INTERNATIONAL PRACTITIONER’S NOTEBOOK

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"INTERNATIONAL NORMS IN THE 21ST CENTURY: DEVELOPMENT AND COMPLIANCE REVISED"

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TABLE OF CONTENTS

Litigating the Holocaust in U.S. Courts:
Perspectives on the Process And its Aftermath

International Law Weekend Panel on Litigating
the Holocaust in U.S. Courts .................... Monica Dugot 389

Advancing the Effectiveness of International Law:
Is U.N. Reform Necessary?

Enhancing Accountability at the International
Level: The Tension Between International
Organization and Member State Responsibility
and the Underlying Issues at Stake .............. Ralph Wilde 395

The Hague Convention on Choice-of-Court Agreements:
Strengthening Compliance with International Commercial
Agreements and Ex-Ante Dispute Resolution Clauses?

After the Hague: Some Thoughts on the Impact
of Canadian Law of the Convention on Choice
of Court Agreements .................. H. Scott Fairley and John Archibald 417

The 2005 Hague Convention on Choice of
Court Clauses ......................... Andrea Schulz 433

Applying Human Rights Law and Humanitarian Law in the
Extraterritorial War Against Terrorism: Too Little, Too Much,
or Just Right?

Application of Human Rights Treaties
Extraterritorially to Detention of Combatants
and Security Internees: Fuzzy Thinking All
Around? .................................. Michael Dennis 459
Filling the Void: Providing a Framework for the Legal Regulation of the Military Component of the War on Terror Through Application of Basic Principles of the Law of Armed Conflict

Geoffrey Corn 481

International Law and the Humanities

International Law and the Humanities: Does Love of Literature Promote International Law?

Daniel Kornstein 491

International Arbitrators: Civil Servants? Sub Rosa Advocates? Men of Affairs?

The Role of International Arbitrators

Susan Franck 499

What is War?

What is War? Terrorism as War after 9/11

Jane Dalton 523

When is a War Not a War? The Myth of the Global War on Terror

Mary Ellen O'Connell 535

“War” in the American Legal System

Detlev Vagts 541

U.N. Reform and the International Court of Justice

U.N. Reform and the International Court of Justice: Introductory Statement

Amb. Andrew Jacovides 547

Is International Law a Threat to Democracy?

Is International Law a Threat to Democracy: Framing the Question

Andrew Strauss 555

On the Uneasy Relation Between International Law and Democracy

Carol Gould 559

War and Freedom of Expression

Political Conflict and Freedom of Expression in Venezuela

Amb. Alvarez Herrera 565

Hate Speech Under the American Convention on Human Rights

Eduardo Bertoni 569
Federal States and International Law

Connecticut and International Law .............. Houston Putnam Lowry 575

Nuclear Non-Proliferation and Unique Issues of Compliance

Compliance Assessment and Compliance Enforcement: The Challenge of Nuclear Noncompliance ................ Christopher Ford 583

Nuclear Non-Proliferation and Unique Issues of Compliance ........................................ Gustavo Zlauvinen 593

Command Responsibility: Prosecuting Military Commanders and Civilian Ministers for Violations of the Laws of War

The Importance of Customary International Law During Armed Conflict ......................... Jordan Paust 601
INTERNATIONAL LAW WEEKEND PANEL ON LITIGATING THE HOLOCAUST IN U.S. COURTS

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I joined Christie’s a little over a year ago as Director of Restitution, coordinating Christie’s restitution issues globally. Restitution is a complex mix of ethical, legal, and commercial concerns and raises ongoing challenges for an auction house, both in terms of policy and practice. Before I share a few thoughts on our approach to these issues, I’d like to begin by giving you some background on what I was doing before joining Christie’s, make a few remarks about Holocaust-era art claims in general and finally give a brief history of Nazi-era art looting to put all of this in context.

Most recently and for seven years, I was Deputy Director of the New York State Banking Department’s Holocaust Claims Processing Office, where I assisted owners and heirs in seeking to recover art collections that were lost or looted during the Nazi-era. The aim was to assist claimants in resolving art claims, in a fair and non-litigious manner, through an open exchange of information and cooperation. As an office within a state bank regulatory agency, the office was and continues to be an especially valuable advocate for claimants whose objects have been found in public or financial institutions, for claimants with well-documented claims, and for claimants seeking to recover paintings not necessarily of high monetary value.

Resolving these claims was facilitated to some degree by an expansion of the legal framework in the last decade, through diplomatic initiatives, class action lawsuits, new laws, and guidelines which include the 1998 Washington Conference Principles on Nazi-Confiscated Art.

Given that each art claim involves a specific and identifiable object, art claims have been resolved on a case-by-case basis. Because looted art has been carved out of every Holocaust asset settlement to date, art claims have not been funneled into a large process or commission. This differs substantially from the more “wholesale approach” on the bank and insurance fronts where Holocaust-era litigation resulted in the establishment of settlement funds, claims processes, and tribunals set up to resolve claims.

Art claims are very fact-specific. The ability to find a resolution or to even pursue a claim often depends on a myriad of factors including: in what country

* Monica Dugot, Esq. is a Senior Vice President and Director of Restitution at Christie’s. This article is a revised reproduction of oral remarks presented at the International Law Weekend 2005, held at the House of the Association of the Bar of the City of New York, from October 20 to 22, 2005.
or state the object is found or in which countries the object changed hands, whether the painting is located in a public institution or in private hands, the monetary value of the object, how much the current holder actually paid for the painting, whether the current holder is a good faith purchaser and whether the heirs are all in agreement as to a particular course of action.

Nazi-era art cases can be difficult to resolve because, as these works may have been traded multiple times since the end of WWII, passed through many individuals, through several nations, many might have ended up in the hands of good faith purchasers who had no knowledge that the work they acquired ten years ago or more, from a reputable gallery, might have a tainted provenance and may be stolen property. As a result, one often ends up with two victims: the original owner and the unknowing purchaser.

Depending upon the claim, litigation might be the only way to reclaim Nazi looted property but as is evident from the handful of lawsuits filed in the United States involving WWII looted-art, litigation is not the most productive avenue for reaching fair and appropriate solutions to these types of cases. The emotional and financial costs associated with litigation are high. The legal costs can easily end up being a sizable percentage of the actual value of the work. Indeed, the legal costs can easily exceed the value of the work. The Nazis looted across the board and many of the paintings they seized were not limited to the museum quality seizures for the Fuhrermuseum that Hitler was planning to build in Linz, Austria but rather, objects whose value was largely sentimental. Finally, litigation results in resolutions that are unpredictable, often cash-driven and anything but amicable.

Not surprisingly, to date, most WWII looted art cases have resulted in settlement. To provide a bit of background on this, as is now known, vast amounts of art were looted or displaced during the Nazi-era. Much of that art was not restituted to its true owners. The looting of art by the Nazis before and during WWII was not a mere incident of the German war effort, but was an official Nazi policy. The Nazis systematically stole millions of pieces of art, cultural artifacts and other objects from museums and private collections in Europe. Those works and many collections were scattered across Europe, often far from their countries of origin. Between 1933 and 1945, art was displaced in a number of different ways which included forced sales, Aryanisations, Degenerate Art de-accessioned by German museums, seizures by the Gestapo, and theft by Russian and American soldiers. In the years immediately following the end of World War II, art was also displaced by the Communists' extensive nationalization of private art collections.

After the war, consistent with Allied policy, collecting points were set up and looted objects generally were returned to the country of origin in cases where that could reasonably be determined. These nations were then to make restitution to victims under systems established in each country. However,
thousands of looted objects remain in government hands. In addition, thousands of looted works remain unaccounted for, but often surface in the hands of dealers, auction houses and museums around the world. As has become clear, many of the stolen pieces have ultimately ended up in private collections and governments here and in Europe. Despite increased attention to Holocaust-related gaps in provenance and so-called “red flag names,” once having entered the market, Nazi-looted art continues to be passed on, often inadvertently.

More and more information concerning the ownership of these pieces has emerged and continues to surface regularly. In addition to the opening up of governmental archival records in many parts of Europe, there are a number of databases that are and continue to become available. Books continue to be published on the subject as well, many documenting pre-War collections and supplying much-needed information to families who wish to pursue these claims, as well as to current holders and dealers who are also faced with these issues. Not surprisingly, as additional information continues to become available, and given the greater access to information, the number of Nazi-era claims is increasing.

Moreover, these displaced works are likely to surface more frequently in the next few years as collections are passed on from one generation to the next. As children and grandchildren inherit these objects, some will end up selling them, in all likelihood largely unaware of the complete provenance and therefore totally unaware of a possible restitution problem.

