during the treaty deliberation process.”\(^{40}\) Although Article 12’s focus on universal recognition

37. See generally, Dinerstein, supra note 25.


39. CRPD, supra note 13, at art. 12 (1), (2).

40. Dinerstein, supra note 25, fn. 5 & 6 at 8 (citing Amita Dhanda, Legal Capacity in the Disability Rights Convention: Stronghold of the Past or Lodestar for the Future, 34 SYRACUSE J. INT’L L. & COM. 429, 438–56 (2007) (covering the deliberations over what was first called Article 9 extensively) [hereinafter Dhanda], and Tara J. Melish, An Eye Toward Effective Enforcement: A
At its most general level, SDM can simply mean that an individual has a person or group of people on whom he or she can rely (if the individual so chooses) to assist the individual in making and communicating his or her decisions to others. It need not be subject to any formal written agreement nor ratified by a court or government agency. Alternatively, SDM can involve a formal relationship—such as, for example, the Representation Agreements used in British Columbia, Canada or the SDM form used by the District of Columbia Public Schools to memorialize the decision-making relationship between a student receiving special education services and his supporter(s)—that is filed and made available to others who may come into contact with the individual. Especially when the individual being supported has significant cognitive disabilities such that the supporter is functioning more as a facilitator than as mere advisor, and is interpreting the individual’s will and preferences to others, such formal acknowledgment may be necessary for third parties to be willing to rely upon the decision being communicated by the person and his or her supporters.

B. Supported decision-making in Practice

For a concept that has taken the disability world by storm, SDM is still in its infancy in terms of its adoption and use. Canada, specifically the province of British Columbia, was the first state entity to adopt the concept. (Other Canadian provinces have followed.) Prior to the CRPD’s adoption in 2006 (and its entry into force in 2008), Sweden and certain states in

Germany also had adopted their own versions of SDM as an alternative to guardianship. Subsequently, States (or provinces or pilot projects within) such as Israel, Ireland, parts of Australia and New Zealand, the Czech Republic, Norway, and Bulgaria among others, have either adopted or have indicated an intention to explore adoption of, SDM.

In many of these countries, the recognition of SDM is closely tied to CRPD Article 12’s ringing declarations that “persons with disabilities have the right to recognition everywhere as persons before the law,” and that they “enjoy legal capacity on an equal basis with others in all aspects of life.” The inherent legal capacity of all individuals provides a critical underpinning to the concept of SDM, and a clear challenge to guardianship and other forms of surrogate decision-making that focus on mental capacity and its limitations rather than legal capacity.

III. THE CRPD’S APPROACH TO GUARDIANSHIP AND SUPPORTED DECISION-MAKING

A. Article 12

“As Amita Dhanda and others have documented, Article 12 was one of the most hotly contested articles to be considered during the treaty deliberation process.” Although Article 12’s focus on universal recognition

37. See generally, Dinerstein, supra note 25.
39. CRPD, supra note 13, at art. 12 (1). (2).
40. Dinerstein, supra note 25, fn. 5 & 6 at 8 (citing Amita Dhanda, Legal Capacity in the Disability Rights Convention: Stranglegold of the Past or Lodestar for the Future, 34 SYRACUSE J. INT’L L. & COM. 429, 438-56 (2007) ((covering the deliberations over what was first called Article 9 extensively) [hereinafter Dhanda]); and Tara J. Melish, An Eye Toward Effective Enforcement: A
of legal capacity did not come out of whole cloth—it had antecedents in The Montreal Declaration on Intellectual Disabilities, issued in 2004, prior United Nations treaties, and the practices of countries mentioned above, among other sources—deliberation over its provisions raised profound questions regarding the meaning of legal capacity, its distinction from mental capacity, and the role of supports in assisting people in their decision-making. After much discussion and debate, over several Ad Hoc Committee sessions, Article 12 emerged in its final form. It acknowledged the importance of legal capacity as an inalienable right of a person; recognized that some people might need support in exercising their legal capacity; and provided for safeguards (which were to be proportional and tailored) designed to make sure that a person’s legal capacity was not abused.

Significantly, Article 12’s focus on the importance of individual choice—which is the hallmark of the autonomy that underlies legal capacity and serves to give it expression—resonates with other salient provisions of the Convention, including the Preamble, Article 3 (General Principles), Article 5 (Equality and non-discrimination), Article 9 (Living independently and being included in the community), Article 23 (Respect for home and the family), Article 25 (Health) and Article 26 (Habilitation and rehabilitation). Nor was Article 12’s call for supports to enhance a person’s functioning a concept confined to Article 12: Articles 19, 20 (Personal mobility), and 24 (2)(d)(e) (Education) all provide for supports in one form or the other.

As Amita Dhandha has noted, Article 12, by its terms, does not necessarily eliminate guardianship as an option that can co-exist with SDM, though a contextual reading of the Article and its provenance certainly calls into question the continued viability of surrogate decision-making arrangements such as guardianship. Different organizations, including United Nations bodies, have weighed in with their views on the subject, arguing for elimination of guardianship under Article 12. In the end, though, the most authoritative views on the subject are those expressed by the Committee on the Rights of Persons with Disabilities, which are addressed in the following section.

B. Interpreting Article 12: General Comment No 1 and the Committee on Persons with Disabilities’ Consideration of States Parties Reports

The Committee on the Rights of Persons with Disabilities ("the Committee") has had two mechanisms in which to address what it sees as the meaning of Article 12 and, in particular, whether guardianship is consistent with it. First, States that have ratified the CRPD must submit reports to the Committee (two years after a State has adopted the CRPD, and at least every four years thereafter) indicating their level of compliance with the CRPD’s articles. In addition, non-governmental organizations and other entities may submit "shadow" reports providing their own perspective on the State’s compliance with the Convention. After the States and any other entities submit their reports, the Committee issues a List of Issues that it wishes the State to address. The State responds to these issues and its representatives make an appearance before the Committee, which meets in Geneva. Committee members ask questions of the State representatives and may also conduct a closed session with any non-governmental organizations that wish to present their views to the Committee in person. The Committee then issues its Concluding Observations, addressing the State’s compliance with each Article and, where compliance has not been shown, setting out the steps the State must take to achieve compliance. The Committee meets semi-


45. The Committee was established by the CRPD in Article 34 and its functions and make-up are set out in Articles 35-39. See CRPD, supra note 13, at art. 34-39. As with other UN bodies, the Committee is considered a committee of experts within the subject matter of the Convention.

46. The Committee also is the adjudicatory body for individual communications or complaints that people can present if their States have ratified the Optional Protocol to the CRPD. See U.N. Office of the High Comm’r of Human Rights, Human Rights Bodies, Complaint Procedures, OHCHR.ORG, http://www.ohchr.org/EN/HRBodies/TPetitions/Pages/HRBTPetitions.aspx (last visited March 28, 2016).

47. CRPD, supra note 13, at art. 35 (1), (2).
of legal capacity did not come out of whole cloth—it had antecedents in The Montreal Declaration on Intellectual Disabilities, issued in 2004; prior United Nations treaties, and the practices of countries mentioned above, among other sources; deliberation over its provisions raised profound questions regarding the meaning of legal capacity, its distinction from mental capacity, and the role of supports in assisting people in their decision-making. After much discussion and debate, over several Ad Hoc Committee sessions, Article 12 emerged in its final form. It acknowledged the importance of legal capacity as an inalienable right of a person; recognized that some people might need support in exercising their legal capacity; and provided for safeguards (which were to be proportional and tailored) designed to make sure that a person’s legal capacity was not abused.

Significantly, Article 12’s focus on the importance of individual choice—which is the hallmark of the autonomy that underlies legal capacity and serves to give it expression—resonates with other salient provisions of the Convention, including the Preamble, Article 3 (General Principles), Article 5 (Equality and non-discrimination), Article 19 (Living independently and being included in the community), Article 23 (Respect for home and the family), Article 25 (Health) and Article 26 (Habilitiation and rehabilitation). Nor was Article 12’s call for supports to enhance a person’s functioning a concept confined to Article 12: Articles 19, 20 (Personal mobility), and 24 (2)(d)(e)(Education) all provide for supports in one form or the other.

As Amita Dhanda has noted, Article 12, by its terms, does not necessarily eliminate guardianship as an option that can co-exist with SDM, though a contextual reading of the Article and its provenance certainly calls into question the continued viability of surrogate decision-making arrangements such as guardianship. Different organizations, including United Nations bodies, have weighed in with their views on the subject, arguing for elimination of guardianship under Article 12.44 In the end, though, the most authoritative views on the subject are those expressed by the Committee on the Rights of Persons with Disabilities, which are addressed in the following section.

B. Interpreting Article 12: General Comment No 1 and the Committee on Persons with Disabilities’ Consideration of States Parties Reports

The Committee on the Rights of Persons with Disabilities (“the Committee”) has had two mechanisms in which to address what it sees as the meaning of Article 12 and, in particular, whether guardianship is consistent with it.46 First, States that have ratified the CRPD must submit reports to the Committee (two years after a State has adopted the CRPD, and at least every four years thereafter) indicating their level of compliance with the CRPD’s articles. In addition, non-governmental organizations and other entities may submit “shadow” reports providing their own perspective on the State’s compliance with the Convention. After the States and any other entities submit their reports, the Committee issues a List of Issues that it wishes the State to address. The State responds to these issues and its representatives make an appearance before the Committee, which meets in Geneva. Committee members ask questions of the State representatives and may also conduct a closed session with any non-governmental organizations that wish to present their views to the Committee in person. The Committee then issues its Concluding Observations, addressing the State’s compliance with each Article and, where compliance has not been shown, setting out the steps the State must take to achieve compliance. The Committee meets semi-


45. The Committee was established by the CRPD in Article 34 and its functions and make-up are set out in Articles 35–39. See CRPD, supra note 13, at art. 35–39. As with other UN bodies, the Committee is considered a committee of experts within the subject matter of the Convention.

46. The Committee also is the adjudicatory body for individual communications or complaints that people can present if their States have ratified the Optional Protocol to the CRPD. See U.N. Office of the High Comm’t for Human Rights, Human Rights Bodies, Complaint Procedure, OCHCR.ORG, http://www.ohchr.org/EN/HRBodies/SPetitions/Pages/SPPetitions.aspx (last visited March 28, 2016).

47. CRPD, supra note 13, at art. 35 (1), (2).
annually in sessions that may last from one to three weeks. To date, the Committee has conducted 14 sessions and four pre-sessional working group sessions, though it was not until the fourth session, in October 2010, that the Committee started to consider the reports from States Parties.48

The second mechanism available to the Committee is for it to issue a General Comment on one or more aspects of the Convention. On April 11, 2014, at its Eleventh Session, the Committee adopted General Comment No 1, Article 12: Equal Recognition before the law.49 The General Comment is both a general response to the trends it had observed in the reporting that had occurred up to that time, and a detailed description of the kinds of practices that would and would not pass muster in the Committee’s interpretation of the requirements of Article 12.

1. General Comment No 1 on Article 12 and Legal Capacity

The General Comment defines support in terms similar to the definition of SDM provided above:

‘Support’ is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity. For example, persons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy (including self-advocacy support), or assistance with communication . . . Support can also constitute the development and recognition of diverse, non-conventional methods of communication, especially for those who use non-verbal forms of communication to express their will and preferences.50

In a key paragraph of the General Comment, Paragraph 29, the

Committee sets out a number of elements of a SDM regime it deems required:

1) Supported decision-making must be “available to all” (and not be limited regarding people who need a high degree of support)
2) All forms of support should be based on the “will and preferences of the person” (and not on his/her presumed best interests)
3) A person’s mode of communication, even if limited or non-conventional, should not be a barrier to obtaining support
4) Legal recognition of the support person(s) chosen by the person must be available and accessible, and “the state has an obligation to facilitate the creation of support,” especially for those who have are isolated or do not have access to natural supports. Third parties must have the ability to verify the identity of the supporter and challenge the action of the support person if they believe that the support person is not following the will and preferences of the person.
5) “Lack of resources cannot be a barrier” to using support, and the State must make sure supports are available at no or nominal cost to the person
6) “Support in decision-making (or the need for it) cannot be used to deny other fundamental rights,” such as voting, reproductive rights, parental rights, etc.
7) The person must have the “right to terminate or change the support relationship at any time”
8) Safeguards designed to respect the will and preferences of the person must be available in all processes related to legal capacity and its exercise.
9) The provision of support should “not be based on assessments of mental capacity” but on “new, non-discriminatory indicators of support needs . . .”51

In the General Comment, the Committee noted that on the basis of initial reports, many States parties did not appear to understand the contours of Article 12, and the need to move from substituted decision-making to SDM.52 The Committee has taken the position that “The development of supported decision-making systems ‘in parallel with the maintenance of substituted decision-making’ regimes is not sufficient to comply with article 12 of the

50. General Comment No. 1, supra note 49, ¶ 17 at 4. More problematically, the General Comment also defines support to include “measures related to universal design and accessibility” that an entity might adopt. Id. Such measures seem better conceptualized as reasonable accommodations or modifications required of a provider, rather than support.
51. General Comment No. 1, supra note 49, ¶ 29 at 6-7 (emphasis supplied).
52. id. ¶ 3, at 1. See Dinerstein, supra note 25, at 11 (stating with regard to Tunisia and Spain, the first two countries to appear before the Committee, and based on their reports to the Committee “that those countries’ governments may not truly understand the difference between substituted and supported decision-making.”).
annually in sessions that may last from one to three weeks. To date, the Committee has conducted 14 sessions and four pre-sessional working group sessions, though it was not until the fourth session, in October 2010, that the Committee started to consider the reports from States Parties.\(^{48}\)

The second mechanism available to the Committee is for it to issue a General Comment on one or more aspects of the Convention. On April 11, 2014, at its Eleventh Session, the Committee adopted General Comment No 1, Article 12: Equal Recognition before the law.\(^{49}\) The General Comment is both a general response to the trends it had observed in the reporting that had occurred up to that time, and a detailed description of the kinds of practices that would and would not pass muster in the Committee’s interpretation of the requirements of Article 12.

1. General Comment No 1 on Article 12 and Legal Capacity

The General Comment defines support in terms similar to the definition of SDM provided above:

‘Support’ is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity. For example, persons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy (including self-advocacy support), or assistance with communication . . . Support can also constitute the development and recognition of diverse, non-conventional methods of communication, especially for those who use non-verbal forms of communication to express their will and preferences.\(^{50}\)

In a key paragraph of the General Comment, Paragraph 29, the


\(^{50}\) General Comment No. 1, supra note 49, ¶ 17 at 4. More problematically, the General Comment also defines support to include “measures related to universal design and accessibility” that an entity might adopt. Id. Such measures seem better conceptualized as reasonable accommodations or modifications required of a provider, rather than support.

Committee sets out a number of elements of a SDM regime it deems required:

1) Supported decision-making must be “available to all” (and not be limited regarding people who need a high degree of support)

2) All forms of support should be based on the “will and preferences of the person” (and not on his/her presumed best interests)

3) A person’s mode of communication, even if limited or non-conventional, should not be a barrier to obtaining support

4) Legal recognition of the support person(s) chosen by the person must be available and accessible, and “the state has an obligation to facilitate the creation of support,” especially for those who have are isolated or do not have access to natural supports. Third parties must have the ability to verify the identity of the supporter and challenge the action of the support person if they believe that the support person is not following the will and preferences of the person.

5) “Lack of resources cannot be a barrier” to using support, and the State must make sure supports are available at no or nominal cost to the person

6) “Support in decision-making (or the need for it) cannot be used to deny other fundamental rights,” such as voting, reproductive rights, parental rights, etc.

7) The person must have the “right to terminate or change the support relationship at any time”

8) Safeguards designed to respect the will and preferences of the person must be available in all processes related to legal capacity and its exercise.

9) The provision of support should “not be based on assessments of mental capacity” but on “new, non-discriminatory indicators of support needs” . . .

In the General Comment, the Committee noted that on the basis of initial reports, many States parties did not appear to understand the contours of Article 12, and the need to move from substituted decision-making to SDM.\(^{52}\) The Committee has taken the position that “The development of supported decision-making systems ‘in parallel with the maintenance of substituted decision-making’ regimes is not sufficient to comply with article 12 of the

\(^{51}\) General Comment No. 1, supra note 49, ¶ 29 at 6-7 (emphasis supplied).

\(^{52}\) Id. ¶ 3, at 1. See Dinerstein, supra note 25, at 11 (stating with regard to Tunisia and Spain, the first two countries to appear before the Committee, and based on their reports to the Committee “that those countries’ governments may not truly understand the difference between substituted and supported decision-making.”)
Convention.  

53. Many countries disagree with this interpretation, including some that have been leaders in promoting SDM.  

54. But for the Committee, existing tests of mental capacity—whether based on status, outcome, or functional ability—are problematic in that they conflate mental capacity with legal capacity and are thus, in view, inconsistent with Article 12.  

2. The Committee’s Consideration of States Parties Reports  

Consistent with its view that Article 12 requires SDM in lieu of substituted decision-making, the Committee in its Concluding Observations (COs) has cited all thirty-four (34) States that have appeared before it for practices that violate Article 12 because of the retention in whole or in part of a substitute decision-making regime.  

Interestingly, the Committee’s COs equate the Article 12(3) requirement of supports to translate into SDM, even though, as noted above, Article 12 itself does not use the term.  

To provide a sense of how the Committee has addressed States Parties’ compliance with Article 12, we discuss briefly the COs for several states that span a range of practices regarding substituted and supported decision-making.  

a. Sweden  

Sweden is a country that has long advocated the use of alternatives to guardianship and is one of the most advanced States in its recognition of legal capacity for people with disabilities. It has banned findings of incapacity since 1989, and has made use of alternatives to guardianship, such as the ombudsman (or good man), but still has court-ordered deputyship (consensual) and administration (imposed) for some people. In response to Sweden’s submission, the Committee concluded:  

Even though declarations of incapacity have been completely abolished, the Committee is concerned that the appointment of an administrator is a form of substituted decision-making.  

The Committee recommends that the State party take immediate steps to replace substituted decision-making with supported decision-making and provide a wide range of measures which respect the person’s autonomy, will and preferences and are in full conformity with article 12 of the Convention, including with respect to the individual’s right, in his or her own capacity, to give and withdraw informed consent for medical treatment, to have access to justice, to vote, to marry and to work.  

b. New Zealand  

New Zealand is a country that is taking steps to address SDM. In its States Report, it indicated that the Protection of Personal Property Rights Act (1988) provided for a presumption of competency (capacity). There is a high threshold to overcome before capacity can be found lacking, and any intervention must be the least restrictive. In response to the State’s initial submission, the Committee inquired as to one of its List of Issues whether the State planned to replace substituted decision-making regimes with SDM ones. New Zealand responded by indicating that its Office of Disability Issues, in consultation with Disabled Persons Organizations ("DPOs"), was working on SDM. The government went on to report:  

This will include promoting a wider understanding of legal  

53. General Comment No. 1, supra note 49, ¶ 28 at 6 (emphasis supplied).  

54. Both Canada and Australia filed Declarations (and Canada a Reservation) indicating that they believed that both supported decision-making and substitute decision-making were acceptable under Article 12, and that there were some circumstances in which substituted decision-making would be called for. See U.N. Treaty Collection, Convention on the Rights of Persons with Disabilities, UN.ORG (March 28, 2016, 5:00 E.D.T.), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en#EndDoc (last visited March 28, 2016). Both Germany and Denmark also submitted comments on the draft Comment indicating that there was a place for substituted decision-making in some circumstances. See Federal Republic of Germany, German Statement on the Draft General Comment on Article 12 CRPD, OCHDR.ORG (Feb. 20, 2014), http://www.ohchr.org/Documents/HRBodies/CRPD/GC/FederalRepublicOfGermany/Art12.pdf (last visited March 28, 2016); see also Government of Denmark, Response from the Government of Denmark with regards to Draft General Comment on Article 12 of the Convention: Equal Recognition before the Law, OCHDR.ORG, http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx (last visited March 28, 2016).  

55. General Comment No. 1, supra note 49, ¶ 13 at 3.  


57. CRPD, supra note 13, at art. 12(3).  


Convention.

Many countries disagree with this interpretation, including some that have been leaders in promoting SDM. But for the Committee, existing tests of mental capacity—whether based on status, outcome, or functional ability—are problematic in that they conflate mental capacity with legal capacity and are thus, in its view, inconsistent with Article 12.

2. The Committee’s Consideration of States Parties Reports

Consistent with its view that Article 12 requires SDM in lieu of substituted decision-making, the Committee in its Concluding Observations (COs) has cited all thirty-four (34) States that have appeared before it for practices that violate Article 12 because of the retention in whole or in part of a substitute decision-making regime. Interestingly, the Committee’s COs equate the Article 12(3) requirement of supports to translate into SDM, even though, as noted above, Article 12 itself does not use the term.

To provide a sense of how the Committee has addressed States Parties’ compliance with Article 12, we discuss briefly the COs for several states that span a range of practices regarding substituted and supported decision-making.

a. Sweden

Sweden is a country that has long advocated the use of alternatives to guardianship and is one of the most advanced States in its recognition of legal capacity for people with disabilities. It has banned findings of incapacity since 1989, and has made use of alternatives to guardianship, such as the ombudsperson (or good man), but still has court-ordered deputyship (consensual) and administratorship (imposed) for some people. In response to Sweden’s submission, the Committee concluded:

Even though declarations of incapacity have been completely abolished, the Committee is concerned that the appointment of an administrator is a form of substituted decision-making.