As with others in the art world, Christie’s is aware of the importance of being proactive with regards to these issues—from a moral, commercial as well as legal standpoint. It has become clear that WWII spoliation issues are with the art world for the long term. We are well aware that a number of these objects will surface when offered up for sale. As intermediaries in the art world, we have a responsibility to properly research property consigned to us and to document the provenance of an object as accurately as possible so that a purchaser can be confident that they are receiving clear title to the work.

From a commercial standpoint, given the art market’s increased awareness of these issues, it is unlikely that potential buyers at auction will bid on works if they are not convinced that the work comes with a clear provenance. As one example, the American Association of Museums guidelines now require that museums take all reasonable steps to resolve the Nazi-era provenance status of objects before acquiring them for their collections. One must also keep in mind that provenance research is not only important with regards to questions of title, but also important in terms of authenticity issues; and what we call a “good provenance” can impact the value of an object.

A few brief comments on Christie’s response to Holocaust-era looted art issues—Our aim is to ensure that sales are handled as responsibly as possible
and that we do not inadvertently sell looted or spoliated objects. In order to achieve this, we make certain that internally there is a high level of awareness with regards to these issues and we work on ensuring that that awareness is incorporated into Christie's day-to-day business and culture. If there is a possible restitution problem with an object consigned to us, the goal is to identify the problem early so that there is sufficient time to resolve the problem.

To the extent that Christie's can act as a neutral intermediary, helping to seek a resolution that is fair to both parties, we do so. Where issues arise, we strive to act as an "honest broker" amongst the parties. Presently, there is no viable dispute resolution mechanism to resolve claims that arise as an alternative to avoiding lengthy judicial proceedings. To be sure, Christie's role is not to adjudicate these claims but where we discover a problem and find ourselves in a situation where we can encourage a dialogue between consignor and claimant, assisting the parties in reaching a settlement is a service we can provide. Where the original owner is a private individual, a dialogue often results in restitution, some monetary compensation or the sale going forward. Where the original owner is a Government or museum, a deal often results in the object being returned.

Although we ask our sellers to warrant that they have good title to the property, as well as warrant that the property is free from third party claims, this alone is no longer sufficient because of the complexities of these issues. Most often, sellers legitimately believe that the work in their possession is free and clear of claims. Christie's generally sells as agent rather than as principal. This means that we are not the owners of the property that we sell and often have or start off with incomplete provenance information when an object is consigned to us.

What is often most critical to resolving Holocaust era art cases is access to provenance information—once the facts are known, there is a greater chance of reaching a solution. Although the perception is that auction houses have access to all provenance information, it is worth pointing out that in the course of researching objects consigned to us, we too run into roadblocks in trying to obtain relevant documentation quickly. On occasion, key information simply no longer exists. This is a problem for most wrestling with these issues, trying to solve claims. Where Christie's can be helpful to third parties such as heirs or museums in their research, we endeavor to do so. Similarly, given the difficulties of this research work, we are grateful for the cooperation and assistance of archivists, experts and others in this field.

Christie's completes various steps to ensure that objects are being offered with as accurate and complete a provenance as possible. As I mentioned, company-wide awareness of restitution issues is a critical step and involves ongoing education and training of Christie's staff globally. In addition to what we ask of the consignor which I described earlier, proper due diligence includes
physically examining the object for marks and labels on the reverse of the picture, researching the provenance of the object itself with the assistance of in-house resources and tools, looking out for key gaps in provenance, as well as checking lots against the published lists for art that was looted from individuals and museums in all relevant countries.

As a final leg in our process, our catalogues are sent to the Art Loss Register for checking. Complimentary catalogues are sent to claimant representatives such as the Holocaust Claims Processing Office and others in the field so that they can review our sales and make certain there are no matches in our catalogues with objects they may be pursuing.

It is clear that the work that needs to be done is laborious and extremely time-consuming but given where things stand at the moment, for instance the lack of one single repository of archival information or central global database which would greatly facilitate and expedite provenance research, these are the steps we complete in order to ensure that we are not offering a lot we know or suspect may have been spoliated and where they might be a dispute as to ownership. Given the constant flow of paintings that pass through our doors (Christie’s offers around 200,000 objects a year), as well as the significant time pressure under which we work as compared to, for instance, a museum with a relatively unchanging collection, the task is a challenging one.

As a final thought, I should say that Christie’s would support ideas and initiatives that would facilitate the handling and resolution of some of the Holocaust-era looted art issues I’ve talked about this morning, for instance organizing all key information into a cost-neutral easily accessible centralized repository or possibly supporting a more uniform set of laws governing the adjudication of these issues, in a way that fairly balances the interests of all parties. Although, as I’ve described, progress has been made with regards to access to information, it is in everyone’s interests that more be done, whether it be working towards centralizing relevant data or digitizing often hard to obtain archival data.
ENHANCING ACCOUNTABILITY AT THE INTERNATIONAL LEVEL: THE TENSION BETWEEN INTERNATIONAL ORGANIZATION AND MEMBER STATE RESPONSIBILITY AND THE UNDERLYING ISSUES AT STAKE

Ralph Wilde*

I. INTRODUCTION ............................................ 396

II. THE CONVENTIONAL POSITION IN INTERNATIONAL LAW: EXCLUSIVE INTERNATIONAL ORGANIZATION RESPONSIBILITY .... 401

III. THE COMPETING POLITICAL ISSUES AT STAKE AND THE BALANCE STRUCK BETWEEN THEM IN THE RATIONALE FOR THE LEGAL POSITION .............................................. 404

A. Policy Issue 1: The Operation of International Organizations .............................................. 404

B. Policy Issue 2: Accountability ................................. 405

C. Maintaining Lack of Member State Responsibility and Enhancing the Accountability of International Organizations .............................................. 406

IV. PROBLEMS WITH THE CURRENT SETTLEMENT ....................... 408

A. Lack of Remedies Against International Organizations ............... 408

B. The Prospects for Greater International Organization Accountability .............................................. 411

C. Revisiting the Settlement and Introducing a Contingent Factor ....................... 412

D. The Limits of the Contingency Model .............................................. 413

V. CONCLUSION ............................................. 414

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I. INTRODUCTION

Since 1945, international organizations have come to play a major role in international and national affairs. All states (apart from the Vatican City) are members of the United Nations and subject to the binding resolutions of the Security Council, such as the series of resolutions imposing a broad range of obligations relating to activities prescribed as ‘terrorist’; many states are subject to the jurisdiction of international courts and tribunals, from the WTO dispute settlement process to the International Tribunal on the Law of the Sea. Since 1945 international organizations have often been involved in the arena of military action, whether in providing legal authority, such as the Iraq war in 1991, or conducting operations on the ground, from all-out military campaigns such as the NATO bombing of the then Federal Republic of Yugoslavia (FRY) in 1999, to peace operations such as the United Nations Mission in Ethiopia and Eritrea (UNMEE) stationed at the Ethiopia-Eritrea border.

For those states that become the target for concerted international intervention, the power wielded by international organizations can be acute, especially in circumstances where international organizations assert administrative prerogatives over territory. Bosnia and Herzegovina, for example, has been subject to a UN-authorized regime of military occupation by NATO (from 1995 to 2004 through SFOR, formerly IFOR) and then the European Union (through the EU Force in Bosnia and Herzegovina (EUFOR), since December


4. See the information contained in the Legality of Use of Force cases before the International Court of Justice (ICJ), available at http://www.icj-cij.org/icjwww/idecisions.htm (last visited Mar. 9, 2006).


6. On the range of projects involving the administration of territory by international organizations since the beginning of the League of Nations, see e.g., R. Wilde, From Danzig to East Timor and Beyond: the Role of International Territorial Administration, 95 AM. J. INT’L L. 583 (2001) [hereinafter Wilde 2001].

and partial administration by a range of different international structures, from the sui generis international organization called the Office of the High Representative, which asserts the power to dismiss elected officials and impose laws, to foreign nationals appointed by international organizations sitting as members public bodies, such as the three members of the Constitutional Court appointed by the President of the European Court of Human Rights, and an OSCE-run electoral system, which operated from 1996 to 2004.

More recently, international organizations in general, and the United Nations in particular, have been placed under greater critical scrutiny, as reflected in the UN reports on the failure to prevent the 1993 genocide in Rwanda and the July 1995 genocide in Srebrenica, the outcry that followed evidence of involvement of UN peacekeepers in trafficking and forced prostitution and the misuse of funds and corruption relating to the Oil for


9. On OHR in Bosnia and Herzegovina, see, e.g., Wilde, supra note 6, at 584 n.4 & 8, 585 n.10, 594–96, 599–601, sources cited therein and accompanying text

10. On the international appointments in Bosnia and Herzegovina, see, e.g., Wilde, supra note 6, at 584 n.9 sources cited therein and accompanying text, 597, 599.


Food Programme in Iraq which ran from 1996 to 2003. This more critical climate has extended to the ever-expanding activities of the Security Council; for example, in its report of 2004, the expert UN High-level Panel raised concerns with the “terrorist list” which is used by the Council’s so-called 1267 Committee to denominate the individuals and organizations in relation to whom member states are obliged to take certain actions (e.g. freezing assets) under some of the aforementioned terrorism resolutions. According to the High-level Panel:

The way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raises serious accountability issues and possibly violate fundamental human rights norms and conventions.

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In the academy, this shift towards a more critical approach is reflected in the decision of the International Law Association (ILA) to create an international research Committee on the “Accountability of International Organizations,” which completed its work in 2004.18

UN reform measures and proposals relating to accountability, including those agreed at the Summit of the General Assembly in 2005, essentially concern internal administrative measures, for example strengthening internal oversight mechanisms including the Office of Internal Oversight Services (OIOS),19 creating a new Oversight Committee to co-ordinate internal accountability mechanisms,20 introducing a new internal Office of Ethics,21 and strengthening staff codes of conduct and disciplinary measures.22 This internal, administrative approach is reflected in the High-level Panel’s prescription for addressing the aforementioned accountability concerns it raised in relation to the terrorist list maintained by the Security Council’s 1267 Committee:23

The Al-Qaida and Taliban Sanctions Committee should institute a process for reviewing the cases of individuals and institutions claiming to have been wrongly placed or retained on its watch lists.24


21. _See generally_ S-G Report on accountability, _supra_ note 20, ¶ 40; _see also_ 2005 World Summit Outcome, _supra_ note 19, ¶ 161 (d).


23. On the Committee, see _supra_ note 16.

The only external, judicial measure being contemplated relates to individual not UN responsibility, concerning the greater use of criminal jurisdiction, with waivers of immunity if necessary, to enable the prosecution of peacekeepers.  

The possibilities of using international and national structures to bring the UN and other international organizations to account for their actions are limited when compared to such possibilities existing with respect to states. In the absence of effective legal remedies against international organizations directly, attempts continue to be made to sue the member states, from the Tin Council litigation of the 1980s to the cases brought to the International Court of Justice.


and the European Court of Human Rights concerning the 1999 NATO bombing campaign. However, the view of most international lawyers, affirmed in the Tin Council cases and endorsed by the Institut de droit international, is that member states of an international organization do not incur legal liability for the acts of the organization act by virtue of their membership of it. However, some accept that member state responsibility might be in order if effective remedies against international organizations are lacking.

This piece revisits the long-standing member-state-responsibility issue to consider how advocates of the current legal position on it, and those who countenance the possibility of recourse to member state responsibility, understand the relationship between the two key policy issues at stake: the effective functioning of international organizations, on the one hand, and the promotion of accountability, on the other. I will suggest that both approaches fail to accord due weight to the need for greater support generally by states for enhanced scrutiny of international public policy.

II. THE CONVENTIONAL POSITION IN INTERNATIONAL LAW: EXCLUSIVE INTERNATIONAL ORGANIZATION RESPONSIBILITY

The traditional approach to the law of international organizations conceals the tension between international organization and individual state responsibility, by conceiving responsibility for the acts of the organization (if a distinct legal person, as with the United Nations) exclusively in terms of the organization itself, not also the individual member states.

In international law, many important international organizations including the UN enjoy distinct legal personality, separate from the legal personalities of their member states. In other words, legally, they are more than the sum of their (state) parts. A corollary to this idea is that the distinct legal person is responsible for the organization's acts. In consequence, when member states

29. See discussion and sources cited infra, Part 2.
30. See discussion and sources cited infra, Part 4(c).
perform certain acts as part of the structure of the international organization—for example voting in the UN Security Council—as a matter of law these acts are not state acts at all, but rather form part of the process of the organization, for which the organization is responsible. Similarly, when states act on behalf of the organization, and in the organization’s name, as a matter of law these are acts of the organization.

This situation might be denigrated as a “legal fiction” when compared with the idea of state responsibility, but of course the concept of the state, and the idea that state representatives engage the legal responsibility when they perform acts in an official capacity, also involves imputing legal personality to an abstract entity rather than a real person. Most international lawyers accept the concept of legal personality and the correlative notion of distinct legal responsibility on the part of international organizations; disagreement exists, however, on the question of whether in addition to international organization responsibility, member states are also liable for the acts of the organization—in a secondary or concurrent manner—by virtue of their membership.

A minority of academic commentators have suggested that there is a general rule of international law providing for such member state responsibility. Such suggestions have been made in two main ways. In the first place, commentators highlight the absence in international law of specific norms providing for limited liability on the part of international organizations, a position at odds with the treatment of corporations by many municipal legal systems. It is argued that in the absence of such norms, member states are secondarily responsible. This argument is challengeable on the grounds that the absence of positive rules providing for limited liability is matched by the absence of such rules providing for secondary liability. Even if, then, there is a lacuna in the law, it is not by itself capable of leading to a conclusion of either secondary or limited liability. Moreover, whether in this respect the position of corporations in municipal law is analogous to the position of

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Report of the International Law Commission on the work of its fifty-seventh session (May 3 to June 3 and July 11 to Aug. 5, 2005), UN doc. A/60/10 (May 2, 2005), Chapter V.

33. Certain ‘official’ acts can also give rise to individual criminal responsibility in international law. See generally Antonio Cassese, International Criminal Law (2003).


35. See Higgins 1995, supra note 34, at 270, 286.
international organizations in international law is not to be assumed, as this argument seems to suggest.\textsuperscript{36}

In the second place, it has been suggested that the presence of limited liability clauses in the constitutions of some international organizations\textsuperscript{37} implies that for those constitutions without such clauses, as in the case of the UN Charter, member states would be liable for the acts of the relevant organizations. Thus the clauses modify a general rule of international law providing for member state liability. However, such clauses could merely reflect uncertainty about the state of international law, and/or be motivated by a desire to warn third parties about where liability would lie.\textsuperscript{38} In the absence of a detailed examination of the travaux préparatoires of all the organizations with such clauses, and a consideration of the overlap of membership of such organizations with other organizations constituted without exclusion clauses, the significance of such clauses in terms of identifying a general rule of secondary liability is unclear.\textsuperscript{39}

These two arguments have traditionally formed the exclusive basis for considering the possibility of secondary or concurrent state liability,\textsuperscript{40} and their weakness has led most commentators and judicial authorities to hold with a general proposition of non-liability.\textsuperscript{41} This majority view, endorsed by the Institut de droit international following the report of then Professor Rosalyn Higgins, is that there is no general principle of international law whereby the member states of the organization involved incur legal liability in consequence of the acts of international organizations by virtue of their membership of such organizations.\textsuperscript{42} Such liability can only subsist if the constituent instruments of

\begin{itemize}
  \item\textsuperscript{36} See id. at 267, 287.
  \item\textsuperscript{37} For such exclusions, see the discussion in Higgins 1995, supra note 34, at 271–72 and Sir Ralph Gibson in the Tin Council cases (CA), supra note 27, [1988] 3 All ER 257, at 354.
  \item\textsuperscript{38} Tin Council Cases (CA), supra note 27, [1988] 3 All ER 257, 354–55; Higgins 1995, supra note 34, at 267, 271–73.
  \item\textsuperscript{39} Higgins 1995, supra note 34, at 273.
  \item\textsuperscript{40} An argument has also been made that certain international organizations enjoy legal personality that is only 'subjective,' viz. opposable only to member states, and not 'objective,' viz. opposable to non-member states; because of this, member states are responsible for the acts of the organization as far as non-member states are concerned. See the discussion in id. at 274–76.
  \item\textsuperscript{41} See Tin Council cases (HL), supra note 27, 81 I.L.R. 670 (1989), at 679–81 (Lord Templeman); 710–15 (Lord Oliver).
  \item\textsuperscript{42} See Tin Council Cases (CA) and Tin Council Cases (HL), supra note 27. See generally Higgins 1995, supra note 34; Institut de droit international, Resolution, The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations Toward Third Parties (1995) available at http://www.idi-iiil.org/ididE/navig_chon1993.html (last visited Oct. 9, 2005) [hereinafter Institut Resolution].
\end{itemize}
the international organizations explicitly provide for it, something which, as mentioned, the UN Charter does not do in the case of the UN.\textsuperscript{43} Is this a politically supportable position?