The Committee recommends that the State party take immediate steps to replace substituted decision-making with supported decision-making and provide a wide range of measures which respect the person’s autonomy, will and preferences and are in full conformity with article 12 of the Convention, including with respect to the individual’s right, in his or her own capacity, to give and withdraw informed consent for medical treatment, to have access to justice, to vote, to marry and to work.

b. New Zealand

New Zealand is a country that is taking steps to address SDM. In its States Report, it indicated that the Protection of Personal Property Rights Act (1988) provided for a presumption of competency (capacity). There is a high threshold to overcome before capacity can be found lacking, and any intervention must be the least restrictive. In response to the State’s initial submission, the Committee inquired as one of its List of Issues whether the State planned to replace substituted decision-making regimes with SDM ones. New Zealand responded by indicating that its Office of Disability Issues, in consultation with Disabled Persons Organizations (“DPOs”), was working on SDM. The government went on to report:

This will include promoting a wider understanding of legal

53. General Comment No. 1, supra note 49, ¶ 28 at 6 (emphasis supplied).

54. Both Canada and Australia filed Declarations (and Canada a Reservation) indicating that they believed that both supported decision-making and substitute decision-making were acceptable under Article 12, and that there were some circumstances in which substituted decision-making would be called for. See U.N. Treaty Collection, Convention on the Rights of Persons with Disabilities, UN.ORG (March 28, 2016), 5:00 E.D.T., https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en&FindDec (last visited March 28, 2016). Both Germany and Denmark also submitted comments on the draft Comment indicating their views that there was a place for substituted decision-making in some circumstances. See Federal Republic of Germany, German Statement on the Draft General Comment on Article 12 CRPD, ORCHIR.ORG (Feb. 20, 2014), http://www.ohchr.org/Documents/HRBodies/CRPD/DC/Germany/Art12.pdf (last visited March 28, 2016); see also Government of Denmark, Response from the Government of Denmark with regards to Draft General Comment on Article 12 of the Convention: Equal Recognition before the Law, ORCHIR.ORG, http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DCG/Articles12And9.aspx (last visited March 28, 2016).

55. General Comment No. 1, supra note 49, ¶ 13 at 3.


57. CRPD, supra note 13, at art. 12(3).
capacity consistent with article 12, examining the use of supported decision-making regimes, and ensuring that policies support it in practice. Supported decision-making is relatively new in New Zealand, and we will need to consider how our unique cultural and social context can be reflected in its recognition. The work will also seek to understand experiences in other countries and learn from current experience domestically.}

In response, although the Committee took note of the State’s recent efforts to explore SDM, it concluded:

The Committee recommends that the State party take immediate steps to revise the relevant laws and replace substituted decision-making with supported decision-making. This should provide a wide range of measures that respect the person’s autonomy, will and preferences, and is in full conformity with article 12 of the Convention, including with respect to the individual’s right, in his or her own capacity, to give and withdraw informed consent, in particular for medical treatment, to access justice, to marry, and to work, among other things, consistent with the Committee’s general comment No. 1 (2014) on equal recognition before the law.

c. Republic of Korea

South Korea (Republic of Korea) is a country that had addressed guardianship legislatively but in a manner that the Committee found wanting. It noted:

The Committee is concerned that the new adult guardianship system, which was introduced in July 2013, permits guardians to make decisions regarding the property and personal issues of persons deemed persistently incapable of managing tasks due to psychological restrictions caused by disease, disability or old age. The Committee notes that such a system continues to promote substituted decision-making instead of supported decision-making, contrary to the provisions of article 12.

The Committee concluded:

The Committee recommends that the State party move from substitute decision-making to supported decision-making, which respects the person’s autonomy, will and preferences and is in full conformity with article 12 of the Convention and general comment No. 1, including with respect to the individual’s right to give and withdraw informed consent for medical treatment, to have access to justice, to vote, to marry, to work and to choose his or her place of residence. The Committee further recommends that the State party provide training, in consultation and cooperation with persons with disabilities and their representative organizations, at the national, regional and local levels for all actors, including civil servants, judges and social workers, on the recognition of the legal capacity of persons with disabilities and on the mechanisms of supported decision-making.

d. Ecuador

Finally, Ecuador is a State where there has been no legislative movement toward SDM, nor an effort to reform guardianship, for that matter. In this case, the Committee stated:

The Committee is concerned that the State party’s civil legislation provides for a substitute decision-making model through the use of roles such as guardians and wards, and that there is no immediate plan to reform the Civil Code and the Code of Civil Procedure to include a supported decision-making model, as recommended in general comment No. 1 (2014)…

The Committee recommends that the State party establish a working group with representatives of independent organizations of persons with disabilities in order to carry out a timely review of civil legislation and introduce supported decision-making mechanisms. It also recommends that the State party draw up an agenda, with a timetable, for the implementation of the new plan.


capacity consistent with article 12, examining the use of supported decision-making regimes, and ensuring that policies support it in practice. Supported decision-making is relatively new in New Zealand, and we will need to consider how our unique cultural and social context can be reflected in its recognition. The work will also seek to understand experiences in other countries and learn from current experience domestically.\footnote{U.N. Convention on the Rights of Persons with Disabilities, Comm. on the Rights of Persons with Disabilities, List of issues in relation to the initial report of New Zealand, Addendum, Replies of New Zealand to the list of issues, ¶ 69-69 at 11, U.N. Doc. CRPD/C/NZL/CO/1/Add.1 (June 27, 2014), https://documents-dds-ny.un.org/doc/undoc/gen/G14/06776/PDF/G1406776.pdf?OpenElement.}

In response, although the Committee took note of the State’s recent efforts to explore SDM, it concluded:

The Committee recommends that the State party take immediate steps to revise the relevant laws and replace substituted decision-making with supported decision-making. This should provide a wide range of measures that respect the person’s autonomy, will and preferences, and is in full conformity with article 12 of the Convention, including with respect to the individual’s right to give and withdraw informed consent for medical treatment, to have access to justice, to vote, to marry, to work and to choose his or her place of residence. The Committee further recommends that the State party provide training, in consultation and cooperation with persons with disabilities and their representative organizations, at the national, regional and local levels for all actors, including civil servants, judges and social workers, on the recognition of the legal capacity of persons with disabilities and on the mechanisms of supported decision-making.\footnote{U.N. Convention on the Rights of Persons with Disabilities, Comm. on the Rights of Persons with Disabilities, Concluding observations on the initial report of the Republic of Korea, ¶ 22 at 3-4, U.N. Doc. CRPD/C/KOR/CO/1 (Oct. 31, 2014), http://treaties.un.org/pages/diplomaticversion.aspx?symbolno=CRPD%28%29%20KOR%20%202014%20%20CO%20%201&Lang=en.}

c. Republic of Korea

South Korea (Republic of Korea) is a country that had addressed guardianship legislatively but in a manner that the Committee found wanting. It noted:

The Committee is concerned that the new adult guardianship system, which was introduced in July 2013, permits guardians to make decisions regarding the property and personal issues of persons deemed persistently incapable of managing tasks due to psychological restrictions caused by disease, disability or old age. The Committee notes that such a system continues to promote substituted decision-making instead of supported decision-making, contrary to the provisions of article 12…

The Committee concluded:

The Committee recommends that the State party move from substitute decision-making to supported decision-making, which respects the person’s autonomy, will and preferences and is in full conformity with article 12 of the Convention and general comment No. 1, including with respect to the individual’s right to give and withdraw informed consent for medical treatment, to have access to justice, to vote, to marry, to work and to choose his or her place of residence. The Committee further recommends that the State party provide training, in consultation and cooperation with persons with disabilities and their representative organizations, at the national, regional and local levels for all actors, including civil servants, judges and social workers, on the recognition of the legal capacity of persons with disabilities and on the mechanisms of supported decision-making.\footnote{U.N. Convention on the Rights of Persons with Disabilities, Comm. on the Rights of Persons with Disabilities, Concluding observations on the initial report of the Republic of Korea, ¶ 21-22 at 4, U.N. Doc. CRPD/C/KOR/CO/1 (Oct. 29, 2014), http://treaties.un.org/pages/diplomaticversion.aspx?symbolno=CRPD%28%29%20KOR%20%202014%20%20CO%20%201&Lang=en.}

d. Ecuador

Finally, Ecuador is a State where there has been no legislative movement toward SDM, nor an effort to reform guardianship, for that matter. In this case, the Committee stated:

The Committee is concerned that the State party’s civil legislation provides for a substitute decision-making model through the use of roles such as guardians and wards, and that there is no immediate plan to reform the Civil Code and the Code of Civil Procedure to include a supported decision-making model, as recommended in general comment No. 1 (2014)…

The Committee recommends that the State party establish a working group with representatives of independent organizations of persons with disabilities in order to carry out a timely review of civil legislation and introduce supported decision-making mechanisms. It also recommends that the State party draw up an agenda, with a timetable, for the implementation of the new plan.\footnote{U.N. Convention on the Rights of Persons with Disabilities, Comm. on the Rights of Persons with Disabilities, Concluding observations on the initial report of Ecuador, ¶ 24-25 at 4, U.N. Doc. CRPD/C/ECU/CO/1 (Oct. 29, 2014), http://treaties.un.org/pages/diplomaticversion.aspx?symbolno=CRPD%28%29%20ECU%20%202014%20%20CO%20%201&Lang=en.}
The Committee, thus, has been quite consistent in responding to States Parties' submissions that it will conclude that any approach to decision-making that does not completely eliminate substituted decision-making will not pass muster under Article 12 in its estimation. Whether this consistent stance will actually result in countries eliminating all forms of substituted decision-making remains to be seen.

IV. Supported Decision-Making in the United States

A. Advancing Rights and Models First Identified in International Law

While the United States has not yet ratified the CRPD, an increasing number of American researchers, legislators, policymakers, and courts have answered international law’s call for decision-making options that are less restrictive and more supportive than guardianship. However, these developments have been slow in coming and have not yet taken full root; although many speeches and studies have decreed overbroad and undue guardianship—such as Congressman Claude Pepper’s famous finding that, “the typical ward has fewer rights than the typical convicted felon”—the estimated number of American adults under guardianship has tripled since 1995.

Nevertheless, recent research and commentary has shown that guardianship can, and too often does, deprive people of their most basic and fundamental rights. Guardians are given “substantial and often complete authority over the lives of vulnerable [people],” extending to the most basic personal and financial decisions, which can lead to negative life outcomes including diminished health and independence. As a result, “even when it is functioning as intended [guardianship] evokes a kind of ‘civil death’ for the individual, who is no longer permitted to participate in society without mediation through the actions of another if at all.”

As the United States Supreme Court has held, people have a fundamental right to make decisions regarding their health care, property, living arrangements, and marriage. There has been a growing recognition of the need to identify and implement options for people with limitations in decision-making that protect and advance, rather than restrict, their rights. In recent years, with increasing frequency and often relying upon rights and concepts first enunciated by international law, courts, policymakers, and legislators have turned to SDM to fulfill that role.
The Committee, thus, has been quite consistent in responding to States Parties’ submissions that it will conclude that any approach to decision-making that does not completely eliminate substituted decision-making will not pass muster under Article 12 in its estimation. Whether this consistent stance will actually result in countries eliminating all forms of substituted decision-making remains to be seen.

IV. Supported Decision-Making in the United States

A. Advancing Rights and Models First Identified in International Law

While the United States has not yet ratified the CRPD, an increasing number of American researchers, legislators, policymakers, and courts have answered international law’s call for decision-making options that are less restrictive and more supportive than guardianship. However, these developments have been slow in coming and have not yet taken full root; although many speeches and studies have deemed overbroad and undue guardianship—such as Congressman Claude Pepper’s famous finding that, “the typical ward has fewer rights than the typical convicted felon”—the estimated number of American adults under guardianship has tripled since 1995. Nevertheless, recent research and commentary has shown that guardianship can, and too often does, deprive people of their most basic and fundamental rights. Guardsmen are given “substantial and often complete authority over the lives of vulnerable [people],” extending to the most basic personal and financial decisions, which can lead to negative life outcomes including diminished health and independence. As a result, “even when it is functioning as intended [guardianship] evokes a kind of ‘civil death’ for the individual, who is no longer permitted to participate in society without mediation through the actions of another if at all.”

As the United States Supreme Court has held, people have a fundamental right to make decisions regarding their health care, property, living arrangements, and marriage. There has been a growing recognition of the need to identify and implement options for people with limitations in decision-making that protect and advance, rather than restrict, their rights. In recent years, with increasing frequency and often relying upon rights and concepts first enunciated by international law, courts, policymakers, and legislators have turned to SDM to fulfill that role.
In 2012, a New York court terminated the guardianship of Dameris L. because she had developed an SDM network of, “family and community support that enables [her] to make, act on, and have her decisions legally recognized.” The court recognized that, “[t]his use of supported decision-making, rather than a guardian’s substituted decision-making, is consistent with international human rights, most particularly Article 12 of the CRPD.” Citing with respect to the CRPD’s, “internationally recognized right of legal capacity through supported decision-making,” the court terminated the guardianship because “Dameris has demonstrated that she is able to exercise her legal capacity, to make and act on her own decisions, with the assistance of a support network . . . [Thus,] [T]erminating the guardianship recognizes and affirms Dameris’s constitutional rights and human rights.”

In 2013, Margaret “Jenny” Hatch defeated a petition seeking to place her in a permanent, plenary guardianship and won the right to make her own life decisions using SDM. Prior to the petition, Ms. Hatch lived in her own apartment, worked at an integrated job she chose and enjoyed, and led an active social life. However, after she was struck by a car while riding her bicycle, her parents sought guardianship over her. Initially, the court ordered her into a temporary guardianship and placed her in a group home—where she was not allowed to use her cell phone or laptop, could not go to her job, and was not permitted to see her friends.

A psychologist called by the petitioners testified that Ms. Hatch needs, “assistance to make decisions regarding her health care, her living arrangements and such like that. She will need someone to guide her and give her assistance.” In response, Ms. Hatch presented evidence that, with support and assistance from friends and professionals, she made her own decisions including whether to sign a complex power of attorney agreement, consent to surgery, and play a lead role in planning her services and supports. Experts called by Ms. Hatch testified, consistent with the CRPD and Dameris L., that these were, “classic or textbook case[s] of the support that would be part of supported decision-making.” After a multiple day trial, the court denied the petition for permanent guardianship, instead appointing Ms. Hatch’s friends as her temporary limited guardians for one year, “with the . . . goal of transitioning to the supportive [sic] decision-making model.”

State legislatures have also recognized, recommended, and implemented SDM systems for people who might otherwise be placed under guardianship. In 2009, the Texas legislature created a pilot program to, “promote the provision of supported decision-making services to persons with intellectual and developmental disabilities and persons with other cognitive disabilities who live in the community.” The program trained volunteers to support people in making, “life decisions such as where the person wants to live, who the person wants to live with, and where the person wants to work, without impeding the self-determination of the person.”

In 2015, after the pilot program expired, Texas passed new laws consistent with the CRPD’s recognition that all people have capacity but that some people need support to exercise it. Texas law now recognizes the availability and effectiveness of “Supports and Services”—defined as formal and informal resources and assistance that enable people to meet their needs; care for their health; manage their finances; and make personal decisions— as an alternative to guardianship. The law requires courts to find by clear and convincing evidence that a person cannot make decisions using “Supports and Services” before appointing a guardian.

In 2014, the Virginia General Assembly directed the state Secretary of Health and Human Services to study SDM and, “recommend strategies to improve the use of supported decision-making in the Commonwealth and ensure that individuals . . . are consistently informed about and receive the opportunity to participate in their important life decisions.” The resulting
In 2012, a New York court terminated the guardianship of Dameris L., because she had developed an SDM network of, “family and community support that enables [her] to make, act on, and have her decisions legally recognized.”76 The court recognized that, “[t]his use of supported decision-making, rather than a guardian’s substituted decision-making, is . . . consistent with international human rights, most particularly Article 12 of the [CRPD].”77 Citing with respect to the CRPD’s, “internationally recognized right of legal capacity through supported decision-making,”78 the court terminated the guardianship because “Dameris has demonstrated that she is able to exercise her legal capacity, to make and act on her own decisions, with the assistance of a support network . . . [Thus,] [t]erminating the guardianship recognizes and affirms Dameris’s constitutional rights and human rights.”79

In 2013, Margaret “Jenny” Hatch defeated a petition seeking to place her in a permanent, plenary guardianship and won the right to make her own life decisions using SDM.80 Prior to the petition, Ms. Hatch lived in her own apartment, worked at an integrated job she chose and enjoyed, and led an active social life.81 However, after she was struck by a car while riding her bicycle, her parents sought guardianship over her.82 Initially, the court ordered her into a temporary guardianship and placed her in a group home—where she was not allowed to use her cell phone or laptop, could not go to her job, and was not permitted to see her friends.83

A psychologist called by the petitioners testified that Ms. Hatch needs, “assistance to make decisions regarding her health care, her living arrangements and such like that. She will need someone to guide her and assist her in this consideration.”84 In response, Ms. Hatch presented evidence that, with support and assistance from friends and professionals, she made her own decisions including whether to sign a complex power of attorney agreement, consent to surgery, and play a lead role in planning her services and supports.85 Experts called by Ms. Hatch testified, consistent with the CRPD and Dameris L., that these were, “classic or textbook case[s] of the support that would be part of supported decision-making.”86 After a multiple day trial, the court denied the petition for permanent guardianship, instead appointing Ms. Hatch’s friends as her temporary limited guardians for one year, “with the . . . goal of transitioning to the supportive [sic] decision-making model.”87

State legislatures have also recognized, recommended, and implemented SDM systems for people who might otherwise be placed under guardianship. In 2009, the Texas legislature created a pilot program to “promote the provision of supported decision-making services to persons with intellectual and developmental disabilities and persons with other cognitive disabilities who live in the community.”88 The program trained volunteers to support people in making, “life decisions such as where the person wants to live, who the person wants to live with, and where the person wants to work, without impeding the self-determination of the person.”89

In 2015, after the pilot program expired, Texas passed new laws consistent with the CRPD’s recognition that all people have capacity but that some people need support to exercise it. Texas law now recognizes the availability and effectiveness of “Supports and Services”—defined as formal and informal resources and assistance that enable people to meet their needs; care for their health; manage their finances; and make personal decisions— as an alternative to guardianship.90 The law requires courts to find by clear and convincing evidence that a person cannot make decisions using “Supports and Services” before appointing a guardian.91

In 2014, the Virginia General Assembly directed the state Secretary of Health and Human Services to study SDM and, “recommend strategies to improve the use of supported decision-making in the Commonwealth and ensure that individuals . . . are consistently informed about and receive the opportunity to participate in their important life decisions.”92 The resulting

---

77. Id. at 853.
78. Id. at 855–56.
79. Id. at 856.
81. Hatch et al., supra note 68, at 65.
82. Id.
83. Margaret Hatch, My Story, in 3 (1) INCLUSION 34, 34 (AAIDD, 2015).
85. See, e.g., Id. at pp. 71–94.
86. See, e.g., Dinerstein Testimony, supra note 84, at 73; Excerpt from Testimony of Dr. Peter Blanck, THE JENNY HATCH JUSTICE PROJECT, at 123 (2013), http://jennyhatchjusticeproject.org/docs/justice_for_jenny_trial/jhp_trial_testimony_excerpt_blanck.pdf.
89. Id.
report cited international efforts in Australia, Canada, Sweden, and England in making several recommendations to expand knowledge and use of SDM, including: that state law be amended to recognize SDM as a "legitimate alternative to guardianship;" that state law, policy, and procedure require anyone appointed as a substitute decision-maker to be trained in and commit to using SDM; and that Virginia develop and require a standard training on SDM for providers and professionals. 93

SDM concepts first identified in international law have also helped shape United States policy and practice. In 2014, the Administration for Community Living in the United States Department of Health and Human Services made funding available to create, "a national training and technical assistance center on . . . supported decision-making."94 Recognizing the importance of international law to this process, the federal agency stated:

By declaring "legal capacity" for all people, the CRPD separates a person's cognitive and communicative abilities from this basic right. In other words, all people regardless of their disability or cognitive abilities have the right to make decisions and have those decisions implemented. These concepts . . . inform and frame the conversation around developing the supported decision-making process. 95

Similarly, powerful private organizations have embraced SDM. In 2012, the American Bar Association ("ABA") convened a stakeholder summit entitled "Beyond Guardianship: Supported Decision-Making by Persons with Intellectual Disabilities."96 Citing the CRPD as its impetus and inspiration, the ABA stated that the goal of the meeting was, "to explore concrete ways to move from a model of substituted decision-making, like guardianship, to one of supported decision-making, consistent with the human right of legal capacity."97 In 2015, an ABA-published journal article called for the increased use of SDM, stating, "[i]n contrast to overbroad or undue guardianship, Supported Decision-Making can increase self-

determination by ensuring that the person retains life control to the maximum extent possible."98

Also in 2015, the National Guardianship Association ("NGA"), an organization representing "over 1,000 guardians, conservators and fiduciaries from across the United States," committed to advancing "the nationally recognized standard of excellence in guardianship,"99 issued a position paper on guardianship and SDM. Echoing the CRPD in recognizing that, "[m]odern day respect for individual rights dictates that we must allow each individual to make or participate to the extent possible in personal decisions," the NGA concluded, "[s]upported decision-making should be considered for the person before guardianship, and the supported decision-making process should be incorporated as a part of the guardianship if guardianship is necessary."100

B. The Future of Supported Decision-Making in the United States:
Achieving the Promise of International Human Rights Law and Practice

Present and planned efforts to advocate for increased access to and implementation of SDM will bring American policy and practice ever closer to the ideals set forth by the CRPD and related international laws. These include the work of The National Resource Center for Supported Decision-Making, which has launched a five-year action plan to increase knowledge and implementation of SDM through:

1. Publication, outreach, and training intended to change attitudes in the legal, educational, medical, and professional fields so that families, practitioners, and providers recognize and consider SDM as an appropriate decision-making option;
2. Identifying local, state, and national policies and practices that are barriers to the use of SDM, and advocating for necessary and appropriate modifications;
3. Conducting and sponsoring research into SDM, including identifying best practices; and

93. Id.
95. Id. at 7.
report cited international efforts in Australia, Canada, Sweden, and England in making several recommendations to expand knowledge and use of SDM, including: that state law be amended to recognize SDM as a "legitimate alternative to guardianship;" that state law, policy, and procedure require anyone appointed as a substitute decision-maker to be trained in and commit to using SDM; and that Virginia develop and require a standard training on SDM for providers and professionals. SDM concepts first identified in international law have also helped shape United States policy and practice. In 2014, the Administration for Community Living in the United States Department of Health and Human Services made funding available to create, "a national training and technical assistance center on ... supported decision-making." Recognizing the importance of international law to this process, the federal agency stated: By declaring 'legal capacity' for all people, the CRPD separates a person’s cognitive and communicative abilities from this basic right. In other words, all people regardless of their disability or cognitive abilities have the right to make decisions and have those decisions implemented. These concepts ... inform and frame the conversation around developing the supported decision-making process. Similarly, powerful private organizations have embraced SDM. In 2012, the American Bar Association ("ABA") convened a stakeholder summit entitled "Beyond Guardianship: Supported Decision-Making by Persons with Intellectual Disabilities." Citing the CRPD as its impetus and inspiration, the ABA stated that the goal of the meeting was, "to explore concrete ways to move from a model of substituted decision-making, like guardianship, to one of supported decision-making, consistent with the human right of legal capacity." In 2015, an ABA-published journal article called for the increased use of SDM, stating, "in contrast to overbroad or undue guardianship, Supported Decision-Making can increase self-determination by ensuring that the person retains life control to the maximum extent possible." Also in 2015, the National Guardianship Association ("NGA"), an organization representing "over 1,000 guardians, conservators and fiduciaries from across the United States," committed to advancing "the nationally recognized standard of excellence in guardianship," issued a position paper on guardianship and SDM. Echoing the CRPD in recognizing that, "in modern day respect for individual rights dictates that we must allow each individual to make or participate to the extent possible in personal decisions," the NGA concluded, "[s]upported decision-making should be considered for the person before guardianship, and the supported decision-making process should be incorporated as a part of the guardianship if guardianship is necessary."