III. THE COMPETING POLITICAL ISSUES AT STAKE AND THE BALANCE STRUCK BETWEEN THEM IN THE RATIONALE FOR THE LEGAL POSITION

When the Institut de droit international drew its conclusion as to the absence of a general rule of member state responsibility, it did so having taken into account the two main competing political issues as stake, which it described thus: "the tensions existing between the importance of the independent responsibility of international organizations on the one hand, and the need to protect third parties dealing with such international organizations, on the other hand".\textsuperscript{44}

These competing principles might be understood in terms of the effective operation of international organizations, on the one hand, and accountability, on the other. How have these principles and the effect on them of member state responsibility been understood in international legal discourse? How was an outcome excluding such responsibility reached on the basis that it accommodated both principles?

A. Policy Issue 1: The Operation of International Organizations

The first key political issue at stake concerns, in the words of then Professor Higgins, "the efficient and independent functioning of international organizations."\textsuperscript{45}

The Institut describes the principle thus: "support for the credibility and independent functioning of international organizations and for the establishment of new international organizations."\textsuperscript{46}

Member state responsibility as traditionally understood is seen as undermining this principle. Professor Higgins points out that:

... if members know that they are potentially liable for contractual damages or tortious harm caused by the acts of an international organization, they will necessarily intervene in virtually all decision-making by international organizations. It is hard to see how the degree

\textsuperscript{43} See Institut Resolution, supra note 42, at art. 5; Higgins 1995, supra note 34, at 273–74; see also ROSALYN HIGGINs, PROBLEMS AND PROCESS INTERNATIONAL LAW AND HOW WE USE IT 47 (Clarendon Press 1994).

\textsuperscript{44} Institut Resolution, supra note 42, at pmbl. (emphasis in original).

\textsuperscript{45} Higgins 1995, supra note 34, at 288.

\textsuperscript{46} Institut Resolution, supra note 42, at art. 8.
of monitoring and intervention required would be compatible with the continuing status of the organization as truly independent, not only from the host state, but from its membership.\(^{47}\)

Here, then, we see a potential problem caused by conceiving member state responsibility for the acts of international organizations: paralysis within existing organizations, with consensus required for every decision, and states reluctant to create and support new international organizations in the future out of a fear of running the risk of liability for future acts they may not be able to control. Such responsibility necessarily contradicts the nature of those international organizations conceived in a manner whereby all member states are not necessarily able to control all the acts of the organization, for example when decisions are taken by the Security Council.

**B. Policy Issue 2: Accountability**

The functional effectiveness principle is only one half of the picture, however. On the other hand, we have what might be regarded as the accountability principle. In the first place, as Professor Higgins states, third parties should be protected: "from undue exposure to loss and damage, not of their own cause, in relationships with [international] . . . organizations."\(^{48}\)

Here the focus is on those affected by the actions of international organizations, who should be provided with legal redress when such actions lead them to suffer harm or some other loss. This victim-orientated approach leads to the related violator-orientated approach of avoiding impunity, promoting the notion that, in the words of Professor Seidl-Hohenveldem: "a state cannot escape its responsibility under international law by entrusting to another legal person [e.g., an international organization] the fulfillment of its international obligations."\(^{49}\)

Professor Brownlie argues that "a State cannot by delegation [e.g., to an international organization] . . . avoid responsibility for breaches of its duties under international law. . . . This approach of public international law is not ad hoc but stems directly from the normal concepts of accountability and effectiveness."\(^{50}\)


\(^{48}\) Id.


Similarly, in two cases before the European Court of Human Rights, the Court stated that:

where States establish international organizations . . . there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.\(^{51}\)

In one of the English cases concerning the collapse of the International Tin Council (ITC), an international organization, and the possibility of obtaining remedies from member states of the organization, Lord Justice Nourse stated that "international law would surely presume that states which were willing to join together in such an enterprise [creating an international organization] would intend that they should bear the burdens together no less than the benefits."\(^{52}\)

These twin principles—that third parties affected by the acts of international organizations should be given redress, and that states should not be able to evade legal responsibility by transferring competences to international organizations—would clearly be supported if member states were made legally responsible for the acts of organizations of which they are a member.

**C. Maintaining Lack of Member State Responsibility and Enhancing the Accountability of International Organizations**

How are the two policy issues outlined above accommodated by the traditional position excluding member state responsibility? Certainly such a position promotes the first policy objective of ensuring the effective functioning of international organizations or, rather, fails to undermine this objective, accepting, of course, the assumption that member state responsibility would


\(^{52}\) Tin Council cases (CA), supra note 27, [1988] 3 All ER 257, at 333 (Nourse LJ).
indeed have such an undermining effect were it to be introduced. Thus the Institut de droit international resolved that

[Important considerations of policy, including support for the credibility and independent functioning of international organizations and for the establishment of new international organizations, militate against the development of a general and comprehensive rule of liability of member States to third parties for the obligations of international organizations.]

However, those supporting this position do not do so by disregarding the accountability principle; they do not conclude that the effective functioning of international organizations trumps the need to ensure accountability. Rather, they seek to promote accountability through alternative means: greater safeguards for third parties operating in relation to international organizations directly. Professor Higgins argues that “a variety of protective measures should properly be taken—whether insurance, or the demand of specific ad hoc guarantees from members, or other measures . . .” and the Institut concludes that:

Important considerations of policy entitle third parties to know, so that they may freely choose their course of action, whether, in relation to any particular transaction or to dealings generally with an international organization, the financial liabilities that may ensue are those of the organization alone or also of the members jointly or subsidiarily. Accordingly, an international organization should specify the position regarding liability

1) in its Rules and contracts;
2) in communications made to the third party prior to the event or transaction leading to liability; or
3) in response to any specific request by any third party for information on the matter.

This approach was formulated in the backdrop of the series of cases before the English courts arising out of the collapse of the ITC mentioned above. These cases concerned contracts freely entered into by private contractors with the ITC. Such a “safeguarding” approach is inappropriate, however, in circumstances where third parties have not chosen the transaction in question—for example when individuals are subject to the control of international

53. Institut Resolution, supra note 42, at art. 8.
55. Institut Resolution, supra note 42, at art. 9.
organizations in field operations authorized by Security Council resolutions passed under Chapter VII of the UN Charter, or, more broadly, where the UN fails to act to prevent human rights atrocities, as in Srebrenica and Rwanda.\(^5\)

In the case of the conduct of territorial administration by the UN, individuals are placed under the control of international organizations regardless of whether they have accepted such control in the light of the remedies available to them.\(^6\)

Whereas in transactions that are freely entered into, adequate remedies for third parties would not necessarily be required—the key requirement being transparency as to the nature of remedies, so that an informed decision can be made—for transactions that are imposed, adequate remedies are arguably necessary. In the case of a failure to protect, being "on notice" of a lack of responsibility is beside the point; the idea here is that there should be a responsibility to take effective action.\(^7\)

The underlying rationale for the lack of member state responsibility in relation to the acts of international organizations has to be understood, then, in terms of a separate area of international law concerning the responsibility of international organizations and the provision of remedies against these actors directly. When the two are taken together, both policy objectives are seemingly supported: the functioning of international organizations is not compromised, nor is securing accountability and redress.

IV. PROBLEMS WITH THE CURRENT SETTLEMENT

A. Lack of Remedies Against International Organizations

The adequacy of the current legal arrangement in securing both effective international organizations and proper levels of accountability presupposes an adequate regime of responsibility, applicable law and remedies against international organizations. However, as far as the law is concerned, whether and to what extent international organizations are subject to national and international law is relatively unclear;\(^8\) moreover, no standing international


\(^{57}\) On international territorial administration, see, e.g., Wilde 2001, supra note 6.

\(^{58}\) On this point see High-Level Panel Report, supra note 17, ¶¶ 199–203; see also ICISS Report, supra note 56, in particular at 69 ff.

\(^{59}\) On the question of applicable law to international organizations, see generally MOSHE HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES: SOME BASIC PRINCIPLES (1995); HENRY G. SCHERMERS & NEILS BLOKKER INTERNATIONAL INSTITUTIONAL LAW (3rd ed., 1990), §§
court or tribunal enjoys jurisdiction to hear complaints brought directly against international organizations, and such complaints are usually barred on the domestic level due to the enjoyment of privileges and immunities. Even if, then, it is beyond question that international organizations are capable of being legally responsible for their acts by virtue of their possession of international legal personality, what law applies to them, and what judicial body exists to apply this law directly in cases where it is alleged that the law has been breached, remains uncertain.