Present and planned efforts to advocate for increased access to and implementation of SDM will bring American policy and practice ever closer to the ideals set forth by the CRPD and related international laws. These include the work of The National Resource Center for Supported Decision-Making, which has launched a five-year action plan to increase knowledge and implementation of SDM through:

1. Publication, outreach, and training intended to change attitudes in the legal, educational, medical, and professional fields so that families, practitioners, and providers recognize and consider SDM as an appropriate decision-making option;
2. Identifying local, state, and national policies and practices that are barriers to the use of SDM, and advocating for necessary and appropriate modifications;
3. Conducting and sponsoring research into SDM, including identifying best practices; and

93. Id.
95. Id. at 7.
4. Holding annual symposia bringing together American and international experts to discuss the state-of-the-art in SDM and strategize ways to increase acceptance and use of SDM.  

In a separate effort, the partners in The National Resource Center for Supported Decision-Making have begun a first-of-its-kind five-year project to address existing gaps in research on SDM. American and international researchers and scholars have theorized that people who use SDM should show increases in self-determination and improved life outcomes. However, no research currently establishes such a linkage, which is an absence noted by leading commentators. This effort is the first, in America or internationally, to longitudinally study whether such connections exist and then document any benefits accruing from it. If successful in establishing a causal link between use of SDM and increased self-determination, this research will demonstrate that SDM is a demonstrably effective alternative to guardianship.

United States federal agencies continue to play a key role in encouraging less-restrictive options for decision-making. While studies show that schools are the most frequent source of referrals for guardianship, the United States Department of Education has supported efforts to decrease overreliance on guardianship, calling it, “one of the most legally restrictive forms of support that can also have negative effects on the individual.” Through its partnerships, the Department of Education has given parents and teachers information and resources that increase knowledge about and access to less restrictive, more inclusive options such as SDM.

101. Martinis, supra note 98, at 110. Jonathan Martinis, the third author, is co-Project Director of the National Resource Center.


103. Id.


105. See, e.g., Kohn et al., supra note 31, at 1115-1120.


108. Id.

2016]  

Such support is key, because using SDM not only furthers the goals of the CRPD and international law, it also advances the overarching aims of United States law. For example, using and supporting SDM as a means of increasing independence and self-determination is consistent with the intent of the Americans with Disabilities Act, which was enacted, “to assure equality of opportunity, full participation, independent living, and economic self-sufficiency” of people with disabilities. In the same way, SDM furthers the purpose of the Developmental Disabilities Assistance and Bill of Rights Act: “assur[ing] that individuals with developmental disabilities . . . have access to needed . . . forms of assistance that promote self-determination, independence, productivity, and inclusion in all facets of community life.”

To help reach these goals, advocacy organizations have followed the lead of Canada, Sweden, and other countries by creating SDM agreements, where individuals are empowered to specify areas where they want support, who will provide it, and how it will be provided. These include the Center for Public Representation, the Texas Guardianship and Supported Decision-Making Workgroup, Disability Rights Maine, and the Arc of North Carolina.

These efforts, moving American policy and practice along the path to SDM first laid by the CRPD, will empower Americans with disabilities to direct their own lives to the maximum of their abilities, in stark contrast to overbroad or undue guardianship. Rather than, “divest[ing] the individual of the ability to make crucial self-defining decisions,” as guardianship has done for hundreds of years, SDM “retains the individual as the primary decision maker, while recognizing that the individual may need some assistance . . . in making and communicating a decision.” In so doing, SDM can end a sad history of “marginalization and isolation from mainstream society,” in favor of an empowering option that makes people with disabilities the primary “causal agents” in their lives, respected and ready to


117. Salzman, 2011, supra note 71, at 293.
4. Holding annual symposia bringing together American and international experts to discuss the state-of-the-art in SDM and strategize ways to increase acceptance and use of SDM.\textsuperscript{101}

In a separate effort, the partners in The National Resource Center for Supported Decision-Making\textsuperscript{102} have begun a first-of-its-kind five-year project to address existing gaps in research on SDM.\textsuperscript{103} American and international researchers and scholars have theorized that people who use SDM should show increases in self-determination and improved life outcomes.\textsuperscript{104} However, no research currently establishes such a linkage, which is an absence noted by leading commentators.\textsuperscript{105} This effort is the first, in America or internationally, to longitudinally study whether such connections exist and then document any benefits accruing from it. If successful in establishing a causal link between use of SDM and increased self-determination, this research will demonstrate that SDM is a demonstrably effective alternative to guardianship.

United States federal agencies continue to play a key role in encouraging less-restrictive options for decision-making. While studies show that schools are the most frequent source of referrals for guardianship,\textsuperscript{106} the United States Department of Education has supported efforts to decrease overreliance on guardianship, calling it, "one of the most legally restrictive forms of support . . . that can also have negative effects on the individual."\textsuperscript{107} Through its partners, the Department of Education has given parents and teachers information and resources that increase knowledge about and access to less restrictive, more inclusive options such as SDM.\textsuperscript{108}

\textsuperscript{101} Martinis, supra note 98, at 110. Jonathan Martinis, the third author, is co-Project Director of the National Resource Center.

\textsuperscript{102} News Staff, Burton Blatt Institute Receives $2.5 Million Grant, SYRACUSE UNIV. NEWS (Oct. 19, 2015), http://news.syr.edu/burton-blatt-institute-receives-2-5-million-grant-60460/.

\textsuperscript{103} Id.


\textsuperscript{105} See, e.g., Kohn et al., supra note 31, at 1115–1120.


\textsuperscript{108} Id.

Such support is key, because using SDM not only furthers the goals of the CRPD and international law, it also advances the overarching aims of United States law. For example, using and supporting SDM as a means of increasing independence and self-determination is consistent with the intent of the Americans with Disabilities Act, which was enacted, "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency"\textsuperscript{109} of people with disabilities. In the same way, SDM furthers the purpose of the Developmental Disabilities Assistance and Bill of Rights Act: "assur[ing] that individuals with developmental disabilities . . . have access to needed . . . forms of assistance that promote self-determination, independence, productivity, and integration and inclusion in all facets of community life."\textsuperscript{110}

To help reach these goals, advocacy organizations have followed the lead of Canada, Sweden, and other countries by creating SDM agreements, where individuals are empowered to specify areas where they want support, who will provide it, and how it will be provided. These include the Center for Public Representation,\textsuperscript{111} the Texas Guardianship and Supported Decision-Making Workgroup,\textsuperscript{112} Disability Rights Maine,\textsuperscript{113} and the Arc of North Carolina.\textsuperscript{114}

These efforts, moving American policy and practice along the path to SDM first laid by the CRPD, will empower Americans with disabilities to direct their own lives to the maximum of their abilities, in stark contrast to overbroad or undue guardianship. Rather than, "divest[ing] the individual of the ability to make crucial self-defining decisions,"\textsuperscript{115} as guardianship has done for hundreds of years, SDM "retains the individual as the primary decision maker, while recognizing that the individual may need some assistance . . . in making and communicating a decision."\textsuperscript{116} In so doing, SDM can end a sad history of "marginalization and isolation from mainstream society,"\textsuperscript{117} in favor of an empowering option that makes people with disabilities the primary "causal agents" in their lives, respected and ready to


\textsuperscript{110} 42 U.S.C.A. §15001 (b) (2015).


\textsuperscript{112} See generally, TEX. GUARDIANSHIP REFORM AND SUPPORTED DECISION-MAKING, http://gtxsdn.wordpress.com/ (last visited Jan 27, 2016).

\textsuperscript{113} See generally, SUPPORTED DECISION-MAKING, http://supportedmydecision.org/ (last visited Jan 27, 2016).


\textsuperscript{115} Saltzman, 2011, supra note 71, at 291.

\textsuperscript{116} Dinerstein, supra note 25, at 10.

\textsuperscript{117} Saltzman, 2011, supra note 71, at 293.
make their own life choices, achieving the improved life outcomes associated with increased self-determination.118

V. CONCLUSION

The concept of adult guardianship law has been constantly evolving in our legal systems for centuries, and perhaps even more so in this century, as we look at the recent developments in international agreements and how they have affected complex legal systems like that of the United States. The goal of this article is to provoke more discussion on this topic in the international sphere so that as our world’s population of people with disabilities and older persons continues to steadily increase, we can feel confident that our legal protections for these individuals are sound and fully incorporate their human rights and decision-making powers. Equal recognition before the law can have a direct impact on a person’s quality of life and protection of fundamental human rights, so it is imperative we initiate this discourse now.


CAPTIVITY AND THE LAW: HOSTAGES, DETAINES, AND CRIMINAL DEFENDANTS IN THE FIGHT AGAINST TERRORISM

Adam R. Pearlman

I. USE OF FORCE IN HOSTAGE RESCUES .................................................. 461
II. DETENTION ................................................................................. 464
III. PROSECUTION OF WAR CRIMINALS ...................................... 466

This article briefly addresses three issues that practitioners handling counterterrorism issues may encounter. First, whether there are limits on the force that can be used in an operation to rescue hostages held by a terrorist organization (such as the group that has alternatively been referred to as ISIS, ISIL, and IS).1 Second, how the detention policies and practices of the United States, specifically with respect to those detained at Guantanamo Bay, compare to the evolving approach of the international community. Finally, it describes military commissions as a mode of prosecuting alleged war criminals, and how United States and international law relate to one another in this context under present law, mindful that litigation in this area is ongoing.

I. USE OF FORCE IN HOSTAGE RESCUES

October 2015 served as a reminder of what is at stake when engaging terrorist hostage-takers, when the first American serviceman was killed in action in Operation Inherent Resolve. Army Master Sgt. Joshua Wheeler was part of an otherwise successful hostage rescue operation, which reportedly saved the lives of nearly seventy Iraqis from an imminent mass execution.3

1. This article will refer to that group as ISIS.
2. For further discussion on this topic, see Adam R. Pearlman, Life and Proportion: Responding to Hostage Situations (forthcoming).
make their own life choices, achieving the improved life outcomes associated with increased self-determination.¹¹⁸

V. CONCLUSION

The concept of adult guardianship law has been constantly evolving in our legal systems for centuries, and perhaps even more so in this century, as we look at the recent developments in international agreements and how they have affected complex legal systems like that of the United States. The goal of this article is to provoke more discussion on this topic in the international sphere so that as our world’s population of people with disabilities and older persons continues to steadily increase, we can feel confident that our legal protections for these individuals are sound and fully incorporate their human rights and decision-making powers. Equal recognition before the law can have a direct impact on a person’s quality of life and protection of fundamental human rights, so it is imperative we initiate this discourse now.


CAPTIVITY AND THE LAW: HOSTAGES, DETAINES, AND CRIMINAL DEFENDANTS IN THE FIGHT AGAINST TERRORISM

Adam R. Pearlman*  

I. USE OF FORCE IN HOSTAGE RESCUES .............................................. 461
II. DETENTION ............................................................................. 464
III. PROSECUTION OF WAR CRIMINALS ............................... 466

This article briefly addresses three issues that practitioners handling counterterrorism issues may encounter. First, whether there are limits on the force that can be used in an operation to rescue hostages held by a terrorist organization (such as the group that has alternatively been referred to as ISIS, ISIL, and IS).¹ Second, how the detention policies and practices of the United States, specifically with respect to those detained at Guantanamo Bay, compare to the evolving approach of the international community. Finally, it describes military commissions as a mode of prosecuting alleged war criminals, and how United States and international law relate to one another in this context under present law, mindful that litigation in this area is ongoing.

I. USE OF FORCE IN HOSTAGE RESCUES ²

October 2015 served as a reminder of what is at stake when engaging terrorist hostage-takers, when the first American serviceman was killed in action in Operation Inherent Resolve. Army Master Sgt. Joshua Wheeler was part of an otherwise successful hostage rescue operation, which reportedly saved the lives of nearly seventy Iraqis from an imminent mass execution.³

* Associate Deputy General Counsel, United States Department of Defense; Special Advisor, International and National Security Law Practice Group, The Federalist Society for Law and Public Policy Studies; Co-Editor, The U.S. Intelligence Community Law Sourcebook. B.A., UCLA; J.D., The George Washington University Law School; M.S.I., National Intelligence University. (This Article is based on the author’s comments on the International Law Weekend panel, “The International Law and Policy of Counterterrorism.” The author spoke in his personal capacity, not as a representative of the Department of Defense; the opinions expressed were his own and do not necessarily reflect the views, assessments, or policies of DoD or any USG agency. The same is true of this Article.)

1. This article will refer to that group as ISIS.
2. For further discussion on this topic, see Adam R. Pearlman, Life and Proportion: Responding to Hostage Situations (forthcoming).
Kidnapping, hostage-taking, and the use of human shields are all prohibited by various instruments of domestic and international law. They continue to be a significant problem, however, so much so that the President recently issued an Executive Order to update the United States' hostage recovery policy and operations architecture.4

As a general matter, international law does not necessarily prohibit "non-state armed groups" from lawfully detaining certain persons.5 However, the taking of hostages, that is,

[1] seize[ing] or detain[ing] and [2] threaten[ing] to kill, to injure, or to continue to detain another person [3] to compel a third person or a governmental organization to do or abstain from doing any act [4] as an explicit or implicit condition for the release of the person detained...

is recognized as a crime in international law, both in the civil and war contexts. The International Convention Against the Taking of Hostages came into being in 1979, went into force in 1983, and calls for State cooperation regarding prosecution or extradition of hostage-takers.6 In international humanitarian law, or the law of war, a similar prohibition sounds in several places in the Geneva Conventions of 1949, including Common Article 3 and articles 34 and 147 of the Fourth Convention.8


5. DEPT OF DEFENSE LAW OF WAR MANUAL § 17.17.2 (June 12, 2015).

1) willful killing,
2) torture or inhuman treatment, including biological experiments,
3) willfully causing greater suffering or serious injury to body or health,
4) unlawful deportation or transfer or unlawful confinement of a protected person,
5) compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention,
6) taking of hostages and

each of these documents, hostage-taking is considered a "grave" offense or breach of the treaties, a legal determination that, in the context of war, opens the door to corrective actions by the United Nations Security Council.9

Further, a State's interest and ability to protect its own nationals in foreign countries is a recognized notion of self-defense doctrine. Former president of the American Society of International Law, Thomas Franck noted that the self-defense claim based on protecting one's citizens abroad requires "clear evidence of provocation" and a reasonable argument that protecting one's citizens actually is the purpose of the forceful response rather than, e.g., regime change.10 Further, Franck asserted, "the claim to act in self-defense of citizens is asserted most strongly when the citizens are members of their nation's armed forces."11

Assuming the correctness of the threshold notion that a country can properly assert self-defense to resort to force against terrorist organizations or others who kidnap that country's citizens, the operational question becomes one relating to the scope of lawful responses to such situations. The principle of proportionality under international humanitarian law would seem to require an analysis of how the life of the hostage weighs against potential collateral damage in large-scale attacks.12 In other words, is the recovery of one's nationals is cognizable as a "military advantage to be gained"13 in the first instance, and if so, should proportionality be measured in the response against the individual kidnapping as a single event, the continued unlawful detention as an ongoing, continuous violation, or against the cumulative sum of the prior instances of similar conduct?

Although the United States is a party neither to Additional Protocol 1 of the Geneva Conventions, nor to the Rome Statute of the International Criminal Court, it is nevertheless worth noting that those two documents

7) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Id. at art. 147. See also DEPT OF DEFENSE LAW OF WAR MANUAL § 5.3.2 (2015) (stating civilians must not be used as hostages).
10. See THOMAS M. FRANCK, RECURS TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 91 (Cambridge Univ. Press 2002).
11. Id. at 89.
Kidnapping, hostage-taking, and the use of human shields are all prohibited by various instruments of domestic and international law. They continue to be a significant problem, however, so much so that the President recently issued an Executive Order to update the United States’ hostage recovery policy and operations architecture.4

As a general matter, international law does not necessarily prohibit “non-state armed groups” from lawfully detaining certain persons.5 However, the taking of hostages, that is, [1] seize[ing] or detain[ing] and [2] threat[en]ing to kill, to injure, or to continue to detain another person [3] to compel a third person or a governmental organization to do or abstain from doing any act [4] as an explicit or implicit condition for the release of the person detained . . . 6 is recognized as a crime in international law, both in the civil and war contexts. The International Convention Against the Taking of Hostages came into being in 1979, went into force in 1983, and calls for State cooperation regarding prosecution or extradition of hostage-takers.7 In international humanitarian law, or the law of war, a similar prohibition sounds in several places in the Geneva Conventions of 1949, including Common Article 3 and articles 34 and 147 of the Fourth Convention.8 In each of these documents, hostage-taking is considered a “grave” offense or breach of the treaties, a legal determination that, in the context of war, opens the door to corrective actions by the United Nations Security Council.9

Further, a State’s interest and ability to protect its own nationals in foreign countries is a recognized notion of self-defense doctrine. Former president of the American Society of International Law, Thomas Franck noted that the self-defense claim based on protecting one’s citizens abroad requires “clear evidence of provocation” and a reasonable argument that protecting one’s citizens actually is the purpose of the forceful response rather than, e.g., regime change.10 Further, Franck asserted, “the claim to act in self-defense of citizens is asserted most strongly when the citizens are members of their nation’s armed forces.”11

Assuming the correctness of the threshold notion that a country can properly assert self-defense to resort to force against terrorist organizations or others who kidnap that country’s citizens, the operational question becomes one relating to the scope of lawful responses to such situations. The principle of proportionality under international humanitarian law would seem to require an analysis of how the life of the hostage weighs against potential collateral damage in large-scale attacks.12 In other words, is the recovery of one’s nationals is cognizable as a “military advantage to be gained”112 in the first instance, and if so, should proportionality be measured in the response against the individual kidnapping as a single event, the continued unlawful detention as an ongoing, continuous violation, or against the cumulative sum of the prior instances of similar conduct?

Although the United States is a party neither to Additional Protocol I of the Geneva Conventions, nor to the Rome Statute of the International Criminal Court, it is nevertheless worth noting that those two documents


5. DEP’T OF DEFENSE LAW OF WAR MANUAL § 17.17.2 (June 12, 2015).


1) willful killing,
2) torture or inhuman treatment, including biological experiments,
3) willfully causing great suffering or serious injury to body or health,
4) unlawful deportation or transfer or unlawful confinement of a protected person,
5) compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention,
6) taking of hostages and

7) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

8. See also DEP’T OF DEFENSE LAW OF WAR MANUAL § 5.3.2 (2015) (stating civilians must not be used as hostages).


10. See THOMAS M. FRANCK, RECURS TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 91 (Cambridge Univ. Press 2002).

11. Id. at 89.


seem to treat these questions somewhat differently in ways that might be relevant to future actions against, for example, ISIS and/or its members. Additional Protocol I requires an attacking state to "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." The associated commentary provides the military advantage must be "substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded." Language in the Rome Statute suggests differently, however, prohibiting certain attacks "which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated." The presence of the word "overall" in the statute might offer an affirmative defense of long-term military advantages not necessarily apparent to the public during a few news cycles.

II. DETENTION

The detention function, as a means of removing enemy threats from the battlefield, has long been recognized as a "fundamental and accepted incident to war." At the outset of Operation Enduring Freedom and the first years of housing a small number of detainees at a facility at Guantanamo Bay Naval Station, the government relied heavily on the President's constitutional powers as Commander-in-Chief for authority to hold enemy combatants. In March 2009, the asserted legal basis of detention at Guantanamo Bay was modified to rely on the statutory authorities of the 2001 Authorization for the use of Military Force, the scope of which the government acceded "informed by the laws of war[.]"


23. See HERON, supra note 20, at 1365.
seem to treat these questions somewhat differently in ways that might be relevant to future actions against, for example, ISIS and/or its members. Additional Protocol I requires an attacking state to “refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”\(^{14}\) The associated commentary provides the military advantage must be “substantial and relatively close,” and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded.\(^{15}\) Language in the Rome Statute suggests differently, however, prohibiting certain attacks “which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”\(^{16}\) The presence of the word “overall” in the statute might offer an affirmative defense of long-term military advantages not necessarily apparent to the public during a few news cycles.

II. DETENTION\(^{17}\)

The detention function, as a means of removing enemy threats from the battlefield, has long been recognized as a “fundamental and accepted incident to war.”\(^{18}\) At the outset of Operation Enduring Freedom and the first years of housing a small number of detainees at a facility at Guantanamo Bay Naval Station, the government relied heavily on the President’s constitutional powers as Commander-in-Chief for authority to hold enemy combatants. In March 2009, the asserted legal basis of detention at Guantanamo Bay was modified to rely on the statutory authorities of the 2001 Authorization for the use of Military Force, the scope of which the government acceded is “informed by the laws of war.”\(^{19}\)

---


15. Id. at Commentary of 1987, Precautions in Attack, 684, ¶ 2209.


24. Horowitz, supra note 20, at 1365.
III. PROSECUTION OF WAR CRIMINALS

People detained may have also committed war crimes for which they can be tried, but that's not the purpose of detention. There are several options available for prosecuting terrorists, including in Article III courts. Military commissions also have served as one potential forum for prosecuting war criminals. Military commissions have been used throughout our nation’s history as a means to hold war criminals accountable for unlawful actions as belligerents. General Washington convened them in the Revolutionary War; they were readily employed in the Civil War, during Reconstruction, and the Philippine Insurrection. The United States and our Allies also used them in World War I, and during and after World War II. The United Nations Command also drafted regulations to use them during the Korean War.

Importantly, belligerency itself is not a crime and, in fact, the Geneva Conventions protect lawful belligerents (that is, members in the armed force of a state, in uniform, carrying arms openly, and not otherwise protected such as medics and chaplains) from prosecution, hence the distinction between the standards for detention discussed above from those for prosecuting an individual detainee. Perhaps the most famous war crimes tribunals were those of Nuremberg, the International Criminal Tribunal for the former Yugoslavia (“ICTY”), and the International Criminal Tribunal for Rwanda (“ICTR”), the latter two of which also tried genocide and crimes against humanity. But States Parties to the Geneva

25. See COPENHAGEN PROCESS, supra note 23, at Preamble II, IV, IX.


27. COPENHAGEN PROCESS, supra note 23, at Commentary 15.1.

28. Winkler, supra note 21, at 247.

29. COPENHAGEN PROCESS, supra note 23, at Commentary 1.3.

30. Id. at Commentary 12.4; see also Hamdan, 548 U.S. 557 (2006).

31. See U.S. CONST. art. III, § 2 (setting forth the judicial power of the United States).


By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.


34. Id. at 240, 252.

35. Id. at 240.


participants. The collective document (principles, guidelines, and commentary) addresses, inter alia, grounds for and the review of one’s detention, as well as the treatment of detainees, conditions of their confinement, and their transfer to third parties.

Although the Principles purport to follow and not expand existing international humanitarian law, they depart from the Geneva Conventions in at least one very basic way, speaking of “detaining authorities,” rather than “detaining Powers.” Authority is defined as “an entity that is recognized as a matter of international law or national law as an entity that may lawfully hold detainees[,] whereas the word “State” does not appear in the text of any of the principles until Principle 15.

Perhaps most relevant to the core of the controversy over United States detention policy since 2001, the principles affirm international recognition that “detention is a necessary and legitimate means in the conducting of military operations.” The Process also confirmed the international law norm that detention is not limited to people who have committed crimes—security reasons may constitute independent bases for detention beyond any criminal acts a detainee may have committed, and criminal process is not necessary to continued lawful detention of an individual who poses a threat. Further, consistent with the D.C. Circuit’s Guantanamo Bay habeas jurisprudence, the Copenhagen Process chairman’s commentary implies that one’s participation in hostilities is sufficient, but not necessary to render him detaineable. Finally, the commentary appears to affirm the use of personal representatives, as opposed to legal counsel for security detainees, implicitly rejecting one of the United States Supreme Court’s key reasons for deeming military-led administrative hearings called Combatant Status Review Tribunals (“CSRTs”) to be deficient in *Hamdan v. Rumsfeld.*

III. Prosecution of War Criminals

People detained may have also committed war crimes for which they can be tried, but that’s not the purpose of detention. There are several options available for prosecuting terrorists, including in Article III courts. Military commissions also have served as one potential forum for prosecuting war criminals. Military commissions have been used throughout our nation’s history as a means to hold war criminals accountable for unlawful actions as belligerents. General Washington convened them in the Revolutionary War; they were readily employed in the Civil War, during Reconstruction, and the Philippine Insurrection. The United States and our Allies also used them in World War I, and during and after World War II. The United Nations Command also drafted regulations to use them during the Korean War.

Importantly, belligerency itself is not a crime and, in fact, the Geneva Conventions protect lawful belligerents (that is, members in the armed force of a state, in uniform, carrying arms openly, and not otherwise protected such as medics and chaplains) from prosecution, hence the distinction between the standards for detention discussed above from those for prosecuting an individual detainee. Perhaps the most famous war crimes tribunals are those of Nuremberg, the International Criminal Tribunal for the former Yugoslavia (“ICTY”), and the International Criminal Tribunal for Rwanda (“ICTR”), the latter two of which also tried genocide and crimes against humanity. But States Parties to the Geneva


28. Winkler, supra note 21, at 247.


30. *Id.* at Commentary 12.4; *see also Hamdan,* 548 U.S. 557 (2006).
Conventions also have duties to uphold the laws of war, and thus may prosecute war crimes, as well. 38

The military commissions system currently prosecuting certain Guantanamo Bay detainees is governed by the Military Commissions Act of 2009 ("MCA"), 39 which enumerates several specific war crimes, including: attacking civilians or civilian objects, murder of protected persons, attacking protected property, pillaging, denying quarter, taking hostages, using poisons, using human shields, torture, rape, mutilation, perfidy, hijacking, material support to terrorism, and conspiracy to commit war crimes. 40

The post-2001 military commissions system has been subject to robust review by Article III courts. In Hamdan v. Rumsfeld in 2006, the Supreme Court ruled that the President did not have authority under then-current law to convene commissions without express Congressional sanction. 41 Congress immediately enacted the current MCA’s predecessor statute, the Military Commissions Act of 2006. Salim Hamdan (the namesake of the famous Supreme Court case) was subsequently re-charged under the statute with, among other offenses, material support of terrorism. 42 On appeal the D.C. Circuit invalidated Hamdan’s material support conviction under the United States Constitution’s Ex Post Facto Clause, because his conduct occurred before the statute was enacted. 43

It should be noted that there is no equivalent hard-line rule in international tribunals. Although there is an analogues maxim to “ex post facto,” namely “nullum crimen sine lege” (“no crime without law”), it is recognized as a “principle of justice,” 44 that has historically been subject to broad interpretation. For example, the violation of aggressive war did not require specific codified elements to be prosecuted by the International Military Tribunal at Nuremberg; instead, the tribunal determined that, “in such circumstances [that] the attacker must know that he is doing wrong, so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.” 45 Indeed, international criminal law, especially as it pertains to combatants’ conduct in the course of hostilities, “follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.” 46

A related issue currently being litigated is whether Congress has the authority to convey jurisdiction to the military to prosecute war crimes not widely recognized in international law. Last year, a D.C. Circuit panel effectively ruled that the presence or absence of international law can affect the political branches’ exercise of their respective war powers, and, in particular, Congress’s powers under the Define and Punish Clause of the United States Constitution. 47 The panel majority treated international law precedent as a jurisdictional predicate for military commission jurisdiction over certain offenses (specifically, conspiracy)—i.e., the President and Congress are constitutionally, institutionally incapable of empowering law of war military commissions with jurisdiction to try domestically codified provisions that lack a clear and unambiguous grounding in the international law of war. 48

The D.C. Circuit granted rehearing en banc and vacated the panel’s ruling. In its brief to the en banc court, the government argued, inter alia, that Congress’ power to “define and punish offenses against the law of nations” 49 is not limited to codifying preexisting international law prohibitions, and that, with respect to military commissions, that mandate and authority is furthered by Congress’ other war powers. 50 Oral arguments before the en banc court were held on December 1, 2015; an opinion has not yet issued.

---


45. Id.

46. Id at 221.

47. U.S. CONST. art. I, § 8, cl. 10.

48. See Bahlul v. United States, 792 F.3d 1 (D.C. Cir. 2015).


Conventions also have duties to uphold the laws of war, and thus may prosecute war crimes, as well.\textsuperscript{38} The military commissions system currently prosecuting certain Guantanamo Bay detainees is governed by the Military Commissions Act of 2009 ("MCA"),\textsuperscript{39} which enumerates several specific war crimes, including: attacking civilians or civilian objects, murder of protected persons, attacking protected property, pillaging, denying quarter, taking hostages, using poisons, using human shields, torture, rape, mutilation, perfidy, hijacking, material support to terrorism, and conspiracy to commit war crimes.\textsuperscript{40}

The post-2001 military commissions system has been subject to robust review by Article III courts. In Hamdan v. Rumsfeld in 2006, the Supreme Court ruled that the President did not have authority under then-current law to convene commissions without express Congressional sanction.\textsuperscript{41} Congress immediately enacted the current MCA’s predecessor statute, the Military Commissions Act of 2006. Salim Hamdan (the namesake of the famous Supreme Court case) was subsequently re-charged under the statute with, among other offenses, material support of terrorism.\textsuperscript{42} On appeal the D.C. Circuit invalidated Hamdan’s material support conviction under the United States Constitution’s Ex Post Facto Clause, because his conduct occurred before the statute was enacted.\textsuperscript{43}

It should be noted that there is no equivalent hard-line rule in international tribunals. Although there is an analogous maxim to "ex post facto," namely "nullum crimen sine lege" ("no crime without law"), it is recognized as a "principle of justice,"\textsuperscript{44} that has historically been subject to broad interpretation. For example, the violation of aggressive war did not require specific codified elements to be prosecuted by the International Military Tribunal at Nuremberg; instead, the tribunal determined that, "in such circumstances [that] the attacker must know that he is doing wrong, so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."\textsuperscript{45} Indeed, international criminal law, especially as it pertains to combatants’ conduct in the course of hostilities, "follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing."\textsuperscript{46}

A related issue currently being litigated is whether Congress has the authority to convey jurisdiction to the military to prosecute war crimes not widely recognized in international law. Last year, a D.C. Circuit panel effectively ruled that the presence or absence of international law can affect the political branches’ exercise of their respective war powers, and, in particular, Congress’s powers under the Define and Punish Clause of the United States Constitution.\textsuperscript{47} The panel majority treated international law precedent as a jurisdictional predicate for military commission jurisdiction over certain offenses (specifically, conspiracy)—i.e., the President and Congress are constitutionally, institutionally incapable of empowering law of war military commissions with jurisdiction to try domestically codified provisions that lack a clear and unambiguous grounding in the international law of war.\textsuperscript{48}

The D.C. Circuit granted rehearing en banc and vacated the panel’s ruling. In its brief to the en banc court, the government argued, \textit{inter alia}, that Congress’ power to “define and punish offenses against the law of nations”\textsuperscript{49} is not limited to codifying preexisting international law prohibitions, and that, with respect to military commissions, that mandate and authority is furthered by Congress’ other war powers.\textsuperscript{50} Oral arguments before the en banc court were held on December 1, 2015; an opinion has not yet issued.


\textsuperscript{40} See Crimes Triable by Military Commission, 10 U.S.C. 950 (2009).

\textsuperscript{41} Hamdan v. Rumsfeld, 548 U.S. 557 (2006).


\textsuperscript{43} Hamdan v. United States, 696 F.3d 1238 (D.C. Cir. 2012).

\textsuperscript{44} \textit{Trial of the Major War Criminals Before the International Military Tribunal}, I, 219 (1947), https://www.loc.gov/rr/frd/Military_Law/pdfs/NT_Vol-I.pdf.

\textsuperscript{45} Id.

\textsuperscript{46} Id. at 221.

\textsuperscript{47} U.S. CONST. art. I, § 8, cl. 10.

\textsuperscript{48} See Bahlul v. United States, 792 F.3d 1 (D.C. Cir. 2015).

\textsuperscript{49} U.S. CONST. art. I, § 8, cl. 10.

FACT FINDING AND STATES IN EMERGENCY

Charles Garraway*

I. INTRODUCTION ............................................................................................................ 471
II. TYPES OF FACT-FINDING ......................................................................................... 472
III. LAW OF ARMED CONFLICT FACT-FINDING ...................................................... 473
IV. THE NATURE OF FACT-FINDING ............................................................................. 477
V. THE INTERNATIONAL HUMANITARIAN FACT-FINDING COMMISSION ....... 478
VI. CONCLUSION .............................................................................................................. 481

I. INTRODUCTION

In the first quarter of the 21st Century, fact-finding has almost become a mantra. Demand has never been higher, with calls for fact-finding in almost every conflict and alleged violation of the laws of armed conflict or of international human rights. Numerous commissions and other bodies have been established by various agencies ranging from the Secretary General of the United Nations to non-governmental organisations.¹ There has been much academic research into fact-finding and the modalities thereof with sets of guidelines and manuals issued, such as the Advanced Practitioner’s Handbook on Commissions of Inquiry—Monitoring, Reporting and Fact-Finding, issued by the Harvard Programme on Humanitarian Policy and Conflict Research.² However, fact-finding is not a homogeneous concept. What tends to be overlooked in the wider debate is that the way that fact-finding is carried out—the modalities—will be affected by the purpose of the fact-finding mission. That in turn will affect the facts that need to be found.

* Charles Garraway is a Fellow of the Human Rights Centre, University of Essex and a former Stedman Professor at the Naval War College, Rhode Island.


Additionally, unless the purpose is clear from the beginning, it is unlikely that there will be clarity in the findings. It is for that reason that the Harvard Manual lays such emphasis on "the mandate." 

In this article, I will be looking at what is fact-finding and in particular fact-finding under the law of armed conflict, a term that will be used in preference to international humanitarian law or the laws of war, terms which are also used in this context. Finally, I will look at the International Humanitarian Fact-Finding Commission and its role, both current and future.

II. TYPES OF FACT-FINDING

There are a number of different types of fact-finding. First there is the basic form, as represented in ordinary everyday life, something has gone wrong and needs to be put right. Whether it is an aircraft accident or the malfunction of a piece of equipment, we want to know what happened. Only then will further inquiries look into why it happened and what needs to be done to make sure it doesn't happen again. In Service life, such inquiries are common. Their aim is to establish a sequence of events and the facts to be collected are those which would assist in that aim. One can see this illustrated in the initial inquiry into the Downing of Malaysian airliner MH 17 over Ukraine. This inquiry simply sought to establish why the plane fell out of the sky. It did not seek to establish responsibility. Thus whilst it was important to discover whether it was an outside agency such as a missile that brought down the plane, the type of missile and the ownership of the missile were irrelevant in view of the limited nature of the inquiry.

Secondly, and at the other extreme, is what I call general fact-finding. Here, the aim is to bring to the attention of the wider public what is happening in a particular area. It is essentially a call to action by the wider international community. Whilst such an inquiry may indeed involve allegations of wrongdoing, as in the original inquiry into the former Yugoslavia, it may simply involve bringing to the world's attention a situation that does not involve any criminal activity, such as famine or the consequences of a natural disaster. Here, it may be irrelevant for the purposes of the inquiry to outline

why the matters are happening; it is the very fact that they are happening that is central to the inquiry. It is incidental that efforts are already being made to alleviate the suffering. In such inquiries, the picture is painted with a broad brush and whilst individual cases may add to the emotive appeal, it is the overall suffering that is the key element.

However, these are at the extreme ends and most fact-finding is conducted on the middle ground. Here, I would suggest there are three main types of fact-finding. The closest to "general fact-finding" is human rights fact-finding because in simple terms, it is the right allegedly violated that is the key fact. Once that violation is established, there is a burden on the State for it is the States that are the key subjects of human rights treaties to justify that violation. This of course can be done as many rights may be subject to derogation or to exceptions. However, the burden has shifted. It follows therefore that the result is the critical fact here, such as a death in custody. Once that fact has been established, the fact-finders have done their job.

At the other extreme here is criminal fact-finding. This is much more detailed and the standard of evidence required, "beyond a reasonable doubt" or its equivalent, is much higher. The result is only the start of the investigation, the inquiry must go on to discover why the result happened and then who was responsible. This is not the wider State responsibility applicable under human rights fact-finding, but a much narrower concept. In the case of war crimes, it will involve going beyond the State or organisation responsible to trace the units and individuals. With the doctrine of command responsibility, it may not be necessary to identify the individual perpetrators but it will be necessary to point the finger at a specific individual, or specific individuals, who bear responsibility and then prove that case, including rebutting possible defences, to the highest standard of proof. Facts here need to be detailed and often corroboration will be sought to strengthen the case. This requires painstaking effort and in relation to international crimes, extensive resources. These are not the sort of inquiries that can be conducted in a matter of days or even weeks. Months and even years may be required to build up a case.

III. LAW OF ARMED CONFLICT FACT-FINDING

In the middle, comes fact-finding in relation to alleged violations of the law of armed conflict. Of course, such fact-finding may involve criminal fact-finding if carried out with the intention of prosecution but usually initial fact-finding is more concerned with the establishment of violations and the possibility of State responsibility. In those cases, the nature of the inquiry is

---

Additionally, unless the purpose is clear from the beginning, it is unlikely that there will be clarity in the findings. It is for that reason that the Harvard Manual lays such emphasis on "the mandate." 3

In this article, I will be looking at what is fact-finding and in particular fact-finding under the law of armed conflict, a term that will be used in preference to international humanitarian law or the laws of war, terms which are also used in this context. Finally, I will look at the International Humanitarian Fact-Finding Commission and its role, both current and future.

II. TYPES OF FACT-FINDING

There are a number of different types of fact-finding. First there is the basic form, as represented in ordinary everyday life, something has gone wrong and needs to be put right. Whether it is an aircraft accident or the malfunction of a piece of equipment, we want to know what happened. Only then will further inquiries look into why it happened and what needs to be done to make sure it doesn't happen again. In Service life, such inquiries are common. Their aim is to establish a sequence of events and the facts to be collected are those which would assist in that aim. One can see this illustrated in the initial inquiry into the downing of Malaysian airliner MH 17 over Ukraine. 4 This inquiry simply sought to establish why the plane fell out of the sky. It did not seek to establish responsibility. Thus whilst it was important to discover whether it was an outside agency such as a missile that brought down the plane, the type of missile and the ownership of the missile were irrelevant in view of the limited nature of the inquiry.

Secondly, and at the other extreme, is what I call general fact-finding. Here, the aim is to bring to the attention of the wider public what is happening in a particular area. It is essentially a call to action by the wider international community. Whilst such an inquiry may indeed involve allegations of wrongdoing, as in the original inquiry into the Former Yugoslavia, 5 it may simply involve bringing to the world's attention a situation that does not involve any criminal activity, such as famine or the consequences of a natural disaster. 6 Here, it may be irrelevant for the purposes of the inquiry to outline


why the matters are happening; it is the very fact that they are happening that is central to the inquiry. It is incidental that efforts are already being made to alleviate the suffering. In such inquiries, the picture is painted with a broad brush and whilst individual cases may add to the emotive appeal, it is the overall suffering that is the key element.

However, these are at the extreme ends and most fact-finding is conducted on the middle ground. Here, I would suggest there are three main types of fact-finding. The closest to "general fact-finding" is human rights fact-finding because in simple terms, it is the right allegedly violated that is the key fact. Once that violation is established, there is a burden on the State for it is the States that are the key subjects of human rights treaties to justify that violation. This of course can be done as many rights may be subject to derogation or to exceptions. However, the burden has shifted. It follows therefore that the result is the critical fact here, such as a death in custody. Once that fact has been established, the fact-finders have done their job.

At the other extreme here is criminal fact-finding. This is much more detailed and the standard of evidence required, "beyond a reasonable doubt" or its equivalent, is much higher. 7 The result is only the start of the investigation, the inquiry must go on to discover why the result happened and then who was responsible. This is not the wider State responsibility applicable under human rights fact-finding, but a much narrower concept. In the case of war crimes, it will involve going beyond the State or organisation responsible to trace the units and individuals. With the doctrine of command responsibility, it may not be necessary to identify the individual perpetrators but it will be necessary to point the finger at a specific individual, or specific individuals, who bear responsibility and then prove that case, including rebutting possible defences, to the highest standard of proof. Facts here need to be detailed and often corroboration will be sought to strengthen the case. This requires painstaking effort and in relation to international crimes, extensive resources. These are not the sort of inquiries that can be conducted in a matter of days or even weeks. Months and even years may be required to build up a case.

III. LAW OF ARMED CONFLICT FACT-FINDING

In the middle, comes fact-finding in relation to alleged violations of the law of armed conflict. Of course, such fact-finding may involve criminal fact-finding if carried out with the intention of prosecution but usually initial fact-finding is more concerned with the establishment of violations and the possibility of State responsibility. In those cases, the nature of the inquiry is

more akin to human rights fact-finding. However, there are substantial differences which are not always appreciated.

The law of armed conflict is traditionally divided into two parts, “Hague law” dealing with the conduct of hostilities, and “Geneva law” dealing with the protection of victims.8 Hague law was always essentially a State-led process and historically goes back millennia.9 Before the Westernphil system, people developed rules on the conduct of hostilities, largely out of self-interest. These were sometimes incorporated in bilateral agreements between belligerents but more often remained unwritten, known as “the laws and customs of war.” Being a State-led process, governed by self-interest, military necessity held sway though that was tempered by humanity. For example, the St. Petersburg Declaration of 186810 banning the use of explosive projectiles under 400 grammes in weight arose from a conference called by Russia because an anti-personnel version of a bullet designed to blow up ammunition wagons had been developed and Russia did not want it to be generally available as it was not in the interests of the Imperial Russian Army.11 The key treaties in this part of the law came from the Hague Peace Conferences of 1899 and 1907, in particular Hague Convention IV of 1907 with its attached Regulations Respecting the Laws and Customs of War on Land.12

“Geneva law” on the other hand had a different genesis. Although there had always been rules protecting victims of war, again governed by State interest, the establishment of what later became the International Committee of the Red Cross, and the first Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 186413, set the law on a new path. Here, the concern was humanity, tempered by military necessity. The four Geneva Conventions of 194914 epitomise this trend. As stated by Peter Maurer, President of the International Committee of the Red Cross in a speech at the United Nations on 30 September 2015, “Humanity is the first and most important principle of the Red Cross and Red Crescent Movement.”15 It follows that Hague law and Geneva law have different philosophical foundations.