For example, individuals complaining of a breach of their civil and political rights by a member state of the Council of Europe would be able to invoke the state’s obligations under the European Convention of Human Rights (ECHR) (provided the alleged breach took place within the state’s ‘jurisdiction’ for the purposes of the Convention), and if they were denied an effective legal remedy against that state in domestic courts, would be entitled to bring a case to the European Court of Human Rights. Such individuals complaining of a

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60. See sources cited supra note 26.

61. See sources cited supra note 32.

62. European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, art. 34, Nov. 4, 1950, 213 U.N.T.S. 222: “The Court may receive applications from any person, nongovernmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right”. For the criteria for admissibility of individual applications, see generally id. art. 25.
breach of their civil and political rights by the UN—for example in Kosovo, where the UN is the governmental authority—such a breach is not regulated by the European Convention, domestic remedies are largely absent because of the enjoyment of legal immunities by the UN and its officials, and there is no standing before the European Court of Human Rights to bring cases directly against the UN as opposed to an ECHR contracting state. An Ombudsman can hear complaints against the UN but its decisions are purely recommendatory and it has no powers of enforcement.63

It follows that, in general, the legal bar against remedies against the member states of international organizations flowing from the lack of liability on the part of member states is matched by the lack of remedies available against such organizations as a matter of fact. Although, then, states act through international organizations in a broad range of affairs, the remedies obtainable against them or the organizations involved for breaches of international law are severely limited.

It is no doubt in consequence of this general problem that Lord Justice Griffiths remarked in one of the Tin Council cases that the appellants, who were barred from suing the individual member states of the Council and had no remedy against the organization itself, "have suffered a grave injustice."64

Those endorsing the general view of a lack of member state responsibility in this broader context have focused their attention on seeking to improve mechanisms for securing the accountability of international organizations. The aforementioned International Law Association study, for example, concluded in 2004 that this regime should be enhanced.65

Underlying this approach is perhaps a certain faith that such enhancements are a likely possibility in the medium term; even if, then, the accountability principle will not be secured by retaining a lack of member state responsibility, this is a price worth paying because it ensures the continued functioning of international organizations and will be relatively short-lived.

Is this faith in the prospects for greater overall, externally-enforced UN accountability well-placed, however? One approach to this question is to consider what motivates states to support international organizations, and the potential effect this motivational structure can have on the position taken by them as to the question of international organization accountability.


65. See ILA Report, supra note 50.
B. The Prospects for Greater International Organization Accountability

Clearly one motivation for state support of international organizations is the ability to transfer the pursuit of certain policies to the international level. Moreover, one reason why this can be attractive is that states are no longer individually responsible for the promotion of the policy—it is the international organization, not them, that is responsible. So, for example, before the 2003 war against Iraq the idea was put forward by the US and its allies that the UN had failed to disarm Iraq through peaceable means, and that this failure by the global organization—rather than its individual member states—therefore justified unilateral military action by certain states who were, by definition, not responsible for the failure. This idea by itself would not militate against the idea of greater remedies against international organizations.

However, it might even be said that this process of displacement from states to international organizations is also appealing to states because of the comparative lack of accountability that exists vis-à-vis international organizations when compared to states. In the context of an international organization accountability deficit, displacement means that the state is not made responsible for the policy and the entity that is responsible is not subject to an effective accountability mechanism. Thus the policy can be promoted without much scrutiny. This is of course an effective means of realizing a particular policy—transfer it onto another actor in relation to whom no effective mechanism for review exists. Because of this, states may well have an interest in keeping international organizations unaccountable.

It is therefore necessary to consider the important role international organizations can play in enabling states to promote policies in an unaccountable fashion. The relatively unaccountable nature of international organizations may be a key structural feature as far as their importance to states is concerned, not something that has come about by accident or, alternatively, solely because of the way states and international organizations are sometimes understood as normative opposites, with international organizations seen, unlike states, as somehow intrinsically humanitarian, selfless and even-handed, and not therefore requiring the kinds of accountability mechanisms that would be in order in the case of states.

The traditional settlement, seeking to enhance the accountability of international organizations rather than opting for member state responsibility, so that both the functioning of such organizations and the existence of effective accountability structures operate, is exposed as problematic because it ignores the possibility that states may wish to block greater international organization accountability as a companion to the lack of member state responsibility. If such greater accountability were to come about, then, states might actually seek
withdraw their support for international organizations. Conceiving member state responsibility is not the only policy prescription jeopardizing the first policy objective of ensuring state support for international organizations, then; promoting greater international organization responsibility might also have this effect.

Attempts to resolve the problem of impunity by focusing exclusive attention on greater international organization responsibility may therefore be misguided, in that their prescriptions may be blocked by states objecting to the underlying policies they promote through international organizations being made subject to greater scrutiny. It may, then, actually be much more difficult to reconcile the effective functioning of international organizations with a greater enhancement of accountability.

C. Revisiting the Settlement and Introducing a Contingent Factor

An alternative approach, accommodating the risk of a failure to enhance structures of accountability in relation to international organizations, is to make the continuance of the traditional settlement denying member state responsibility contingent on improvements in such structures. If improvement is not forthcoming, then the introduction of member state responsibility can be considered. Such an approach can be seen in a series of cases brought to the European Commission and Court of Human Rights concerning the question of state responsibility relating to the acts of international organizations under the European Convention of Human Rights, two of which were mentioned earlier. In one such case, M, the European Commission of Human Rights stated that if the transfer of state powers to an international organization necessarily excluded the state’s

[R]esponsibility under the Convention with regard to the exercise of the transferred powers . . . the guarantees of the Convention could wantonly be limited or excluded and thus be deprived of their peremptory character. The object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective. . . . Therefore the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection.66

What is perhaps implicit in this dictum—that if there is no equivalent protection of human rights within the organization, then the transfer of competences to the organization would engage state responsibility—is made explicit in the later Matthews case, where the European Court of Human Rights stated that “[t]he Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be ‘secured.’ Member States’ responsibility therefore continues even after such a transfer.”

The possibility of falling back on member state responsibility is also left open by the Institut, which asserted a “failure to take any of” the aforementioned actions it prescribed to safeguard the rights of third parties “should be taken as a relevant factor in considering the liability of the States members.”

This suggests, then, that in the traditional settlement the scenario of non member-state responsibility coupled with greater third party safeguards—and, one would add, a strict regime of accountability for those activities of international organizations where the issue of consent by third parties is inapplicable—is posited as an ideal, in that it safeguards both the principle of the smooth operation of international organizations and the principle of accountability. If, however, this ideal is not possible because an effective accountability regime for, and third party safeguards in relation to, international organizations is lacking, then an imperfect alternative should be adopted, whereby the latter principle is promoted through means detrimental to the realization of the former principle.

D. The Limits of the Contingency Model

According to the assumption that member state responsibility undermines the effective functioning of international organizations, clearly the contingency model assumes that this price will have to be paid to secure accountability if the ideal model of international organization accountability is not forthcoming. It might be said, however, that the negative aspects of this imperfect solution are not too great, because in the medium to long term greater accountability mechanisms operating in relation to international organizations will be forthcoming, something that perhaps might be hastened by the introduction of a regime of responsibility operating against member states. Thus the detrimental effect on the working of international organizations will be short lived. This echoes the earlier assumption made in relation to the conventional view rejecting member state responsibility.

68. Institut Resolution, supra note 42, at art. 9.
Given what has been said already about the potential benefits for states of a lack of international organization responsibility, however, is it really possible to be confident in assuming the short-lived nature of the contingency model? The strategy of pushing for member state responsibility might not actually motivate states to support greater international organization accountability so as to stave off attempts to make states directly liable, because more fundamentally states may not wish any effective accountability mechanisms to operate.

To be sure, as an alternative to direct state responsibility greater international organization accountability would mean that states could preserve the displacement of responsibility onto international organizations, but the much greater accountability that would then operate would mean that the policies that have been displaced would be subjected to greater scrutiny, something which states may not wish to have happen. Instead of leading to a greater push for international organization accountability, then, the member state accountability model might actually precipitate a challenge by states to the existing mechanisms that enforce their own responsibility directly, for example international human rights bodies.