Although it is often argued that these two branches of the law of armed conflict merged in the 1977 Additional Protocols to the 1949 Geneva Conventions,16 the philosophical differences remain. Whilst it is correct that Additional Protocol I that dealt with international armed conflict, conflicts between States, contained much Hague law, those provisions still need to be looked at primarily through the eyes of the State, not the victim. For example, the principle of proportionality, a term that is in fact never used in the Protocol, is described in Article 51(5)(b) as: “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”17

The key words here are “expected” and “anticipated.” It is the intention of the attacker that is important. This much more reflects the balance between military necessity and humanity which has underlined the law of armed conflict, certainly for the last 150 years.18 But how does this affect fact-finding? Whereas under human rights fact-finding, it is the result that is the most significant fact and much of the subsequent findings will flow from that, this is not necessarily so under the law of armed conflict. In cases involving Geneva law, there is a similarity to human rights fact-finding in that the result will certainly be important, if not necessarily pivotal. Thus, if a prisoner of war is dead, there is a burden on the detaining power to explain that death.

However, “Hague law” remains different. As the emphasis is on the intention of the attacker, the result may not be so crucial and indeed, may be positively misleading. An example is the attack by the United States led Coalition in 1991 on the Al-Firdus bunker in Baghdad in the 1990/1991
more akin to human rights fact-finding. However, there are substantial differences which are not always appreciated.

The law of armed conflict is traditionally divided into two parts, "Hague law" dealing with the conduct of hostilities, and "Geneva law" dealing with the protection of victims. Hague law was always essentially a State-led process and historically goes back millennia. Before the Westphalian system, people developed rules on the conduct of hostilities, largely out of self-interest. These were sometimes incorporated in bilateral agreements between belligerents but more often remained unwritten, known as "the laws and customs of war." Being a State-led process, governed by self-interest, military necessity held sway though that was tempered by humanity. For example, the St. Petersburg Declaration of 1864 banning the use of explosive projectiles under 400 grammes in weight arose from a conference called by Russia because an anti-personnel version of a bullet designed to blow up ammunition wagons had been developed and Russia did not want it to be generally available as it was not in the interests of the Imperial Russian Army. The key treaties in this part of the law came from the Hague Peace Conferences of 1899 and 1907, in particular Hague Convention IV of 1907 with its attached Regulations Respecting the Laws and Customs of War on Land.

"Geneva law" on the other hand had a different genesis. Although there had always been rules protecting victims of war, again governed by State interest, the establishment of what later became the International Committee of the Red Cross, and the first Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 1864, set the law on a new path. Here, the concern was humanity, tempered by military necessity. The four Geneva Conventions of 1949 epitomise this trend. As stated by Peter Maurer, President of the International Committee of the Red Cross in a speech at the United Nations on 30 September 2015, "Humanity is the first and most important principle of the Red Cross and Red Crescent Movement." It follows that Hague law and Geneva law have different philosophical foundations.

Although it is often argued that these two branches of the law of armed conflict merged in the 1977 Additional Protocols to the 1949 Geneva Conventions, the philosophical differences remain. Whilst it is correct that Additional Protocol I that dealt with international armed conflict, conflicts between States, contained much Hague law, those provisions still need to be looked at primarily through the eyes of the State, not the victim. For example, the principle of proportionality, a term that is in fact never used in the Protocol, is described in Article 51(5)(b): as "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

The key words here are "expected" and "anticipated." It is the intention of the attacker that is important. Much more reflects the balance between military necessity and humanity which has underlined the law of armed conflict, certainly for the last 150 years. But how does this affect fact-finding? Whereas under human rights fact-finding, it is the result that is the most significant fact and much of the subsequent findings will flow from that, this is not necessarily so under the law of armed conflict. In cases involving Geneva law, there is a similarity to human rights fact-finding in that the result will certainly be important, if not necessarily pivotal. Thus, if a prisoner of war is dead, there is a burden on the detaining power to explain that death.

However, "Hague law" remains different. As the emphasis is on the intention of the attacker, the result may not be so crucial and indeed, may be positively misleading. An example is the attack by the United States-led Coalition in 1991 on the Al-Firdus bunker in Baghdad in 1990/1991.
Persian Gulf War. Here, a target identified by intelligence as an Iraqi command and control centre was attacked. However, it turned out that it was also being used as an air raid shelter and in excess of 200 civilian casualties were the result. The issue here was not the fact of the civilian deaths—that was admitted on all sides—but whether the United States knew or should have known of their presence. Conflicting accounts can be found in the Human Rights Watch Report, “Needless Deaths in the Gulf War: Civilian Casualties During the Air Campaign and Violations of the Laws of War,” and in the official United States Final Report to Congress, Conduct of the Persian Gulf War. Under a human rights approach, once the result has been established, the burden shifts to the State to justify that result. This is not so under a law of armed conflict approach.

It follows that fact-finding into a single incident will differ according to the mandate of the fact-finders. In a fact-finding mission, in which I was involved, it was discovered that a civilian factory had been attacked and severely damaged. Different fact-finders would have been interested in different facts. If the purpose of the mission was simply to draw attention to the damage being done to the local economy and the consequent impoverishment of the population, then the only facts required would be the damage itself. The reasons for that damage, and whether the damage was legitimate or not, would be totally irrelevant. On the other hand, a human rights fact-finding mission would need to go further. There would be a need to show not only the damage and its effects on the human rights of the local population but also who was responsible for the damage. Once responsibility had been established and if it could be imputed to a State, assuming jurisdictional issues are satisfied, the burden shifts to the State. On the other hand, law of armed conflict fact-finding has to go further still. The test here would be what was the expected “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof” to be set against the “concrete and direct military advantage anticipated.”

It was noted that the attacks had taken place at night, when the work force was absent. This indicated that care had been taken to minimise civilian casualties. Furthermore, the attacker had used precision guided munitions to attack specific areas of the factory. As such munitions are expensive—and were in short supply—this indicated that for the attacker, this was a high value target. It followed that the indications were that the balance was satisfied though it could not be established conclusively without having access to the intelligence on which the attacker relied. New and different facts now entered into the equation.

Obviously, had this been a criminal investigation and it had appeared that the balance had not been met, further facts would have been required. Who carried out the attack and who gave the orders? What knowledge did they have as individuals?

It can thus be seen that fact-finding depends on the mandate. Without a clear mandate outlining the purpose of the mission, it will be near impossible to identify the relevant facts required to be found.

IV. THE NATURE OF FACT-FINDING

Apart from the purpose of fact-finding, there is also an issue over the nature of fact-finding. Since the end of the Cold War and the inexcusable rise of international criminal justice, there has been an emphasis on accountability as one of the key aspects of fact-finding. It follows from this that fact-finding must be, for the most part, public. Most current fact-finding reports are in the public domain—and indeed in the case of “general fact-finding” where the intention is to increase public awareness that is a sine qua non. However, there is a tension here in respect of criminal accountability. It has become the practice for individuals not to be named. Often their identities are held in sealed documents which are then handed over to relevant authorities.

However, it was not always this way. Fact-finding for most of the twentieth century was an essential part of confidence building. An early example came with the Dogger Bank incident on the night of 21/22 October 1904, when the Russian Baltic Fleet mistook some British sailors in the

20. Id.
24. Id.
Persian Gulf War. Here, a target identified by intelligence as an Iraqi command and control centre was attacked. However, it turned out that it was also being used as an air raid shelter and in excess of 200 civilian casualties were the result. The issue here was not the fact of the civilian deaths—that was admitted on all sides—but whether the United States knew or should have known of their presence. Conflicting accounts can be found in the Human Rights Watch Report, 'Needless Deaths in the Gulf War: Civilian Casualties During the Air Campaign and Violations of the Laws of War,' and in the official United States Final Report to Congress, Conduct of the Persian Gulf War. Under a human rights approach, once the result has been established, the burden shifts to the State to justify that result. This is not so under a law of armed conflict approach.

It follows that fact-finding into a single incident will differ according to the mandate of the fact-finders. In a fact-finding mission, in which I was involved, it was discovered that a civilian factory had been attacked and severely damaged. Different fact-finders would have been interested in different facts. If the purpose of the mission was simply to draw attention to the damage being done to the local economy and the consequent impoverishment of the population, then the only facts required would be the damage itself. The reasons for that damage, and whether the damage was legitimate or not, would be totally irrelevant. On the other hand, a human rights fact-finding mission would need to go further. There would be a need to show not only the damage and its effects on the human rights of the local population but also who was responsible for the damage. Once responsibility had been established and if it could be imputed to a State, assuming jurisdictional issues are satisfied, the burden shifts to the State. On the other hand, law of armed conflict fact-finding has to go further still. The test here would be whether the so-called "incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof" to be set against the "concrete and direct military advantage anticipated."

It was noted that the attacks had taken place at night, when the work force was absent. This indicated that care had been taken to minimise civilian casualties. Furthermore, the attacker had used precision guided munitions to attack specific areas of the factory. As such munitions are expensive—and were in short supply—this indicated that for the attacker, this was a high value target. It followed that the indications were that the balance was satisfied though it could not be established conclusively without having access to the intelligence on which the attacker relied. New and different facts now entered into the equation.

Obviously, had this been a criminal investigation and it had appeared that the balance had not been met, further facts would have been required. Who carried out the attack and who gave the orders? What knowledge did they have as individuals?

It can thus be seen that fact-finding depends on the mandate. Without a clear mandate outlining the nature of the mission, it will be near impossible to identify the relevant facts required to be found.

IV. THE NATURE OF FACT-FINDING

Apart from the purpose of fact-finding, there is also an issue over the nature of fact-finding. Since the end of the Cold War and the inexorable rise of international criminal justice, there has been an emphasis on accountability as one of the key aspects of fact-finding. It follows from this that fact-finding must be, for the most part, public. Most current fact-finding reports are in the public domain—and indeed in the case of "general fact-finding" where the intention is to increase public awareness that is a sine qua non. However, there is a tension here in respect of criminal accountability. It has become the practice for individuals not to be named. Often their identities are held in sealed documents which are then handed over to relevant authorities.

However, it was not always this way. Fact-finding for most of the twentieth century was an essential part of confidence building. An early example came with the Dogger Bank incident on the night of 21/22 October 1904, when the Russian Baltic Fleet mistook some British trawlers in the

20. Id.
24. Id.
Dogger Bank area of the North Sea (just off the coast of the United Kingdom) for an Imperial Japanese Navy force and fired on them. Here, the Parties used a Commission of Inquiry established under the 1899 Hague Convention for the Pacific Settlement of International Disputes. This was suggested by France in order to prevent a serious rift between London and St. Petersburg which could undermine the Entente Cordiale. Further examples of such inquiries can be found in the early part of the twentieth century though the practice died out somewhat during the stormy war years in the middle of the twentieth century. Fact-finding as a confidence building measure was used in South America under the so-called Bryan Treaties (named after the then Secretary of State William Jennings Bryan) based on the 1907 Hague Convention for the Pacific Settlement of International Disputes. These can be found as late as the 1990s.

V. THE INTERNATIONAL HUMANITARIAN FACT-FINDING COMMISSION

Where does the International Humanitarian Fact-Finding Commission ("IHFFC") fit in? The IHFFC is a treaty body established under Article 90 of Additional Protocol I to the 1949 Geneva Conventions as a permanent independent fact-finding mechanism. The Commission's mandate is to: "(i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol; (ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol;"

The Commission consists of fifteen "members of high moral standing and acknowledged impartiality." States that have signed up to the Commission, of whom there are currently seventy-six, may each nominate one candidate and elections are then carried out. The Commissioners are elected for a five-year period but they are free to stand again for further terms. The last elections were in December, 2011.

Unfortunately, the Commission has never been used. Why is it that in an age where fact-finding is in great demand, States seem to prefer to rely on ad hoc inquiries rather than on a permanent body? The answer may rest in the history of Article 90 itself.

A fact-finding element was included within the Geneva Conventions themselves. An inquiry would be established "in a manner to be decided between the interested parties." The purpose was to act as a conflict-resolution mechanism and it was not agreed without considerable discussion. States, as always, were reluctant to agree to anything that might be seen to limit their own sovereignty. This procedure had never been used and so in 1977, it was decided to try to expand the provision. However, it was still controversial. As a result, Article 90 is one of the longest Articles in the Protocol.

It is important to remember the context in which Article 90 was drafted. During 1977, the Cold War was still ongoing and accountability was not a focus of attention. The intention was to provide a mechanism which would assist States to "respect and ensure respect" for the law of armed conflict. As a result, the system is essentially voluntary and confidential, though there is a degree of mandatory jurisdiction between States that have accepted the

34. See LAWS OF WAR, supra note 10, at 473 (citing Protocol I, at art. 90).
35. Id. at 474 (citing Protocol I, at art. 90(2)(c)(i)-(ii)).
36. Id. at 473 (citing Protocol I, at art. 90(1)(b)).
37. Id. at 473 (citing Protocol I, at art. 90(1)(b)).
38. Id.
40. See LAWS OF WAR, supra note 10, at 197, 222, 244, 301 (citing Common Article 1 in 1949 Geneva Conventions I, II, III, and IV).
Dogger Bank area of the North Sea (just off the coast of the United Kingdom) for an Imperial Japanese Navy force and fired on them.27 Here, the Parties used a Commission of Inquiry,28 established under the 1899 Hague Convention for the Pacific Settlement of International Disputes.29 This was suggested by France in order to prevent a serious rift between London and St. Petersburg which could undermine the Entente Cordiale.30 Further examples of such inquiries can be found in the early part of the twentieth century though the practice died out somewhat during the stormy war years in the middle of the twentieth century. Fact-finding as a confidence building measure was used in South America under the so-called Bryan Treaties (named after the then Secretary of State William Jennings Bryan) based on the 1907 Hague Convention for the Pacific Settlement of International Disputes.31 These can be found as late as the 1990s.32

V. THE INTERNATIONAL HUMANITARIAN FACT-FINDING COMMISSION

Where does the International Humanitarian Fact-Finding Commission ("IHFFC") fit in? The IHFFC is a treaty body established under Article 90 of Additional Protocol I to the 1949 Geneva Conventions34 as a permanent independent fact-finding mechanism. The Commission’s mandate is to: "(i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol; (ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol."35

The Commission consists of fifteen "members of high moral standing and acknowledged impartiality."36 States that have signed up to the Commission, of whom there are currently seventy-six, may each nominate one candidate and elections are then carried out.37 The Commissioners are elected for a five-year period but they are free to stand again for further terms.38 The last elections were in December, 2011. Unfortunately, the Commission has never been used. Why is it that in an age where fact-finding is in great demand, States seem to prefer to rely on ad hoc inquiries rather than on a permanent body? The answer may rest in the history of Article 90 itself.

A fact-finding element was included within the Geneva Conventions themselves.39 An inquiry would be established "in a manner to be decided between the interested parties." The purpose was to act as a conflict-resolution mechanism and it was not agreed without considerable discussion. States, as always, were reluctant to agree to anything that might be seen to limit their own sovereignty. This procedure had never been used and so in 1977, it was decided to try to expand the provision. However, it was still controversial. As a result, Article 90 is one of the longest Articles in the Protocol.

It is important to remember the context in which Article 90 was drafted. During 1977, the Cold War was still ongoing and accountability was not a focus of attention. The intention was to provide a mechanism which would assist States to "respect and ensure respect"40 for the law of armed conflict. As a result, the system is essentially voluntary and confidential, though there is a degree of mandatory jurisdiction between States that have accepted the

---

34. See LAWS OF WAR, supra note 10, at 473 (citing Protocol I, at art. 90).
35. Id. at 474 (citing Protocol I, at art. 90(2)(c)(i)–(ii)).
36. Id. at 473 (citing Protocol I, at art. 90(1)(ii)).
37. Id. (citing Protocol I, at art. 90(3)(b)).
38. Id.
40. See LAWS OF WAR, supra note 10, at 197, 222, 244, 301 (citing Common Article 1 in 1949 Geneva Conventions I, II, III, and IV).
competence of the Commission. Reports are made to the Parties to the conflict and may only be published with the agreement of those Parties. Article 90 is drafted primarily for use in international armed conflicts and though the Commission has indicated its willingness to assist in non-international armed conflicts, the provisions of the Article are ill suited to such intervention and there would need to be a degree of flexibility shown. This can be done by using “good offices” rather than the formal investigation provisions.

But is there still a place for such a body? I believe that there is. First, the Commission provides a wealth of expertise, particularly in the law of armed conflict. Most inquiries today are carried out by human rights bodies and, even when they seek to investigate violations of the law of armed conflict, they tend to approach the issue from a human rights perspective. The advantage of the IHFFC is that it has the expertise in the law of armed conflict that is sometimes lacking in human rights focused inquiries. However, the world is not cast in two dimensions only. Most armed conflicts today, certainly those of a non-international nature, begin below the armed conflict threshold as internal disturbances and tensions, thus outside the framework of the law of armed conflict. This is certainly true of Syria, where, when the Human Rights Council Inquiry was established, human rights alone were the normative international legal framework. Only later did matters progress to a full armed conflict—or armed conflicts. There is a need therefore for greater collaboration between the two legal communities. Members of the IHFFC could be added to inquiries established by human rights bodies to provide the necessary expertise in the law of armed conflict.

But there are also specific situations where a confidential and independent inquiry mechanism could assist States in carrying out their duty to “respect and ensure respect” for the law of armed conflict. An example might be a border incident between two States where both countries do not wish to escalate matters but there are allegations made that war crimes have been committed by one or other (or both) sides. An independent inquiry reporting confidentially to both States could be seen as a de-escalating factor. It would enable either (or both) State(s) to take appropriate action within their national legal system without escalating the matter to the international stage.

Similarly, mistakes happen in war. Not every attack that goes wrong is necessarily a war crime. The Al-Firdus bunker illustrates the difficulties there. The days when a State could investigate itself and satisfy civil

41. See LAWS OF WAR, supra note 10, at 475 (citing Protocol I, at art. 90(5)(c)).


43. See HUMAN RIGHTS, supra note 21; see also Final Report, supra note 24.


45. Who coined the phrase, “The First Casualty of War is Truth?”, GUARDIAN.CO.UK, http://www.theguardian.com/newsandqueries/query/0,5753,-21510,00.html (last visited Feb. 20, 2016). society have gone. There is a growing need for reassurance. An independent and impartial inquiry by an international body might help here. Whilst it might seem that confidentiality would be a problem in so far as civil society is concerned, the confidentiality belongs to the Parties—not to the Commission. It follows therefore that there would be nothing to prevent the Parties, by agreement, producing an agreed summary of the report, amended to remove sensitive classified information. It would be necessary though for the Commission to also agree to ensure that the abridged report accurately reflected the findings. It is worthy of note that the request by Médicins Sans Frontieres for the IHFFC to be called in to examine the attack on the hospital at Kunduz in October 2015 must have been in full knowledge that, as the IHFFC reports to States, they themselves would not receive the report.

VI. CONCLUSION

It has been said that truth is the first casualty in war. But this also applies before the level of war is reached. In States undergoing any form of emergency, there is usually a battle to control the levers of power and one of the key levers is information. All sides want to control the narrative. Fact-finding is a powerful tool to prevent such control. That is why it is so often resisted and distorted. Facts may not fit the narrative. But for the fact-finding community itself, it is essential not only to ensure that the modalities are right but also that the foundations are in place for any particular initiative. That means that the purpose of the fact-finding mission is clearly identified, including its legal framework. This will ensure that the mission can focus on the key facts and not be forced into a scatter-gun approach. There is no hierarchy in fact-finding but it is important that the long-term aim is identified as this will affect matters like confidentiality of reports. Not all fact-finding is necessarily for accountability purposes but all fact-finding should lead to accountability in the sense that it prepares the ground for national—or international—action to restore peace and security. All wars—and even emergencies—end. Winning the peace is often the hardest part and that will depend in large part upon the narrative that wins through. Fact-finding can contribute to the correct narrative and thus contribute to winning the peace. It will be a long haul but it is worthwhile.
competence of the Commission. Reports are made to the Parties to the conflict and may only be published with the agreement of those Parties. Article 90 is drafted primarily for use in international armed conflicts and though the Commission has indicated its willingness to assist in noninternational armed conflicts, the provisions of the Article are ill suited to such intervention and would need to be a degree of flexibility shown. This can be done by using "good offices" rather than the formal investigation provisions.

But is there still a place for such a body? I believe that there is. First, the Commission provides a wealth of expertise, particularly in the law of armed conflict. Most inquiries today are carried out by human rights bodies and, even when they seek to investigate violations of the law of armed conflict, they tend to approach the issue from a human rights perspective. The advantage of the IHFFC is that it has the expertise in the law of armed conflict that is sometimes lacking in human rights focused inquiries. However, the world is not cast in two dimensions only. Most armed conflicts today, certainly those of a non-international nature, begin below the armed conflict threshold as internal disturbances and tensions, thus outside the framework of the law of armed conflict. This is certainly true of Syria, where, when the Human Rights Council Inquiry was established, human rights alone were the normative international legal framework. Only later did matters progress to a full armed conflict—armed conflicts. There is a need therefore for greater collaboration between the two legal communities. Members of the IHFFC could be added to inquiries established by human rights bodies to provide the necessary expertise in the law of armed conflict.

But there are also specific situations where a confidential and independent inquiry mechanism could assist States in carrying out their duty to "respect and ensure respect" for the law of armed conflict. An example might be a border incident between two States where both countries do not wish to escalate matters but there are allegations made that war crimes have been committed by one or other (or both) sides. An independent inquiry reporting confidentially to both States could be seen as a de-escalating factor. It would enable either (or both) State(s) to take appropriate action within their national legal system without escalating the matter to the international stage.

Similarly, mistakes happen in war. Not every attack that goes wrong is necessarily a war crime. The Al-Firdus bunker illustrates the difficulties there. The days when a State could investigate itself and satisfy civil society have gone. There is a growing need for reassurance. An independent and impartial inquiry by an international body might help here. Whilst it might seem that confidentiality would be a problem in so far as civil society is concerned, the confidentiality belongs to the Parties—not to the Commission. It follows therefore that there would be nothing to prevent the Parties, by agreement, producing an agreed summary of the report, amended to remove sensitive classified information. It would be necessary though for the Commission to also agree to ensure that the abridged report accurately reflected the findings. It is worthy of note that the request by Médecins Sans Frontieres for the IHFFC to be called in to examine the attack on the hospital at Kunduz in October 2015 must have been in full knowledge that, as the IHFFC reports to States, they themselves would not receive the report.