The contingency model, then, may not be a short-term remedy, and as such may come at a higher price in terms of undermining the effective functioning of international organizations than has usually been understood. The nature of dilemma faced by those seeking to promote such effective functioning and accountability is perhaps, therefore, different: not whether the push for immediately enhancing accountability justifies a short period during which the work of international organizations may suffer, but rather how a more long-term perceived conflict between accountability, on the one hand, and the effective functioning of international organizations, on the other, is to be understood.

V. CONCLUSION

Attempts to rectify the inconsequential nature of international organization liability as far as substantive legal outcomes are concerned—pushing for greater international organization accountability, and possibly falling back on member state responsibility as a stop-gap before such improvements are made—will both make the concept of multilateral liability more costly for states. The international organization accountability model, although retaining the displacement of policy from states to international organizations, would still mean that substantive policy outcomes—or lack of outcomes in the case of a failure to prevent atrocities—are subject to much greater scrutiny than at present. The future prospects of such a model depend in large part on the willingness of states to accept such policies being subject to this enhanced form of scrutiny, something which cannot be assumed.
Equally, the prospects of the member state responsibility stop-gap model depend on states’ willingness to accept this greater policy scrutiny and its operation through mechanisms operating in relation to them directly. It also risks undermining the effective functioning of international organizations insofar as member state responsibility is understood to have such an effect. Moreover, it may not lead to greater state support for enhanced international organization accountability as an alternative to direct state responsibility if states are reluctant to see any enhanced policy scrutiny. In such circumstances, states might opt for a diminution in the mechanisms that operate against them directly.

Any transformation of the current accountability deficit in relation to the acts of international organizations depends not only on international organizations themselves accepting greater scrutiny; it is also necessary to acknowledge what is at stake for member states in such a process, and way in which the current settlement enables states to pursue policies with the broader context of a relatively attenuated environment of scrutiny. In seeking to understand the prospects for such a transformation, therefore, one has to take account of the willingness on the part of member states to have the international policy they promote through international organizations subject to a greater regime of accountability than is the case at present.
I. INTRODUCTION

The Hague Convention on Choice of Court Agreements (HCCCA), signed by member states of the Hague Conference on Private International Law in June 2005, is an important step in harmonizing national conflicts of law rules that sometime strain to manage the burgeoning traffic in transnational litigation generated by global commerce. This development is particularly important for Canada, a nation dependent on the benefits of international business and trade and particularly so given the recent sui generis evolution of Canadian conflict of laws rules against which the HCCCA may provide a welcome panacea. Nevertheless, given the narrow focus and application of the HCCCA to...
“exclusive choice of court agreements concluded in civil or commercial matters,” essentially a designation by private contracting parties of the court(s) of one Contracting State to the HCCCA, much of the status quo in the national law of Contracting States will remain undisturbed. Whether the HCCCA ultimately gains broad acceptance and when it will come into force are also open questions that only an indeterminate amount of time will answer.

Our purpose here is to give a succinct account of the applicable status quo in Canada with respect to recognition and enforcement of foreign judgments and the likely impact of the HCCCA thereon, assuming the Convention does come into force and Canada follows through in ratifying it. We also focus on the Uniform Law Conference of Canada’s Uniform Enforcement of Foreign Judgments Act, a model law for possible subsequent adoption by all Canadian jurisdictions, the development of which paralleled Canadian participation in the Hague project and which was conceived as a domestic legislative response to many of the same issues addressed by the HCCCA.

II. THE STATUS QUO

Prior to the Supreme Court of Canada’s seminal ruling in Morguard Investments v. De Savoye, Canadian courts rigorously adhered to the English common-law approach to recognition and enforcement of foreign judgments. This approach allowed that, unless the Canadian defendant had voluntarily attorned to the jurisdiction of the foreign court, or was otherwise deemed to be found within that jurisdiction in certain circumstances, the foreign proceeding

2. Id. art. 3.

In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment:

1) Where the defendant is a subject of the foreign country in which the judgment has been obtained;
2) Where he was resident in the foreign country when the action began;
3) Where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued;
4) Where he has voluntarily appeared;
5) And where he has contracted to submit himself to the forum in which the judgment was obtained.

Id.; see also Vaughan Black, Enforcement of Judgments and Judicial Jurisdiction in Canada,
could be safely ignored. The foreign plaintiff would be required to sue on its 
judgment, against which a full defense on the merits could then be waged at 
home. New Brunswick’s Foreign Judgments Act and Saskatchewan’s Foreign 
Judgments Act effectively codify the pre- *Morguard* rules, only recognizing a 
foreign court’s jurisdiction where the defendant is, at the time of the 
commencement of the action, ordinarily resident in the foreign country, or 
where the defendant voluntarily attorns, or has expressly or impliedly agreed 
to submit, to the foreign jurisdiction.

Somewhat surprisingly in retrospect, given that Lord Justice Buckley’s 
decision in *Emanuel v. Symon* focused specifically on foreign judgments, 
Canadian courts, before *Morguard*, applied the English approach co-equally to 
the enforcement of rulings from one province to another within the federation. 
Thus, in either case, recognition and enforcement required a new action and 
potentially a new trial. Legislatures in all Canadian provinces, except Quebec, 
attempted to address the enforcement issue as between sister provinces with 
reciprocal enforcement of judgments legislation. Some provinces’ reciprocal 
enforcement legislation went further, listing a number of foreign jurisdictions 
as “reciprocating states” where complementary legislation has been adopted in 
cooperating foreign jurisdictions. For example, British Columbia enacted the 
Court Order Enforcement Act (COEA), which allows a judgment creditor from 
a reciprocating state—including a number of foreign countries—to apply to the 
Supreme Court of British Columbia to have the judgment registered as a 
judgment of that court. Nevertheless, under the COEA, the out-of-province

9 OXFORD J. LEGAL STUD. 547. (1989) (commenting critically on the pre- *Morguard* approach of 
Canadian courts).

8. See Reciprocal Enforcement of Judgments Act, R.S.O. c. R–5 (1990); Reciprocal Enforcement 
Reciprocal Enforcement of Judgments Act, C.C.S.M. c. J20 (2005); Reciprocal Enforcement of Judgments 
Act, R.S.Y. c. 189 (2002); Reciprocal Enforcement of Judgments Act, R.S.N.W.T. c.R–1 (1988) as duplicated 
for Nunavut Act, S.C. c. 28 (1993); Reciprocal Enforcement of Judgments Act, R.S.N.S. c. 388 (1989); 
Reciprocal Enforcement of Judgments Act, R.S.P.E.I. c. R–6 (1988); Reciprocal Enforcement of Judgments 
Act, R.S.N.L. c. R–4 (1990); Court Order Enforcement Act, R.S.B.C. c. 78 (1996) [hereinafter, the “COEA”]; 
but see also Civil Code of Québec, C.C.Q. Art. 3155 (2005); Québec treats all judgments originating from 
outside the province, whether they originate from another province or another country, as foreign judgments, 
and its judgments receive the same treatment in the other provinces.
9. See COEA, supra note 8.
10. *Id.* § 29. The reciprocating states are all provinces and territories of Canada except Quebec, 
most of the states of Australia, certain Pacific islands, the Federal Republic of Germany, the Austrian 
Republic, the United Kingdom (pursuant to Schedule 4 to the Act), and, in the U.S.A., the following States:
or foreign judgment, as the case may be, will not be registered if the defendant was neither carrying on business nor ordinarily resident in the other jurisdiction and did not voluntarily appear or otherwise submit to the other jurisdiction.\(^1\) Thus, the COEA does not address those cases in which a plaintiff has a judgment from another Canadian province or foreign country that clearly had jurisdiction over the subject matter of the dispute, but the defendant was not a resident of that province or foreign country and did not attorn. Therefore, while this reciprocating legislation streamlines the process of recognition and enforcement, substantively it still fails to take plaintiffs much beyond the rigid, conservative confines of *Emanuel v. Symon*. Indeed, the Supreme Court of Canada rendered its groundbreaking decision in *Morguard*, a British Columbia case, within the context of the substantive shortcomings of the COEA.