VI. CONCLUSION

It has been said that truth is the first casualty in war. But this also applies before the level of war is reached. In States undergoing any form of emergency, there is usually a battle to control the levers of power and one of the key levers is information. All sides want to control the narrative. Fact-finding is a powerful tool to prevent such control. That is why it is so often resisted and distorted. Facts may not fit the narrative. But for the fact-finding community itself, it is essential not only to ensure that the modalities are right but also that the foundations are in place for any particular initiative. That means that the purpose of the relevant fact-finding mission is clearly identified, including its legal framework. This will ensure that the mission can focus on the key facts and not be forced into a scatter-gun approach. There is no hierarchy in fact-finding but it is important that the long-term aim is identified as this will affect matters like confidentiality of reports. Not all fact-finding is necessarily for accountability purposes but all fact-finding should lead to accountability in the sense that it prepares the ground for national—or international—action to restore peace and security. All wars—ever emergencies—end. Winning the peace is often the hardest part and that will depend in large part upon the narrative that wins through. Fact-finding can contribute to the correct narrative and thus contribute to winning the peace. It will be a long haul but it is worthwhile.

41. See LAWS OF WAR, supra note 10, at 475 (citing Protocol I, at art. 90(5)(c)).
42. Human Rights Council Res. S-16/1, A/HRC/RES/S-16/1 (Apr. 29, 2011), http://www.securitycouncilreport.org/atf/cf%7eS%3BF%9B%60%2D%2D%3A9E%-8CD3- C56E%2F96F%F%67D%5%2D%2DAHC%20RES%20S-16%201%201.pdf
43. See HUMAN RIGHTS, supra note 21; see also Final Report, supra note 24.
SECURING CHILD RIGHTS IN TIME OF CONFLICT

Diane Marie Amann

It is an honor to serve on this panel alongside representatives from two pillars of child protection, the Office of Children's Issues at the United States Department of State and the Office of the Special Representative of the United Nations Secretary-General for Children and Armed Conflict. Since its establishment in the wake of the landmark 1996 United States report on armed conflict and children, the United Nations office has worked tirelessly to demobilize children in militias, to include children's issues in peace negotiations, and also to raise awareness through means such as its ongoing "Children Not Soldiers/Enfants Pas Soldats" social media campaign. The State Department office, meanwhile, spearheads efforts to enforce adherence, within and without the United States, to two Hague treaties relating to cross-border abduction and adoption of children.

My role on this panel derives from my own legal research regarding children affected by war. I plan not only to identify a bridge between the

--


activities of the United Nations and the State Department offices, but also to situate my own research within that linkage. I will explore my precise topic, “Securing Child Rights in Time of Conflict,” by examining every element of that title: “securing,” “child,” “right,” “in time of,” and “conflict.”4 At first blush all these elements seem simple to grasp; however, each provides much food for thought.9

Let us begin with the last word, “conflict.” Not unlike this panel’s theme—“conflict resolution”—the word is at once narrow and broad. To the extent it refers to “armed conflict,” it is relatively narrow, given that legal doctrine ascribes precise meaning to that term.5 Yet even within international legal regimes, the term may be used more broadly, to reflect severe and sustained violence that falls short of armed conflict, yet has been deemed to warrant at least a modicum of international intervention. The International Criminal Court thus enjoys jurisdiction over enumerated crimes when committed in armed conflict—that is, war crimes—and also “when committed as part of a widespread or systematic attack directed against any civilian population”—that is, crimes against humanity.6 To similar effect, the Special Representative for Children and Armed Conflict routinely reports on events occurring in places like Yemen and Somalia in the context of “extreme violence,” a term that tends to describe situations that, although they cause great concern, may not satisfy legal definitions of “armed conflict.”7

This attention to incidents of extreme violence has merit. Johan Galtung, a Norwegian sociologist, has urged action against “structural violence” as well as “direct violence.”8 The latter is analogous to what the law calls “armed conflict,” while the former refers to institutions and incidents involving exploitation. Exploitation “may lead to direct violence” and, as Galtung wrote, “is violence in itself.”9 The State Department office concentrates on this sort of structural violence; that is, instances in which a child is at risk because she has been taken abroad by a noncustodial parent, or because she is the subject of an insufficiently regulated transnational adoption. In comparison, the extreme violence of concern to the United Nations office falls on a spectrum between Galtung’s structural violence and direct violence. Often it draws close to the latter—but not always, and thus the conceptualization of “extreme violence” opens a lacuna in settled law aimed at protecting children and others who may become victims of armed conflict. One effort to bridge this gap is the United States’ Atrocities Prevention Board, which President Barack Obama established in 2011 in order to identify the structures of violence that may sow the seeds of a full-blown armed conflict.10

Taking these considerations into account, we must ask whether there is something that we can call not-conflict; that is, “peace.” Is there a peace-time? War and peace frequently are discussed as if they are two separate things. Yet the concepts lose their definition upon a mapping of the world as it is, a patchwork of overt and direct conflicts interspersed with suppressed conflicts, halted conflicts, or conflicts-in-making.11 In recognition of this fluidity, a team of Europe-based social scientists wrote in a 2011 report:

The ‘post-conflict’ situation is not as easy to define as it sounds. In big international wars, a formal surrender, a negotiated cessation of hostilities, and/or peace talks followed by a peace treaty mark possible ‘ends’ to conflicts. But in the sort of intra-state wars that we are chiefly concerned with it is not so simple. Hostilities do not normally end abruptly, after which there is complete peace. There may be an agreed ‘peace’ but fighting often continues at a low level or sporadically, and frequently resumes after a short period.11

In short, there is no easy answer to the question of what is a conflict, let alone which conflicts merit international scrutiny with respect to the treatment of children.

---

5. See e.g., Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. For the Former Yugoslavia Nov. 2, 1995) (stating that “armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”), http://www.icc-cpi.int/nocase/150202.htm.
9. Id. at 154.
activities of the United Nations and the State Department offices, but also to situate my own research within that linkage. I will explore my precise topic, “Securing Child Rights in Time of Conflict,” by examining every element of that title: “securing,” “child,” “right,” “in time of,” and “conflict.” At first blush all these elements seem simple to grasp; however, each provides much food for thought.4

Let us begin with the last word, “conflict.” Not unlike this panel’s theme—“conflict resolution”—the word is at once narrow and broad. To the extent it refers to “armed conflict,” it is relatively narrow, given that legal doctrine ascribes precise meaning to that term.5 Yet even within international legal regimes, the term may be used more broadly, to reflect severe and sustained violence that falls short of armed conflict, yet has been deemed to warrant at least a modicum of international intervention. The International Criminal Court thus enjoys jurisdiction over enumerated crimes when committed in armed conflict—that is, war crimes—and also “when committed as part of a widespread or systematic attack directed against any civilian population”—that is, crimes against humanity.6 To similar effect, the Special Representative for Children and Armed Conflict routinely reports on events occurring in places like Yemen and Somalia in the context of “extreme violence,” a term that tends to describe situations that, although they cause great concern, may not satisfy legal definitions of “armed conflict.”7

This attention to incidents of extreme violence has merit. Johan Galtung, a Norwegian sociologist, has urged action against “structural violence” as well as “direct violence.”8 The latter is analogous to what the law calls “armed conflict,” while the former refers to institutions and incidents involving exploitation. Exploitation “may lead to direct violence” and, as Galtung wrote, “is violence in itself.”9 The State Department office concentrates on this sort of structural violence; that is, instances in which a child is at risk because she has been taken abroad by a noncustodial parent, or because she is the subject of an insufficiently regulated transnational adoption. In comparison, the extreme violence of concern to the United Nations office falls on a spectrum between Galtung’s structural violence and direct violence. Often it draws close to the latter—but not always, and thus the conceptualization of “extreme violence” opens a lacuna in settled law aimed at protecting children and others who may become victims of armed conflict. One effort to bridge this gap is the United States’ Atrocities Prevention Board, which President Barack Obama established in 2011 in order to identify the structures of violence that may sow the seeds of a full-blown armed conflict.10

Taking these considerations into account, we must ask whether there is something that we can call not-conflict; that is, “peace.” Is there a peacetime? War and peace frequently are discussed as if they are two separate things. Yet the concepts lose their definition upon a mapping of the world as it is, a patchwork of overt and direct conflicts interspersed with suppressed conflicts, halted conflicts, or conflicts-in-making. In recognition of this fluidity, a team of Europe-based social scientists wrote in a 2011 report:

The ‘post-conflict’ situation is not as easy to define as it sounds. In big international wars, a formal surrender, a negotiated cessation of hostilities, and/or peace talks followed by a peace treaty mark possible ‘ends’ to conflicts. But in the sort of intra-state wars that we are chiefly concerned with it is not so simple. Hostilities do not normally end abruptly, after which there is complete peace. There may be an agreed ‘peace’ but fighting often continues at a low level or sporadically, and frequently resumes after a short period.11

In short, there is no easy answer to the question of what is a conflict, let alone which conflicts merit international scrutiny with respect to the treatment of children.


5. See, e.g., Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, § 70 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2 1993) (stating that “armed conflict exists whenever there is a resort to armed force between States or protected armed violence between governmental authorities and organized armed groups or between such groups within a State”); http://www.icj.org/s/cases/tadic/doc/en/51002.htm.


9. Id. at 154.


This discussion points to our penultimate term, "in time of." Can we distinguish a "time of conflict" from other time? Common discourse draws that distinction with an air of certainty, but critical literature is more circumspect. As one example, the 2012 monograph War Time in effect labeled all of our lifetimes—indeed, those of our parents and grandparents—as a continuous time of war. Its author, legal historian Mary Dudziak, used as an empirical marker those events for which United States armed forces awarded medals to service members. These included high-intensity conflicts like the Civil War and the two World Wars, of course, but also incidents like the three-and-a-half-month Nicaraguan Campaign of 1912 and the twenty-nine-day intervention in Grenada in 1983. In Dudziak's view such events—often given names like "action," "operation," "mission," or "expedition," rather than "conflict,"—engender levels of violence sufficient to negate claims to a time of peace. Another example is a three-part series of posts that Judge Patricia Wald published at IntLawGrrls in 2009, eight years after her retirement from the International Criminal Tribunal for the former Yugoslavia. In it she asked what women wanted from international legal institutions, then answered: "I believe women want international law and tribunals to make a difference in their daily lives." Wald elaborated:

Even if tribunals do their work well, so that women's wrongs are recognized as serious war crimes, crimes against humanity, and tools of genocide—even if enough women can infuse their own sensitivities into the process—even if tribunals achievements are truly accessible to ordinary women—will all that really help women in states where old ways survive? In states where women are treated, in peacetime as well as in wartime, as property, and their sexual and physical integrity impugned at will?  

"No," the post replied. Effectively rejecting the wartime/peacetime binary that undergirds both international humanitarian law and international criminal law, Wald argued that these bodies of law ought to protect women in peace as well as in war.  

---

13. See id. at 138–54.
14. Id. at 135–53.
17. Id.
18. Id.
22. Hague Abduction Convention, supra note 3, at art. 4.
This discussion points to our penultimate term, "in time of." Can we distinguish a "time of conflict" from other time? Common discourse draws that distinction with an air of certainty, but critical literature is more circumspect. As one example, the 2012 monograph War Time in effect labeled all of our lifetimes—indeed, those of our parents and grandparents—as a continuous time of war. Its author, legal historian Mary Dudziak, used as an empirical marker those events for which United States armed forces awarded medals to service members. These included high-intensity conflicts like the Civil War and the two World Wars, of course, but also incidents like the three-and-a-half-month Nicaraguan Campaign of 1912 and the twenty-nine-day intervention in Grenada in 1983. In Dudziak’s view such events—often given names like “action,” “operation,” “mission,” or “expedition,” rather than “conflict”—engender levels of violence sufficient to negate claims to a time of peace. Another example is a three-part series of posts that Judge Patricia Wald published at IntLawGrrls in 2009, eight years after her retirement from the International Criminal Tribunal for the former Yugoslavia. In it she asked what women wanted from international legal institutions, then answered: “I believe women want international law and tribunals to make a difference in their daily lives.” Even if tribunals do their work well, so that women’s wrongs are recognized as serious war crimes, crimes against humanity, and tools of genocide—even if enough women can infuse their own sensitivities into the process—even if tribunals achieve/are truly accessible to ordinary women—will all that really help women in states where old ways still survive? In states where women are treated, in peacetime as well as in wartime, as property, and their sexual and physical integrity impugned at will? 

“No,” the post replied. Effectively rejecting the wartime/peacetime binary that undergirds both international humanitarian law and international criminal law, Wald argued that these bodies of law ought to protect women in peace as well as in war.

13. See id. at 138–54.
14. Id. at 135–53.
17. Id.
18. Id.

We turn next to the human subject of this essay’s title: “child.” Again, initially this is a word that invites immediate understanding, yet any number of questions may be asked of it. Who is a child? What is a child? When—how old—is a child? How adult is a child? Everyone knows some child who is sometimes quite precocious, who sounds quite old and wise. Most of us also probably know some thirty-somethings who often sound quite juvenile, and seem unlikely ever to reach adulthood.

Notwithstanding these developmental vagaries, laws often determine childhood exclusively by reference to chronological age. Such legal line-drawing itself may give rise to discrepancies. This is evident with respect to child soldiering, a crime against children with which the United Nations office is especially concerned. In treaties like the 1977 Additional Protocols to the Geneva Conventions children are protected against recruitment only until they reach their fifteenth birthday, while more recent treaties raise the level of protection to eighteen. A child living amid conflict whose age lies in between those milestones subsists in a legal gray area—assuming, of course, that records exist to pinpoint the day on which he or she was born. Often, in conflict zones, they do not. The dilemma persists elsewhere in international law, too. The Convention on the Rights of the Child generally applies to all persons who have not yet reached their eighteenth birthday, but the Hague treaty intended to protect children against kidnapping by noncustodial parents “shall cease to apply when the child attains the age of 16 years.”

Where is the child? This question may seem out of place, but only if one ignores the degree to which geography determines which legal frameworks are applicable. Reference to “the global child”—the term of art that informs my current scholarship—may conjure images of children elsewhere, in other places, often in great distress. Yet in fact, the American boy or girl at ease and chewing bubblegum is a participant in global society no less than a child soldier at the frontlines in Colombia or a newborn at a refugee camp in Jordan. The same may be said of a homeless teen in Detroit, on the one hand, and a toddler prince in England, on the other. All young

21. Convention on the Rights of the Child, art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Child Rights Convention], http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx. The convention does allow exceptions, specifying: “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”
22. Hague Abduction Convention, supra note 3, at art. 4.
people share the experience of growth, and also a unique duality based in part on the inherent vulnerability of the young.

Yet even as many in global society assert the child’s virtue and vulnerability, others assert the culpability of certain children; indeed, some children are viewed as enemies deserving of eradication. The latter claims complete the dual status of the child: simultaneously, she may be innocent and guilty, defenseless and dangerous. A recent example may be found in the story of Canadian-born Omar Khadr, a fifteen year old whom United States service members seized following a firefight in Afghanistan. Rebuffing complaints that he was a child soldier who should undergo rehabilitation, the United States detained him until 2012, when Khadr, by then twenty-five, was transferred to Canada’s custody. Early on, the United States subjected Khadr to intense interrogation. A video published by the Toronto Star showed the anguished teenager, his orange jumpsuit falling from his shoulders, crying out again and again, “Ya Umi—Oh, Mommy.”

Accounts of police killings of unarmed youngsters, as well as occasional images of a tiny, shackled child standing before a judge in a felony courtroom, belie any assumption that this side of the child’s dual status emerges only in time of armed conflict.

Sinister expressions of the child-as-threat likewise appear throughout history. In 1946, Nazi leader Otto Ohlendof testified that his Einsatzgruppe had liquidated 90,000 “men, women, and children” during World War II. He matter-of-factly explained when a judge asked why the children were killed: "The order was that the Jewish population should be totally exterminated.” Nearly three decades later, Loung Ung, a seven year old displaced along with her parents and siblings when the Khmer Rouge seized Phnom Penh, observed: “The soldiers are executing the entire families of those whom they’ve taken away, including young children. The Angkar fears the survivors and children of the men they have killed will rise up one day and take their revenge. To eliminate this threat, they will kill the entire family.”

Ung did not publish those words until 2000, decades after her childhood had ended. That fact serves as a reminder that in contrast with other human groups, children are especially voiceless. Even a young person who feels she has autonomy—who has opinions—frequently finds that familial, social, and legal structures operate to forbid her to offer her voice and be heard. This leads to consideration of yet another title term. Do children, in fact, have “rights”? Before 1945, international law accorded them almost none. One searches in vain for references to children in the pivotal international documents of the immediate postwar era, such as the Nuremberg Charter and United Nations Charter. By contrast, the 1998 Rome Statute of the International Criminal Court speaks repeatedly of children. The very first words of the preamble state: “Mindful that during this century millions of children, women and men”—note that children are named first—“have been victims of unimaginable atrocities.” The statute authorizes the appointment of experts to advise the prosecutor on violence against children. It mandates the selection of judges with expertise in children’s issues, and sets forth numerous protections for child witnesses. It confers jurisdiction over the war crimes of recruiting and using child soldiers, as may be expected, and also over a range of war crimes, crimes against humanity, and genocidal acts that either are specific to children or disproportionately affect children.

This shift in legal regulation is due in no small part to the development and implementation of the 1989 Child Rights Convention, to which all the world’s countries except the United States belong. Even South Sudan and Somalia—two of the newest nation-states, and both the chronic sites of extreme violence—have joined the treaty. The same is true of two nonmember states recognized by the United Nations, the Holy See and the State of...
people share the experience of growth, and also a unique duality based in part on the inherent vulnerability of the young.

Yet even as many in global society assert the child’s virtue and vulnerability, others assert the culpability of certain children; indeed, some children are viewed as enemies deserving of eradication. The latter claims complete the dual status of the child: simultaneously, she may be innocent and guilty, defenseless and dangerous. A recent example may be found in the story of Canadian-born Omar Khadr, a fifteen year old whom United States service members seized following a firefight in Afghanistan. Rebuffing complaints that he was a child soldier who should undergo rehabilitation, the United States detained him until 2012, when Khadr, by then twenty-five, was transferred to Canada’s custody. Early on, the United States subjected Khadr to intense interrogation. A video published by the Toronto Star showed the anguished teenager, his orange jumpsuit falling from his shoulders, crying out again and again, “Ya Umi—Oh, Mommy.” Accounts of police killings of unarmed youngsters, as well as occasional images of a tiny, shackled child standing before a judge in a felony courtroom, belie any assumption that this side of the child’s dual status emerges only in time of armed conflict.

Sinister expressions of the child-as-thwart likewise appear throughout history. In 1946, Nazi leader Otto Ohlendorf testified that his Einsatzgruppe had liquidated 90,000 “men, women and children” during World War II. A matter-of-factly explained when a judge asked why the children were killed: “The order was that the Jewish population should be totally exterminated.” Nearly three decades later, Loung Ung, a seven year old displaced along with her parents and siblings when the Khmer Rouge seized Phnom Penh, observed: “The soldiers are executing the entire families of those whom they’ve taken away, including young children. The Angkor fears the survivors and children of the men they have killed will rise up one day and take their revenge. To eliminate this threat, they will kill the entire family.”

Ung did not publish those words until 2000, decades after her childhood had ended. That fact serves as a reminder that in contrast with other human groups, children are especially voiceless. Even a young person who feels she has autonomy—who has opinions—frequently finds that familial, social, and legal structures operate to forbid her to offer her voice and be heard.

This leads to consideration of yet another title term. Do children, in fact, have “rights”? Before 1945, international law accorded them almost none. One searches in vain for references to children in the pivotal international documents of the immediate postwar era, such as the Nuremberg Charter and United Nations Charter. By contrast, the 1998 Rome Statute of the International Criminal Court speaks repeatedly of children. The very first words of the preamble state: “Mindful that during this century millions of children, women and men—have been victims of unimaginable atrocities.” The statute authorizes the appointment of experts to advise the prosecutor on violence against children. It mandates the selection of judges with expertise in children’s issues, and sets forth numerous protections for child witnesses. It confers jurisdiction over the war crimes of recruiting and using child soldiers, as may be expected, and also over a range of war crimes, crimes against humanity, and genocidal acts that either are specific to children or disproportionately affect children.

This shift in legal regulation is due in no small part to the development and implementation of the 1989 Child Rights Convention, to which all the world’s countries except the United States belong. Even South Sudan and Somalia—two of the newest nation-states, and both the chronic sites of extreme violence—have joined the treaty. The same is true of two nonmember states recognized by the United Nations, the Holy See and the State of...
by dint of this near-universal support, nearly all young persons are said to enjoy similar rights; enforcement of that guarantee is, of course, another matter. Also of significance in shaping the current climate of child rights is the Hague Abduction Convention, which was adopted nearly a decade before the Child Rights Convention and to which the United States is a party.35

Postdating the Rome Statute is another important development on the United Nations's agenda on children and armed conflict. Anchored by a 1999 Security Council resolution,36 and promoted by the Office of the Special Representative on Children and Armed Conflict, the agenda turns on a legal framework formulated in the 2000s and named "the Six Grave Violations Against Children."37 These grave violations, to which the United Nations office devotes its attention, are: killing or maiming of children; recruitment or use of children under eighteen as soldiers; sexual violence; attacks against schools or hospitals; denial of humanitarian access; and abduction.38 Given that the source material is international humanitarian and international criminal law, it should come as no surprise that this list overlaps the Rome Statute's enumeration of crimes against children.39 Accordingly, both the United Nations office and the Office of the International Criminal Court Prosecutor have worked to find common ground in efforts at prevention and punishment.

Since taking office in 2012, International Criminal Court Prosecutor Fatou Bensouda has expressed concern for all aspects of children's existence in armed conflict. She said in a 2014 keynote speech: "in addition to focusing on children who are forced to carry arms, we must also address the issue of children who are affected by arms."40 Thus at the International Criminal Court the initial, almost singular attention to the recruitment and use of children as combatants has broadened to include other in-conflict crimes against children, such as trafficking, forcible transfer, sexual and gender-based violence, killing, wounding, detention, deprivation of loved ones, food, shelter, health care, schools, culture, and community.