*Morguard* eschewed the traditional English formula in relation to the inter-provincial context, importing the American constitutional concept of "full faith and credit"\(^12\) as between co-ordinate jurisdictions within national boundaries, and posited a new formula. The enforcing court would recognize and enforce the judgment of the originating court, precluding any further defense on the merits, provided: the adjudicating court had properly exercised jurisdiction under its own rules; and the enforcing court could satisfy itself that there was "a real and substantial connection" between the adjudicating jurisdiction and determinative features of the *lis* or the defendant as a party.\(^13\)

Further, the *Morguard* court, in prophetic unanimous reasons in obiter authored by Justice LaForest, suggested that the same approach might apply to foreign judgments of comparably civilized jurisdictions. Justice LaForest premised his reasons on the notion of "international comity" which he described as:

the recognition [that] one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights

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11. *Id.* § 29(6)(b).
of its own citizens or of other persons who are under the protection of its laws.\(^\text{14}\)

Justice LaForest resurrected this nineteenth-century notion, borrowed from American jurisprudence, in light of late twentieth-century realities placed on a trade-dependent country:

Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under the circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the European Community, have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants.\(^\text{15}\)

The LaForest opinion added that "[u]nder these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for a reappraisal." Lower courts across Canada enthusiastically took up this invitation to a dramatically liberalized approach and their endorsements entailed sometimes harsh consequences for Canadian defendants.\(^\text{16}\) The retrospective application of the new rule caught many defendants who had decided, pre-\textit{Morguard}, not to defend themselves against foreign law suits.\(^\text{17}\) It also caught those defendants whose exposure to damages awards—notably from U. S. civil juries—were far in excess of anything a Canadian court would have awarded had the defendants been sued in a Canadian jurisdiction at first instance.\(^\text{18}\) Nevertheless, the Supreme Court chose not to revisit such concerns until \textit{Beals v. Saldanha}.\(^\text{19}\) thirteen years later, in which it affirmed the international comity branch of \textit{Morguard}. With that, the lower court applications of \textit{Morguard} to transnational cases were essentially vindicated,

\begin{itemize}
\item \textit{Morguard}, supra note 4, at 1096.
\item \textit{Id.} at 1098.
\item \textit{See} \textit{Fairley, supra note 13}, \textit{Blom, supra note 13}.
\item \textit{See, e.g., Moses v. Shore Boat Builders Ltd.} 106 D.L.R. (4th) 654 (B.C.C.A. 1993), leave to appeal refused, 24 C.P.C. (3d) 294 (S.C.C. 1994), post-\textit{Morguard} enforcement of pre-\textit{Morguard} Alaska Judgment; for other examples, \textit{see discussion in Blom, supra note _Ref129568697\h13, at 38–39; Fairley, supra note13, at 3–4.}
\end{itemize}
including those that yielded harsh results from the Canadian defendant’s perspective such as in *Old North State Brewing Co.*,\(^{20}\) considered in more detail below.

The substantial connections test, as laid down in *Morguard*, forecloses any re-opening of a case on its merits. In the wake of adopting this new test in the enforcement of foreign judgments, the question arises whether existing defenses to enforcement, elaborated under the previous Anglo-Canadian common-law approach of formal attornment, should be revised. The Supreme Court of Canada, in *Beals*, answered this question—essentially, but not unequivocally—in the negative. Once the Court satisfies itself that a substantial connection to the foreign jurisdiction exists, defendants are left only with certain impeachment defenses—namely, natural justice, public policy, and fraud—to oppose recognition and enforcement of the foreign judgment.

The aforementioned defenses have—and, thus far, continue to retain—relatively narrow application. For a defense based on natural justice, the enforcing court measures the foreign judgment against its own standards of natural justice, but does not impose requirements of conformity with its own procedural rules. The public policy defense must establish that the foreign law, on which the judgment is founded, is on its face, not in its application, offensive to the fundamental morality of the Canadian legal system.\(^{21}\) Finally, a “fraud” that was adjudicated upon in the foreign court cannot be re-litigated unless newly discovered and material evidence has become available.\(^{22}\)

*Morguard*, and later *Beals*, significantly altered the legal landscape for the enforcement of foreign judgments in Canada without any assurance of similarly liberal treatment for Canadian judgments presented for enforcement in other jurisdictions. The perceived result is a playing field tilted against Canadian businesses, particularly those in the position of defendant.\(^{23}\)

Though, as noted above, some provinces have designated several countries as reciprocating jurisdictions in their reciprocal enforcement legislation, in order to facilitate enforcement of judgments through a registration mechanism, domestic rules alone do not guarantee reciprocal treatment by other countries, as is the case under international treaties.\(^{24}\) Canada is a party to two treaties in


\(^{21}\) *Beals*, supra note 19; see also *Beals* v. Saldanha, 54 O.R. 3d 641 (C.A. 2001).


\(^{24}\) This is the case of Germany and Austria notably in British Columbia as well as a number of Australian States in a few provinces that so provide.
the field of enforcement of judgments: the 1984 Convention between Canada and the United Kingdom on the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters,\textsuperscript{25} and the 1996 Convention between Canada and France on Recognition and Enforcement of Judgments in Civil and Commercial Matters and Mutual Legal Assistance in Maintenance.\textsuperscript{26} As a simple "enforcement" convention, the Canada/United Kingdom Convention does not deal with jurisdictional issues and is limited to facilitating recognition and enforcement of judgments between the two countries.\textsuperscript{27} The Canada/France Convention, signed in June 1996, is not in force because the implementing legislation has not yet been adopted. One interesting feature of the Canada/France Convention is that it provides a list of bases of jurisdiction that can illustrate admissible grounds of jurisdiction.\textsuperscript{28}

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\textsuperscript{27} Its application has remained fairly marginalized, most probably because it remains largely ignored by practitioners. Only a handful of cases have relied expressly on the Canada/United Kingdom Convention, such as in Fabrelle Wallcoverings & Textiles Ltd. v. North American Decorative Products Inc., 6 C.P.C. (3d) 170 (Ont. Gen. Div. 1992), and J.B.S. Tooling Co. v. Upward Tool Group Inc., 6 C.P.C. (4th) 191 (Ont. Gen. Div. 1996). It was, however, ignored in Union of India v. Bumper Development Corp., 36 C.P.C. (3d) 249 (Alta. Q.B. 1995). The two Ontario cases have read the Canada/United Kingdom Convention as incorporating the \textit{Morguard} test.

\textsuperscript{28} Canada/France Convention, supra note 26, art. 5.

The court of the State of origin shall be deemed to have jurisdiction within the meaning of this Convention if in particular:

- The defendant had his or her habitual residence, if a natural person, or its principal place of business, if an artificial person, in the State of origin when the proceedings were started;
  - a) The defendant had a place of business or branch in the State of origin when the proceedings were started and was served in that State in connection with a dispute related to the activities of that place of business or branch;
  - b) In an action for damages in tort, \textit{quasi-delict} or \textit{delict}, the wrongful act occurred in the State of origin;
  - c) The claim is related to a dispute in connection with rights \textit{in rem} in immovable property located in the State of origin;
  - d) The defendant expressly submitted in writing to the jurisdiction of the court of the State of origin;
  - e) The defendant appeared without challenging the court's jurisdiction or presented a defence on the merits;
  - f) The contractual obligation that is the subject of the dispute was or should have been performed in the State of origin;
III. LOOKING FORWARD

In the aftermath of Morguard, case law continues to develop in the common-law provinces regarding the application of the decision's principles and their extension to foreign judgments. Controversy and uncertainty remain as those within and outside the legal profession appreciate that the Morguard principle of comity amounting to full faith and credit might not always be acceptable because of the variety of legal systems around the world.

A. The Uniform Law

There is growing recognition in Canada of an unequal playing field in transnational litigation. With this perspective in mind, the ULCC set about drafting the Uniform Act, under which it seeks to clarify the enforcement rules applicable in common law provinces. The Uniform Act establishes a closed list of acceptable bases of jurisdiction, particularly for default foreign judgments, in order to limit the application of the "real and substantial connection" test imposed by the Morguard ruling. It also enables the enforcing Canadian court to exercise some discretion to verify the jurisdiction of the foreign court and, hence, determine whether enforcement is appropriate, as well as to limit the enforcement of excessive damages awards.

The ULCC, in drafting the Uniform Act, gave deep consideration to the Hague's discussions on a comprehensive, worldwide draft convention on jurisdiction and the enforcement of judgments in order to ensure that some degree of congruity and complementarities will exist between legislation based on the Uniform Act and any Hague treaty or other treaty initiatives that may eventually emerge. What the Uniform Act does not do is purport to offer a competitive statutory regime that would interfere with current or future treaty

h) For any question related to the validity or administration of a trust established in the State of origin or to trust assets located in that State, the trustee, settlor or beneficiary had his or her habitual residence or its principal place of business in the State of origin;

i) In matters of custody of and access to children, the child had his or her habitual residence in the State of origin at the commencement of the proceedings on the merits;

j) In matrimonial matters, both spouses had their last common habitual residence in the State of origin.

Id.