It is perhaps advisable to pause at this juncture to recall once again that

35. See Hague Abduction Convention, supra note 3.
38. Id.
39. See generally ICC Statute, supra note 6, at arts. 5–8.

many of these harms occurs not only in what the law calls armed conflict, but also, unfortunately, in the day-to-day lives of some children—even children in our own communities. Spurred by a state legislative initiative, my home institution, the University of Georgia School of Law, has just launched the first law school clinic in the United States that will deal with child sexual abuse.41 The establishment of this clinic underscores the ubiquity of sexual and gender-based violence, among other forms of abuse, and so serves as a reminder that protection of the global child must begin in our own schools and on our own soccer pitches.

We thus conclude with examination of the first word in our title. How do we go about "securing" rights? To secure rights—to use human-rights legal terms of art, to respect and ensure rights42—requires the enlistment of multiple actors, in multiple sites and by multiple means. Necessary is the participation of organizations like the International Criminal Court, the Office of the Special Representative and myriad other United Nations entities, regional organizations like the European, Inter-American, and African human rights systems, and national units like the United States Department of State. The same is true of subnational units like the State of Georgia, as well as civil society actors ranging from Human Rights Watch to the International Law Students Association to a law school clinic. All have a role to play in securing child rights.

The means must include civil or criminal litigation, claims commissions and other reparations schemes, and reporting mechanisms. Yet even if these post hoc means were to achieve full success, they would be insufficient: in an ideal world, violations would not occur in the first place. Attention to prevention is thus essential.

Among the newest efforts to pursue human security ex ante are the Sustainable Development Goals adopted by United Nations member states in 2015.43 The seventeen goals—eradication of hunger, poverty, and inequality, for instance, as well as improvements in health, education, and the

Palestine. By dint of this near-universal support, nearly all young persons are said to enjoy similar rights; enforcement of that guarantee is, of course, another matter. Also of significance in shaping the current climate of child rights is the Hague Abduction Convention, which was adopted nearly a decade before the Child Rights Convention and to which the United States is party.35

Postdating the Rome Statute is another important development on the United Nations' agenda on children and armed conflict. Anchored by a 1999 Security Council resolution,36 and promoted by the Office of the Special Representative on Children and Armed Conflict, the agenda turns on a legal framework formulated in the 2000s and named "the Six Grave Violations Against Children."37 These grave violations, to which the United Nations office devotes its attention, are: killing or maiming of children; recruitment or use of children under eighteen as soldiers; sexual violence; attacks against schools or hospitals; denial of humanitarian access; and abduction.38 Given that the source material is international humanitarian and international criminal law, it should come as no surprise that this list overlaps the Rome Statute's enumeration of crimes against children.39 Accordingly, both the United Nations Office and the Office of the International Criminal Court Prosecutor have worked to find common ground in efforts at prevention and punishment.

Since taking office in 2012, International Criminal Court Prosecutor Fatou Bensouda has expressed concern for all aspects of children's existence in armed conflict. She said in a 2014 keynote speech: "in addition to focusing on children who are forced to carry arms, we must also address the issue of children who are affected by arms."40 Thus at the International Criminal Court the initial, almost singular attention to the recruitment and use of children as combatants has broadened to include other in-conflict crimes against children, such as trafficking, forcible transfer, sexual and gender-based violence, killing, wounding, detention, deprivation of loved ones, food, shelter, health care, schools, culture, and community.

It is perhaps advisable to pause at this juncture to recall once again that

35. See Hague Abduction Convention, supra note 3.
38. Id.
39. See generally ICC Statute, supra note 6, at arts. 5-8.

many of these harms occurs not only in what the law calls armed conflict, but also, unfortunately, in the day-to-day lives of some children—even children in our own communities. Spurred by a state legislative initiative, my home institution, the University of Georgia School of Law, has just launched the first law school clinic in the United States that will deal with child sexual abuse.41 The establishment of this clinic underscores the ubiquity of sexual and gender-based violence, among other forms of abuse, and so serves as a reminder that protection of the global child must begin in our own schools and on our own soccer pitches.

We thus conclude with examination of the first word in our title. How do we go about "securing" rights? To secure rights—to use human-rights legal terms of art, to respect and ensure rights42—requires the enlistment of multiple actors, in multiple sites and by multiple means. Necessary is the participation of organizations like the International Criminal Court, the Office of the Special Representative and myriad other United Nations entities, regional organizations like the European, inter-American, and African human rights systems, and national units like the United States Department of State. The same is true of subnational units like the State of Georgia, as well as civil society actors ranging from Human Rights Watch to the International Law Students Association to a law school clinic. All have a role to play in securing child rights.

The means must include civil or criminal litigation, claims commissions and other reparations schemes, and reporting mechanisms. Yet even if these post hoc means were to achieve full success, they would be insufficient: in an ideal world, violations would not occur in the first place. Attention to prevention is thus essential.

Among the newest efforts to pursue human security ex ante are the Sustainable Development Goals adopted by United Nations member states in 2015.43 The seventeen goals—eradication of hunger, poverty, and inequality, for instance, as well as improvements in health, education, and the

environment—offer ways to better humans’ lives and, presumably, to reduce frictions that spark violence.\(^\text{44}\) Of particular interest is Goal 16, “dedicated to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels.”\(^\text{45}\) Within its scope are instruments ranging from the Child Rights Convention to the Arms Trade Treaty\(^\text{46}\)—full implementation of which could do much to improve children’s fate—and the full range of institutions and actors under review. Together, they bear promise as means to secure child rights in time of conflict.

---


---

# LAWYERING PEACE: THE ROLE OF LAWYERS IN PEACEBUILDING

Paul R. Williams* & Christin Cosier**

I. LAWYERING TO MAKE A DIFFERENCE
   A. Expect to Have an Impact
   B. Put Your Briefcase on the Ground
   C. Build a Team
   D. Manage Risks

II. LAWYERING PEACE WITH BRIEFCASES ON THE GROUND
   A. Build Trust
   B. Add Value Right Away
   C. Do Not Tell Your Clients What to Do
   D. Always Sit in the Second Chair

III. LAWYERING PEACE AND MAKING A BOND
   A. Get to Know Your Clients
   B. Recognize Your Clients’ Mental State
   C. Do Not Define Success for Your Clients

IV. LAWYERING PEACE WITH UNIQUE CLIENTS
   A. “Getting to Yes” is Complicated
   B. Words Matter

VI. CONCLUSION

Based on the Public International Law & Policy Group’s (“PILPG”) two decades of experience assisting countries and clients in conflict situations, it is clear there are a number of ways for lawyers and international law to promote peacebuilding. This article condenses information shared during the International Law Weekend panel, “International Law and States in Emergency: Responses and Challenges.” The focus of the presentation was...
environment—offer ways to better humans’ lives and, presumably, to reduce frictions that spark violence. Of particular interest is Goal 16, “dedicated to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels.” Within its scope are instruments ranging from the Child Rights Convention to the Arms Trade Treaty—full implementation of which could do much to improve children’s fate—and the full range of institutions and actors under review. Together, they bear promise as means to secure child rights in time of conflict.

#LAWYERING PEACE: THE ROLE OF LAWYERS IN PEACEBUILDING

Paul R. Williams* & Christin Coster**

I. LAWYERING TO MAKE A DIFFERENCE ......................................................... 494
   A. Expect to Have an Impact .............................................................. 494

II. LAWYERING PEACE WITH BRIEFCASES ON THE GROUND ......................... 495
   A. Put Your Briefcase on the Ground ............................................... 495
   B. Build a Team ........................................................................... 496
   C. Manage Risks ........................................................................... 496

III. LAWYERING PEACE AND MAKING A BOND ............................................. 496
   A. Build Trust ................................................................................. 497
   B. Add Value Right Away ............................................................... 497
   C. Do Not Tell Your Clients What to Do ........................................... 497
   D. Always Sit in the Second Chair .................................................... 498

IV. LAWYERING PEACE WITH UNIQUE CLIENTS ....................................... 498
   A. Get to Know Your Clients ............................................................ 499
   B. Recognize Your Clients’ Mental State ......................................... 499
   C. Do Not Define Success for Your Clients ...................................... 500

V. LAWYERING PEACE WHEN WORDS MATTER ..................................... 500
   A. “Getting to Yes” is Complicated ................................................... 501
   B. Words Matter ............................................................................. 501

VI. CONCLUSION ....................................................................................... 502

Based on the Public International Law & Policy Group’s (“PILPG”) two decades of experience assisting countries and clients in conflict situations, it is clear there are a number of ways for lawyers and international law to promote peacebuilding. This article condenses information shared during the International Law Weekend panel, “International Law and States in Emergency: Responses and Challenges.” The focus of the presentation was

* Rebecca Grauer Professor of Law and International Relations, American University, Ph.D., Cambridge University, 1998; J.D., Stanford Law School, 1990; B.A., U.C. Davis 1987. From 1991 to 1993, Professor Grauer served as an Attorney-Advisor in the United States Department of State’s Office of the Legal Advisor for European Affairs. In 1995, he founded the Public International Law & Policy Group (PILPG), which provides pro bono public international legal assistance to states and substate entities. In the course of his career, Dr. Williams has assisted over two dozen states in major international peace negotiations and has advised numerous governments on the drafting and implementation of post-conflict constitutions. In 2005, several of Dr. Williams’ pro bono government clients throughout the world joined together to nominate him for the Nobel Peace Prize.

how lawyers can and should make a difference in peacebuilding and post-conflict constitution drafting. The world needs more lawyers to "lawyer peace" by assisting countries and clients involved in ongoing conflicts or in peace negotiations. In the spirit of the International Law Student Association, this article provides guidance to early career legal professionals who plan to lawyer peace.

Lawyers should keep in mind five guiding principles in order to be effective resources for clients during conflicts and crises: lawyer to make a difference, put your briefcase on the ground, build bonds with clients, recognize unique qualities of clients, and know that words matter. To illustrate these principles we will share examples from PILPG's work providing pro bono legal assistance for the past twenty years to clients involved in negotiating peace agreements, drafting post-conflict constitutions, and designing transitional justice systems.

I. LAWYERING TO MAKE A DIFFERENCE

Many of today's young lawyers are dynamic individuals, excited about using their legal skills to make a difference in the world. For those choosing to enter public international law or to undertake substantial pro bono work through their firm, great opportunities exist to make an impact. During an active, or "hot" conflict, lawyers play an important role in resolving the conflict by using their legal skills on behalf of clients in peace negotiations, post-conflict constitution drafting, and transitional justice. Yet it is incumbent upon young lawyers to ascertain how to undertake lawyering to make a difference in each context.

A. Expect to Have an Impact

The initial step in understanding lawyering to make a difference is acknowledging that attorneys play a unique and critical role in these processes. Young lawyers at the United States Department of State are often told by their foreign service clients that they can have a substantial impact on United States foreign policy if they do not actually try to make foreign policy themselves, but rather use their legal skills to help ensure that the policy options being crafted by the foreign service officers fit within the framework of international law. This is a nuanced point, and rebel groups, self-determination movements, and civil society delegations often need that exact same service from lawyers. Attorneys should help these groups to accomplish their objectives within the framework of international law, by using international law to help their clients more effectively construct positions and negotiate for their adoption. Importantly, and as discussed in more detail below, lawyers thus make a difference by empowering their clients to make a difference.

II. LAWYERING PEACE WITH BRIEFCASES ON THE GROUND

One of the most important aspects of lawyering peace is physically traveling to wherever your clients are to work with them. While others may be working to end a conflict by putting boots on the ground, lawyers seek to end conflicts by putting "brieInvestment in" on the ground. Your effectiveness as a lawyer will hinge on your ability to work anywhere around the world while maintaining access to resources and managing the risks of being in a conflict zone. By going where their clients are, potentially for extended periods of time, lawyers on the ground will be able to build trust with their clients in a way that other outside actors cannot.

A. Put Your Briefcase on the Ground

To be effective at lawyering peace it is imperative to be prepared to "put briefcases on the ground." It is a simple yet crucial tenet of lawyering peace. Sometimes this requires briefcases in Doha, Geneva, Paris or Vienna, but more often it will require being present in Juba, Tripoli, Mogadishu, Baghdad, Kabul, Sana'a or some other flashpoint of conflict. Key to providing effective advice is the ability to develop trust with clients, understand their circumstances, and be available around the clock to help them prepare their tactics and strategy for successful negotiations.

While much present-day lawyering can be done from a distance, lawyering peace requires more constant and on the ground contact with clients. Early in PILPG's relationship with the Darfur rebel groups seeking to negotiate a peace agreement with the government in Khartoum, the PILPG team spent the entire month of December in Sudan with the rebel leaders to build relationships, develop trust, and provide pre-negotiation assistance. Building upon the work done together with the clients in the field, PILPG's team then also spent a month travelling to New York, Paris, and Brussels,
how lawyers can and should make a difference in peacebuilding and post-conflict constitution drafting. The world needs more lawyers to “lawyer peace” by assisting countries and clients involved in ongoing conflicts or in peace negotiations. In the spirit of the International Law Student Association, this article provides guidance to early career legal professionals who plan to lawyer peace.

Lawyers should keep in mind five guiding principles in order to be effective resources for clients during conflicts and crises: lawyer to make a difference, put your briefcase on the ground, build bonds with clients, recognize unique qualities of clients, and know that words matter. To illustrate these principles we will share examples from PILPG’s work providing pro bono legal assistance for the past twenty years to clients involved in negotiating peace agreements, drafting post-conflict constitutions, and designing transitional justice systems.

I. LAWYERING TO MAKE A DIFFERENCE

Many of today’s young lawyers are dynamic individuals, excited about using their legal skills to make a difference in the world. For those choosing to enter public international law or to undertake substantial pro bono work through their firm, great opportunities exist to make an impact. During an active, or “hot” conflict, lawyers play an important role in resolving the conflict by using their legal skills on behalf of clients in peace negotiations, post-conflict constitution drafting, and transitional justice. Yet it is incumbent upon young lawyers to ascertain how to undertake lawyering to make a difference in each context.

A. Expect to Have an Impact

The initial step in understanding lawyering to make a difference is acknowledging that attorneys play a unique and critical role in these processes. Young lawyers at the United States Department of State are often told by their foreign service clients that they can have a substantial impact on United States foreign policy if they do not actually try to make foreign policy themselves, but rather use their legal skills to help ensure that the policy options being crafted by the foreign service officers fit within the framework of international law. This is a nuanced point, and rebel groups, self-determination movements, and civil society delegations often need that exact same service from lawyers. Attorneys should help these groups to accomplish their objectives within the framework of international law, by using international law to help their clients more effectively construct positions and negotiate for their adoption. Importantly, and as discussed in more detail below, lawyers thus make a difference by empowering their clients to make a difference.

II. LAWYERING PEACE WITH BRIEFCASES ON THE GROUND

One of the most important aspects of lawyering peace is physically traveling to wherever your clients are to work with them. While others may be working to end a conflict by putting boots on the ground, lawyers seek to end conflicts by putting “briefcases” on the ground. Your effectiveness as a lawyer will hinge on your ability to work anywhere around the world while maintaining access to resources and managing the risks of being in a conflict zone. By going where their clients are, potentially for extended periods of time, lawyers on the ground will be able to build trust with their clients in a way that other outside actors cannot.

A. Put Your Briefcase on the Ground

To be effective at lawyering peace it is imperative to be prepared to “put briefcases on the ground.” It is a simple yet crucial tenet of lawyering peace. Sometimes this requires briefcases in Doha, Geneva, Paris or Vienna, but more often it will require being present in Juba, Tripoli, Mogadishu, Baghdad, Kabul, Sana’a or some other flashpoint of conflict. Key to providing effective advice is the ability to develop trust with clients, understand their circumstances, and be available around the clock to help them prepare their tactics and strategy for successful negotiations.

While much present-day lawyering can be done from a distance, lawyering peace requires more constant and on the ground contact with clients. Early in PILPG’s relationship with the Darfur rebel groups seeking to negotiate a peace agreement with the government in Khartoum, the PILPG team spent the entire month of December in Sudan with the rebel leaders to build relationships, develop trust, and provide pre-negotiation assistance. Building upon the work done together with the clients in the field, PILPG’s team then also spent a month travelling to New York, Paris, and Brussels,
training diaspora advisors to the rebel delegation. Being present on the ground allowed the PILPG team to gain a deep understanding of the clients and their interests.

B. Build a Team

Briefcases on the ground will be most effective if they have backup support in another location. To be an effective lawyer in the field it is necessary to build a team of colleagues to support the substance of the work, through both quick turnaround and substantial legal research. The upside of being in the field is the ability to develop close client relationships and be responsive to their legal needs; the downside is that it is often extremely difficult to access the resources that are routine for the substantive work of lawyering. Part of the magic of successfully lawyering peace from the field is to be able to provide near instantaneous, high quality work product that the clients are unable to generate for themselves, and that others are unable to generate because they are not physically present.

The only way to answer virtually any question from the clients while you are with them in the field is by reaching out to a qualified team working in another location that can draft thorough, well-researched answers, which can then be shared with the client. In many cases, it is ideal to have the team on a different time zone. As an example, when PILPG’s team was in Baghdad for the Iraqi constitutional negotiations in 2005 and again in 2007, we had teams of lawyers in New York, San Francisco, and Melbourne which were able to support PILPG’s team in Baghdad by providing around the clock research and analysis, so that the chair of the constitution drafting commission in Baghdad had comprehensive answers the next morning to questions he asked the previous evening.

C. Manage Risks

Putting briefcases on the ground is not without its risks, especially when lawyering peace. Going where your clients are will involve travel to some of the most conflict-ridden areas of the world. Those lawyering peace occasionally find themselves wearing bulletproof vests, driving in armored SUVs, and hearing the sound of gunfire and shelling. In rare circumstances they may need to “duck and cover” or flee a cross-fire situation. Members of PILPG have traversed innumerable checkpoints, made use of concrete duck and cover bunkers on more than one occasion, and safely evacuated nearly half a dozen posts, including being flown out in C-130s by the United States Marines.

These kinds of situations are what your clients face every day and sharing in that with them is part of putting briefcases on the ground. When you are lawyering peace, you have to be aware that you may end up in dangerous situations. While the risks you will take are necessary to build the relationships with your clients, do not take them needlessly—nor relish them. It is simply true that aspiring young professionals must understand the risks and be prepared to deal with them. The key ingredient is to have an uncompromisingly strict and comprehensive security plan, and to implement it no matter what frivolous risks others might take.

III. LAWYERING PEACE AND MAKING A BOND

Being a briefcase on the ground with clients makes lawyers privy to a small part of their lives and experience, which provides lawyers a chance to bond with their clients. Bonding with the client is important in order to continue to build and maintain trust, and enable the clients to really listen to their lawyer. In some instances, lawyers may have to build a bond quickly as, despite being a briefcase on the ground, they may meet some clients for the first time right before entering the negotiating room. Demonstrating that you can add value immediately, without telling your client what to do, is one way lawyers can make a bond and demonstrate their support and reliability to the client.

A. Build Trust

Putting briefcases on the ground is a key component of making a bond because it leads to building trust. Reliably providing in-person, high quality support and advice to clients helps to build substantial trust between the lawyer and the client. As with any lawyer/client relationship, trust is a necessary element if a client is going to follow the advice of the lawyer. Governments, rebel groups, and even civil society actors engaged in peace negotiations are, by nature and necessity, distrustful of those outside their immediate circle. Each group, depending on their nationality, culture, and previous experience will have a unique way of verifying reliability and building trust. The one common factor to building trust with clients is physical presence. Being on the ground with them in their home environment, even for a few days or weeks, is essential to earning their trust. Staying in touch with clients as well as up to speed with events on the ground when you are not physically present is imperative for making subsequent in-person meetings more effective and maintaining the trust you have built.

B. Add Value Right Away

Make sure the information provided to the client is distilled to be immediately relevant so they can actually use it in the negotiations that day. There is little point in giving the client a dense, unintelligible memorandum
training diaspora advisors to the rebel delegation. Being present on the
ground allowed the PILPG team to gain a deep understanding of the clients
and their interests.

B. Build a Team

Briefcases on the ground will be most effective if they have backup
support in another location. To be an effective lawyer in the field it is
necessary to build a team of colleagues to support the substance of the work,
through both quick turnaround and substantial legal research. The upside of
being in the field is the ability to develop close client relationships and be
responsive to their legal needs; the downside is that it is often extremely
difficult to access the resources that are routine for the substantive work of
lawyering. Part of the magic of successfully lawyering peace from the field
is to be able to provide near instantaneous, high quality work product that the
clients are unable to generate for themselves, and that others are unable to
generate because they are not physically present.

The only way to answer virtually any question from the clients while
you are with them in the field is by reaching out to a qualified team working
in another location that can draft thorough, well-researched answers, which
can then be shared with the client. In many cases, it is ideal to have the team
on a different time zone. As an example, when PILPG’s team was in
Baghdad for the Iraqi constitutional negotiations in 2005 and again in 2007,
we had teams of lawyers in New York, San Francisco, and Melbourne which
were able to support PILPG’s team in Baghdad by providing around the clock
research and analysis, so that the chair of the constitution drafting
commission in Baghdad had comprehensive answers the next morning to
questions he asked the previous evening.

C. Manage Risks

Putting briefcases on the ground is not without its risks, especially when
lawyering peace. Going where your clients are will involve travel to some
of the most conflict-ridden areas of the world. Those lawyering peace
occasionally find themselves wearing bulletproof vests, driving in armored
SUVs, and hearing the sound of gunfire and shelling. In rare circumstances
they may need to “duck and cover” or flee a cross-fire situation. Members
of PILPG have traversed innumerable checkpoints, made use of concrete
duck and cover bunkers on more than one occasion, and safely evacuated
nearly half a dozen posts, including being flown out in C-130s by the United
States Marines.

These kinds of situations are what your clients face every day and
sharing in that with them is part of putting briefcases on the ground. When

you are lawyering peace, you have to be aware that you may end up in
dangerous situations. While the risks you will take are necessary to build the
relationships with your clients, do not take them needlessly—or relish them.
It is simply true that aspiring young professionals must understand the risks
and be prepared to deal with them. The key ingredient is to have an
uncompromisingly strict and comprehensive security plan, and to implement
it no matter what frivolous risks others might take.

III. LAWYERING PEACE AND MAKING A BOND

Being a briefcase on the ground with clients makes lawyers privy to a
small part of their lives and experience, which provides lawyers a chance to
bond with their clients. Bonding with the client is important in order to
continue to build and maintain trust, and enable the clients to really listen to
their lawyer. In some instances, lawyers may have to build a bond quickly
as, despite being a briefcase on the ground, they may meet some clients for
the first time right before entering the negotiating room. Demonstrating that
you can add value immediately, without telling your client what to do, is one
way lawyers can make a bond and demonstrate their support and reliability
to the client.

A. Build Trust

Putting briefcases on the ground is a key component of making a bond
because it leads to building trust. Reliably providing in-person, high quality
support and advice to clients helps to build substantial trust between the
lawyer and the client. As with any lawyer/client relationship, trust is a
necessary element if a client is going to follow the advice of the lawyer.
Governments, rebel groups, and even civil society actors engaged in peace
negotiations are, by nature and necessity, distrustful of those outside their
immediate circle. Each group, depending on their nationality, culture, and
previous experience will have a unique way of verifying reliability and
building trust. The one common factor to building trust with clients is
physical presence. Being on the ground with them in their home
environment, even for a few days or weeks, is essential to earning their trust.
Staying in touch with clients as well as up to speed with events on the ground
when you are not physically present is imperative for making subsequent in-
person meetings more effective and maintaining the trust you have built.

B. Add Value Right Away

Make sure the information provided to the client is distilled to be
immediately relevant so they can actually use it in the negotiations that day.
There is little point in giving the client a dense, unintelligible memorandum
that they would have to spend weeks interpreting. They will likely not have time to sit, read, and think through a long legal document, but will be moving from one highly charged negotiating session to another without much time to reflect. The form and quality of the product the client receives from their lawyer will directly impact their experience during negotiations.

Lawyers should also be prepared to answer extemporaneous questions that arise during the day, or during the evening, while preparing for the next day. As discussed above, building a supporting research team either on the ground or at your fingertips by email is vital to maintain a steady flow of useful information to the clients. PILPG has discovered that clients are particularly fond of two types of initial legal analysis: memoranda that address core elements and memoranda that address comparative state practices. Clients want to know what are the few core elements of an issue that they must focus on, and they want to know how similarly situated states have dealt with the issues they are facing. Clients are also very keen on their lawyers discovering comparable situations that they can use to bolster their position or support the solution they are negotiating for.

C. Do Not Tell Your Clients What to Do

When giving information to clients, lawyers should always be advising them how to do something, not telling them what they should do. It is up to the clients to make their own decisions, but lawyers can equip them to do that by explaining all the options and giving examples of how the various options have played out in other conflict situations so that clients feel supported, not commanded.

One practical tool that lawyers can use to support clients and add value immediately is a decision tree. A decision tree is a series of questions on a particular topic for the clients to discuss and determine the most appropriate path for themselves. It provides a tool for immediate use and guides clients in a discussion based on the realities of different options for how to do something, rather than prescribing one direction or another for them. Working through a decision tree with clients prepares them to negotiate by helping them determine how they can reach their desired outcome at the table.

D. Always Sit in the Second Chair

This chair is not at the table, but is behind the client who is at the table. The physical position represents a large part of the lawyer’s role in the delegation—the role of supporting and providing information to the client who is at the table making decisions about their own future and the future of their country. Sitting in the second chair will further support the trust you have already built with the clients.

IV. LAWYERING PEACE WITH UNIQUE CLIENTS

Lawyers who are lawyering peace will have the challenging and inspiring opportunity to work with a wide variety of clients. These clients will likely be coming from very different backgrounds and will also be experiencing varying levels of impact from the ongoing conflict in their country. Young lawyers should be ready to try to understand the context of the conflict from their clients’ perspective by dedicating themselves to learning about their unique clients.

A. Get to Know Your Clients

As lawyers go around the world lawyering peace, putting briefcases on the ground, they will get to know their clients well. Young lawyers must realize that clients in this field are highly unique. Lawyering peace is quite different in this way from more traditional lawyering. As a lawyer for a client from a country in crisis, imagine walking into the negotiating room. The clients, and the other negotiating parties, may be rebels or opposition leaders, antagonists, perpetrators, or victims. The majority of these clients do not have legal training and have never negotiated before. Often they have an imperfect grasp of English (or whatever the international language of negotiation might be at a particular venue), which may be their second, third or fourth language.

Early on in a relationship, a client asked his PILPG lawyer, “Right, when I enter the negotiation room, what do I do?” The PILPG lawyer started to explain various negotiation tactics and the client interrupted, asking, “No, I really mean what do I do first, where do I sit, must I shake hands with the war criminals on the other delegation, who speaks first—remember, this is my first negotiation.” Another PILPG client spent two full days sitting with the PILPG team discussing the history of their conflict, with no notes. This client came from an oral culture and needed to ensure that PILPG understood the complete story of their conflict before engaging on even the most minor legal issue. The oral culture dynamic of this particular client presented unique challenges in the negotiation process as the opposing delegation was highly legalistic and was constantly dropping written proposals on the table.

These experiences demonstrate how interesting, yet challenging, it can be to work with clients in this field. Understanding the hurdles of working with such unique clients is imperative to achieving the goals you are working with the clients to reach.
that they would have to spend weeks interpreting. They will likely not have time to sit, read, and think through a long legal document, but will be moving from one highly charged negotiating session to another without much time to reflect. The form and quality of the product the client receives from their lawyer will directly impact their experience during negotiations.

Lawyers should also be prepared to answer extemporaneous questions that arise during the day, or during the evening, while preparing for the next day. As discussed above, building a supporting research team either on the ground or at your fingertips by email is vital to maintain a steady flow of useful information to the clients. PILPG has discovered that clients are particularly fond of two types of initial legal analysis: memoranda that address core elements and memoranda that address comparative state practices. Clients want to know what are the few core elements of an issue that they must focus on, and they want to know how similarly situated states have dealt with the issues they are facing. Clients are also very keen on their lawyers discovering comparable situations that they can use to bolster their position or support the solution they are negotiating for.

C. Do Not Tell Your Clients What to Do

When giving information to clients, lawyers should always be advising them how to do something, not telling them what they should do. It is up to the clients to make their own decisions, but lawyers can equip them to do that by explaining all the options and giving examples of how the various options have played out in other conflict situations so that clients feel supported, not commanded.

One practical tool that lawyers can use to support clients and add value immediately is a decision tree. A decision tree is a series of questions on a particular topic for the clients to discuss and determine the most appropriate path for themselves. It provides a tool for immediate use and guides clients in a discussion based on the realities of different options for how to do something, rather than prescribing one direction or another for them. Working through a decision tree with clients prepares them to negotiate by helping them determine how they can reach their desired outcome at the table.

D. Always Sit in the Second Chair

This chair is not at the table, but is behind the client who is at the table. The physical position represents a large part of the lawyer's role in the delegation—the role of supporting and providing information to the client who is at the table making decisions about their own future and the future of their country. Sitting in the second chair will further support the trust you have already built with the clients.

IV. LAWYERING PEACE WITH UNIQUE CLIENTS

Lawyers who are lawyering peace will have the challenging and inspiring opportunity to work with a wide variety of clients. These clients will likely be coming from very different backgrounds and will also be experiencing varying levels of impact from the ongoing conflict in their country. Young lawyers should be ready to try to understand the context of the conflict from their clients’ perspective by dedicating themselves to learning about their unique clients.

A. Get to Know Your Clients

As lawyers go around the world lawyering peace, putting briefcases on the ground, they will get to know their clients well. Young lawyers must realize that clients in this field are highly unique. Lawyering peace is quite different in this way from more traditional lawyering. As a lawyer for a client from a country in crisis, imagine walking into the negotiating room. The clients, and the other negotiating parties, may be rebels or opposition leaders, antigovernment, perpetrators, or victims. The majority of these clients do not have legal training and have never negotiated before. Often they have an imperfect grasp of English (or whatever the international language of negotiation might be at a particular venue), which may be their second, third or fourth language.

Early on in a relationship, a client asked his PILPG lawyer, “Right, when I enter the negotiation room, what do I do?” The PILPG lawyer started to explain various negotiation tactics and the client interrupted, asking, “No, I really mean what do I do first, where do I sit, must I shake the hand of the war criminals on the other delegation, who speaks first—remember, this is my first negotiation.” Another PILPG client spent two full days sitting with the PILPG team discussing the history of their conflict, with no notes. This client came from an oral culture and needed to ensure that PILPG understood the complete story of their conflict before engaging on even the most minor legal issue. The oral culture dynamic of this particular client presented unique challenges in the negotiation process as the opposing delegation was highly legalistic and was constantly dropping written proposals on the table.

These experiences demonstrate how interesting, yet challenging, it can be to work with clients in this field. Understanding the hurdles of working with such unique clients is imperative to achieving the goals you are working with the clients to reach.
B. Recognize Your Clients' Mental State

On top of the characteristics discussed above, lawyers must know that their clients will also be experiencing a tremendous amount of psychological stress. This is the context of a crisis. The clients may have been involved in conflict for months or years, constantly fearing for their lives or those of their family and community. As members of a negotiation talk, they are likely to be under even more pressure, possibly receiving serious death threats. The clients have almost definitely lost friends and family in the fighting, and may have seen their community pulled apart and destroyed. In spite of this, or because of it, they are committed to negotiating for the future of their country. Imagine the weight and responsibility they must feel at every decision, at every stroke of the pen writing a ceasefire, peace agreement, or constitution.

Given the stress the clients are feeling, lawyers cannot interact with them like normal clients. Their minds will be in ten places at once and they may have trouble focusing on putting words on paper. Although the words are ultimately important, the client may not be thinking about the long term, but rather the shots being fired right now. Being sensitive to this is key for successfully lawyering peace.

C. Do Not Define Success for Your Clients

Young lawyers must also recognize the reality that delegations will bring some level of self-interest to the negotiating table, and some may not have a fair and equal future in mind. Lawyers must be prepared for the consequences of getting to yes with unjust parties—the yes at the end of a negotiation may not be the ideal. There is a balance to strike between working towards a better deal and recognizing when the "yes" you have might be the best deal your clients are going to get. It is best to let the clients determine what "success" means in this situation rather than holding that burden as the lawyer. Towards the end of the Dayton Peace negotiations, the Bosnian delegation decided to sign the agreement in spite of its numerous flaws, and even though it fell short of a dozen key redlines the Bosnian delegation had set forth at the outset. When asked why the delegation was going to sign, the head of the delegation replied, "We will not survive another winter, we are getting 50,000 NATO troops, and we were promised this agreement is only temporary."

V. LAWYERING PEACE WHEN WORDS MATTER

Ultimately, everything the parties decide during a negotiation will have to be drafted with words on paper. While it may sound like a simple enough task to write down the parties' decisions, this can often be one of the most complicated parts of the process. Nevertheless, getting the words right when recording the final terms of the agreement is vital for effectively lawyering peace.

A. "Getting to Yes" is Complicated

Getting to yes, and then getting "yes" down on paper is a process, with many challenges. During negotiations, there is first a political negotiation, where the parties to the talks work out the outcome, with support from their lawyers. Then there is a legal negotiation, where the lawyer steps forward to choose the words that will describe the political decisions that have been made by their clients. In lawyering peace, getting to yes is only half the process. The "yes" the parties agree on may be fairly ambiguous, meaning one thing to one side and something else to the other side. It is the lawyers that have to decide how to spell yes, and in what language.

This may involve another level of negotiating, which is working with the clients to ensure the words match the decisions made, and will bring about the intended results. Often the parties may agree to broad concepts such as federalism, devolution, maximum protection of human rights, and equitable sharing of natural resources. Each of these concepts requires at least two or three pages of text to effectively encapsulate the details of the concepts, as well as establish clear rules and mechanisms for accomplishing the objectives of the parties. That work is often left to the lawyers, who are uniquely suited to this task because of their training and close bond with their clients.

B. Words Matter

The words recorded during and after a negotiation will shape the country for years, or even decades, to come. For any negotiated peace agreement, the details are what make it sustainable, and the details are the sphere of the law. A peace agreement is not just for the moment; the provisions in the agreement go on to shape constitutions and have an enduring impact.

Focusing on the words used during the negotiation and drafting processes is a key part of a lawyer's role. Lawyers will determine the terms used for peace, justice, and power, and through actually putting words on paper they will shape the direction of the country for years to come. It is for this reason that lawyers play a key role along with other custodians of long-term peace—they are uniquely trained to focus on, and understand, the impact that word choice can have on the future of a country. It is important for young lawyers not to forget this basic tenet of their profession—words matter.
B. Recognize Your Clients’ Mental State

On top of the characteristics discussed above, lawyers must know that their clients will also be experiencing a tremendous amount of psychological stress. This is the context of a crisis. The clients may have been involved in conflict for months or years, constantly fearing for their lives or those of their family and community. As members of a negotiation delegation, they are likely to be under even more pressure, possibly receiving serious death threats. The clients have already definitely lost friends and family in the fighting, and may have seen their community pulled apart and destroyed. In spite of this, or because of it, they are committed to negotiating for the future of their country. Imagine the weight and responsibility they must feel at every decision, at every stroke of the pen writing a ceasefire, peace agreement, or constitution.

Given the stress the clients are feeling, lawyers cannot interact with them like normal clients. Their minds will be in ten places at once and they may have trouble focusing on putting words on paper. Although the words are ultimately important, the client may not be thinking about the long term, but rather the shots being fired right now. Being sensitive to this is key for successfully lawyering peace.

C. Do Not Define Success for Your Clients

Young lawyers must also recognize the reality that delegations will bring some level of self-interest to the negotiating table, and some may not have a fair and equal future in mind. Lawyers must be prepared for the consequences of getting to yes with unjust parties—the yes at the end of a negotiation may not be the ideal. There is a balance to strike between working towards a better deal and recognizing when the “yes” you might have the best deal your clients are going to get. It is best to let the clients determine what “success” means in this situation rather than holding that burden as the lawyer. Towards the end of the Dayton Peace negotiations, the Bosnian delegation decided to sign the agreement in spite of its numerous flaws, and even though it fell short of a dozen key redlines the Bosnian delegation had set forth at the outset. When asked why the delegation was going to sign, the head of the delegation replied, “We will not survive another winter, we are getting 50,000 NATO troops, and we were promised this agreement is only temporary.”

V. LAWYERING PEACE WHEN WORDS MATTER

Ultimately, everything the parties decide during a negotiation will have to be drafted with words on paper. While it may sound like a simple enough task to write down the parties’ decisions, this can often be one of the most complicated parts of the process. Nevertheless, getting the words right when recording the final terms of the agreement is vital for effectively lawyering peace.

A. “Getting to Yes” is Complicated

Getting to yes, and then getting “yes” down on paper is a process, with many challenges. During negotiations, there is first a political negotiation, where the parties to the talks work out the outcome, with support from their lawyers. Then there is a legal negotiation, where the lawyer steps forward to choose the words that will describe the political decisions that have been made by their clients. In lawyering peace, getting to yes is only half the process. The “yes” the parties agree on may be fairly ambiguous, meaning one thing to one side and something else to the other side. It is the lawyers that have to decide how to spell yes, and in what language.

This may involve another level of negotiating, which is working with the clients to ensure the words match the decisions made, and will bring about the intended results. Often the parties may agree to broad concepts such as federalism, devolution, maximum protection of human rights, and equitable sharing of natural resources. Each of these concepts requires at least two or three pages of text to effectively encapsulate the details of the concepts, as well as establish clear rules and mechanisms for accomplishing the objectives of the parties. That work is often left to the lawyers, who are uniquely suited to this task because of their training and close bond with their clients.

B. Words Matter

The words recorded during and after a negotiation will shape the country for years, or even decades, to come. For any negotiated peace agreement, the details are what make it sustainable, and the details are the sphere of the law. A peace agreement is not just for the moment; the provisions in the agreement go on to shape constitutions and have an enduring impact.

Focusing on the words used during the negotiation and drafting processes is a key part of a lawyer’s role. Lawyers will determine the terms used for peace, justice, and power, and through actually putting words on paper they will shape the direction of the country for years to come. It is for this reason that lawyers play a key role along with other custodians of long-term peace—they are uniquely trained to focus on, and understand, the impact that word choice can have on the future of a country. It is important for young lawyers not to forget this basic tenet of their profession—words matter.
VI. CONCLUSION

Lawyers can have an enduring, global impact by lawyering peace in conflict situations and working closely with clients who are fighting for a better future. Unfortunately, the world today is not a peaceful place. Almost every continent has countries or communities in conflict. Working with these clients is one of the greatest opportunities for dynamic young lawyers to go out and make a difference in the world.

Lawyers who want to lawyer peace will have to keep the five guiding principles discussed in this article in mind in order to lawyer peace effectively. They will have to go where their clients are, putting briefcases on the ground. This may involve risks but will also involve exciting chances to build close relationships in different corners of the world. Lawyers who lawyer peace will learn new ways to interact with and add value to meet their clients’ immediate needs. Bonding with those clients will be key to earning their trust and showing them how valuable the support and assistance of a lawyer is in negotiating. They will be working with unique and sometimes challenging clients with diverse interests and intense experiences. A lawyer who “lawyers peace” stands behind his client with ready support and information to help them make the best decisions.

Ultimately, lawyers in this field will end up writing the words that shape a country’s future for years to come. It is the lawyers who will draft the final agreement or the final constitution, locking in place the “yes” reached by all parties. This will last long after the lawyer has returned home, or hurried to another negotiation with another client, in another conflict. The world needs more lawyers to lawyer peace in times of crisis, lawyering to make the world a safer and better place both now and in the future.
VI. CONCLUSION

Lawyers can have an enduring, global impact by lawyering peace in conflict situations and working closely with clients who are fighting for a better future. Unfortunately, the world today is not a peaceful place. Almost every continent has countries or communities in conflict. Working with these clients is one of the greatest opportunities for dynamic young lawyers to go out and make a difference in the world.

Lawyers who want to lawyer peace will have to keep the five guiding principles discussed in this article in mind in order to lawyer peace effectively. They will have to go where their clients are, putting briefcases on the ground. This may involve risks but will also involve exciting chances to build close relationships in different corners of the world. Lawyers who lawyer peace will learn new ways to interact with and add value to meet their clients’ immediate needs. Bonding with those clients will be key to earning their trust and showing them how valuable the support and assistance of a lawyer is in negotiating. They will be working with unique and sometimes challenging clients with diverse interests and intense experiences. A lawyer who “lawyers peace” stands behind his client with ready support and information to help them make the best decisions.

Ultimately, lawyers in this field will end up writing the words that shape a country’s future for years to come. It is the lawyers who will draft the final agreement or the final constitution, locking in place the “yes” reached by all parties. This will last long after the lawyer has returned home, or hurried to another negotiation with another client, in another conflict. The world needs more lawyers to lawyer peace in times of crisis, lawyering to make the world a safer and better place both now and in the future.
AMERICAN BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW AND PRACTICE

http://www.abanet.org/intlaw/

The ABA Section of International Law and Practice assists in international policy development, promoting the rule of law, and educating legal practitioners. Since 1933, it has been involved in a wide range of legal activities and international legal issues.

Committees within the Section of International Law and Practice include the following:

- Business Transactions & Disputes Division
- Business Regulation Division
- Comparative Law Division
- Public International Law Division
- General Division

Along with the International Law Association American Branch, the ABA Section of International Law and Practice co-sponsors the annual ILA Weekend in New York, New York, United States.

Selected ILA Weekend speeches, panel remarks, and other proceedings are published each year in the International Practitioners' Notebook, which is the annual spring issue of the ILSA Journal of International & Comparative Law. Further information about the International Law Association and ILA Weekend is available at http://www.ambranch.org/.

Both law students and professionals in the field are welcome in the ABA Section of International Law and Practice. For membership information, visit http://www.abanet.org/about/membership.html.
INTERNATIONAL LAW ASSOCIATION
AMERICAN BRANCH

http://www.ambranch.org

The International Law Association (ILA), founded 1873 in Brussels, is a private international organization. It is a non-governmental association with United Nations consultative status. The ILA's biennial conference debates and proceedings have in many cases influenced the decisions of the United Nations General Assembly.

ILA members may belong to one of more than forty national ILA branches. The ILA's Secretary General of the Association maintains an office in London, England, and individual ILA members whose countries do not yet have ILA branches are members of the London "Headquarters." The ILA conducts international law study through committees. Committee members are specialists and prepare biennial conference reports under the supervision of the ILA's Director of Studies.


The International Law Association American Branch sponsors the annual ILA Weekend in New York, New York, United States. Selected speeches, panel remarks, and other proceedings from the ILA Weekend are published each year in the International Practitioners' Notebook, the spring issue of the ILSA Journal of International & Comparative Law.

More information and an online application for membership in the ILA American Branch are available on the ILA Website at http://www.ambranch.org/fee.htm.
ILSA Journal of International & Comparative Law
NOVA SOUTHEASTERN UNIVERSITY
SHEPARD BROAD COLLEGE OF LAW

The ILSA Journal of International & Comparative Law is housed at Nova Southeastern University's Shepard Broad College of Law in Fort Lauderdale, Florida, and is an International Law Students Association publication. The ILSA Journal of International & Comparative Law publishes three editions every year, including a compilation of notes, comments, and essays; the International Practitioners' Notebook; and the Bilingual Edition.

Subscriptions: The subscription price is $30.00 per volume per year for domestic subscribers and $35.00 per volume per year for foreign subscribers. Subscriptions are renewed automatically unless the subscriber sends a timely notice of termination. All notifications of address changes should include the old and new addresses.

For subscriptions, please cut out the attached coupon and mail to:
Subscriptions Editor
ILSA Journal of International & Comparative Law
Nova Southeastern University, Shepard Broad College of Law
Law Library & Technology Center, Room L112
3305 College Avenue
Ft. Lauderdale, FL 33314
Fax: (954) 262-3830

Name: _____________________________
Address: ___________________________

Payment is enclosed □ Bill Me: □