30. Uniform Act, supra note 3.
31. Id. § 8.
32. Id. § 6.
initiatives on the same subject matter. To this end, the ULCC has expressly stated that the Uniform Act should apply only to the enforcement of foreign judgments rendered in countries with which Canada has not concluded a treaty or convention on recognition and enforcement of judgments.\textsuperscript{33} The Uniform Act is premised as general legislation that could be augmented by more specialized regimes such as the HCCCA and, thus, legislation based on the Uniform Act would not apply to the extent that a proceeding falls within the ambit of the HCCCA in a Canadian jurisdiction that has enacted and brought into force both regimes.

To date, Saskatchewan is the only province that has introduced legislation\textsuperscript{34} to adopt the Uniform Act, which will replace the province's much more restrictive Foreign Judgments Act.\textsuperscript{35} Whether other provinces will enact similar legislation remains to be seen. Nevertheless, one expects that such legislation would help avoid, or at least minimize, the sometimes harsh results that can arise from unqualified applications of \textit{Morguard} and \textit{Beals}. How would the disposition of cases be influenced in the result?

Consider a recent post-\textit{Morguard} decision of the British Columbia courts, \textit{Old North State Brewing Co. v. Newlands Service Inc.}\textsuperscript{36} There, the vendor (V), situated in British Columbia, and a purchaser (P), in North Carolina, where the goods were to be delivered, had signed a typical international sales contract for the delivery and commissioning of machinery. V sourced a substantial portion of its business abroad, much of it in the United States, and prudently inserted into its standard form contract language that it was to be governed by the laws of British Columbia and that the parties thereto would attorn to the courts of that jurisdiction. Dissatisfied with the machinery, P sued V for breach of contract in its home jurisdiction, not in V's home jurisdiction as specified in the contract. V did not attorn and P obtained a default judgment in North Carolina and an award of treble damages, pursuant to the local legislation, plus punitive damages and attorney's fees.

Predictably, P sought enforcement of the judgment in British Columbia, where V's assets were available to satisfy it. P succeeded at first instance, and the judgment was upheld on appeal. The enforcing court satisfied itself that "a real and substantial connection" existed between the \textit{lis} and the originating court and, on the basis of \textit{Morguard}, refused to permit a defense on the merits.

\textsuperscript{33} See \textit{UNIFORM LAW CONFERENCE OF CANADA, WORKING GROUP ON ENFORCEMENT OF FOREIGN JUDGMENTS, UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT (REVISED DRAFT & COMMENTARY)}, Fredericton, New Brunswick: Aug.10-14, 2003.

\textsuperscript{34} An Act Respecting the Enforcement of Foreign Judgments, Sask. Bill No. 101 of 2004–05 (Saskatchewan).

\textsuperscript{35} The Foreign Judgments Act, R.S.S., c. F–18 (1978).

\textsuperscript{36} \textit{Old North, supra} note20.
by V. Moreover, the trial court found that the parties' choice of forum clause was non-exclusive. The British Columbia Court of Appeal agreed. It also agreed that enforcement of both punitive and treble damages by way of a default judgment in a foreign jurisdiction was not per se contrary to Canadian public policy.

The application of the Uniform Act to a case like Old North would possibly yield a much different and, at least from the perspective of the Canadian defendant, more fair result. When measured against domestic judicial standards and litigants' expectations, the jurisdictional analyses of both the British Columbia Supreme Court and the Court of Appeal are consistent with sections 8 and 9 the Uniform Act. The Uniform Act does not expressly prevent a court from assuming jurisdiction based on a real and substantial connection when faced with an exclusive choice of court agreement under which the parties have agreed to be governed by a different jurisdiction. Nevertheless, section 10 of the Uniform Act is an "escape clause" that may have protected the Canadian defendant in Old North. Section 10 provides that a foreign judgment may not be enforced if the judgment debtor proves to the satisfaction of the enforcing court that it was clearly inappropriate for the foreign court to take jurisdiction. One may not be hard-pressed to argue that the North Carolina Court inappropriately assumed jurisdiction by ignoring the choice of forum provision in a typical international sales contract, and refusing to give effect to the reasonable expectations of two sophisticated parties.

Further, Article 5 of the Uniform Act gives the enforcing Court the power to reduce enforcement of non-compensatory and excessive compensatory damages. It provides that, where the enforcing Court determines that a foreign judgment includes an amount added to compensatory damages as punitive or multiple damages or for other non-compensatory purposes, it will limit enforcement of that part of the award to the amount of similar or comparable damages that could have been awarded in the enforcing jurisdiction. Thus, in Old North, the British Columbia court would have been encouraged and likely would have exercised its discretion to eliminate the punitive and treble damages award of the North Carolina court. Canadian defendants will doubtless welcome such changes in judicial discretion influenced by the Uniform Act in future enforcement actions. At the same time, the Uniform Act is also a unilateral instrument that incoming litigants might view as undercutting the principles of comity articulated in Morguard. Nevertheless, in the absence of any alternatives on point, the Uniform Act appears necessary as general law in aid of a better balanced status quo—a statutory guide to fine-tune a system Canadian courts have not been prepared to fine-tune on their own.
B. The HCCCA

Unlike the Uniform Act, which focuses only on recognition and enforcement, but does so, on a broad front, the HCCCA regulates both the jurisdiction to adjudicate and the recognition and enforcement of judgments, but on a narrower front: disputes governed in business to business choice of court agreements. Earlier convention drafts provided for jurisdiction on the basis of several enumerated grounds, including a connection between the cause of action and the court seized of the matter, which conforms with the Morguard principle that the jurisdiction must have a "substantial connection" to the action. While the HCCCA, like its earlier drafts, still treats the jurisdiction of the rendering court as a linchpin, eschewing any general re-examination of either the choice of law or adjudication on the merits, it establishes only a single basis for jurisdiction, the parties' choice of forum, subject to safeguards that may be applied by both originating and enforcing courts.

The HCCCA, as a multilateral convention, creates a level playing field for Canadian parties to international litigation involving business-to-business contractual disputes. It will limit—though perhaps not to the extent of its earlier, wider-ranging drafts—the negative impact, real and perceived, of the unilateral liberalization of domestic rules on enforcement of judgments in one jurisdiction without reciprocal benefits accruing in others. International initiatives have the principal benefit of avoiding the risks of unilateralism that is counterproductive for important Canadian interests tied to international commerce, a central concern prompting the Morguard obiter to embrace comity between nations through their respective courts.37 Further, though the HCCCA is considerably narrower in scope and effect than as originally envisaged,38 it offers the possibility of both realistic success in its adoption by member states, and a solid point of departure from which the Hague could very well expand upon, working toward more comprehensive rules for jurisdictional equilibration.

There are three basic rules on which the HCCCA's operation turns: first, the court chosen by the parties in an exclusive choice of court agreement has jurisdiction; second, if an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and shall decline to hear the case; and, third, a judgment resulting from jurisdiction exercised in accordance with a choice of court agreement (exclusive or non-exclusive) shall be recognized and enforced in the courts of other Contracting States.

37. See A New Age of Uncertainty, supra note 13.
38. For a comprehensive discussion on the history of the Hague project and the difficulties encountered therein see: Ronald Brand, Concepts, Consensus and the Status Quo: Getting to "Yes" on a Hague Jurisdiction and Judgments Convention in TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: CONFLICT AND COHERENCE 71 (Chi Carmody et al. eds., 2003).
Similar to the New York Convention, which has given a measure of predictability to treatment of international arbitration agreements, the HCCCA establishes rules for enforcing private-party agreements in respect of the forum for resolution of any resulting disputes, as well as rules for recognizing and enforcing the decisions issued by the chosen forum. Thus, with litigation and arbitration on a more equal footing within an increasingly globalized legal and economic order, parties to trans-national transactions are able select the form of dispute resolution based on its individual merits rather than the parties’ level of confidence in the recognition and enforcement potential of that dispute resolution mechanism.

By rationalizing the forum selection process in international contract litigation before national courts, the HCCCA aims to restore predictability—so critical to international commercial transactions—that judicial discretion exercised in such litigation can possibly undermine. Recall that, in Old North, the North Carolina Court’s discretion to consider optimal jurisdictional placement of a dispute with international elements subverted the reasonable expectations of the contracting parties; nevertheless, the British Columbia Court subsequently recognized its jurisdiction and enforced the default judgment. The HCCCA, which deals with both exclusive and non-exclusive choice of court clauses, addresses this alarming version of comity.

Article 3 of the HCCCA creates a presumption that if a party lists only one court or country, the clause is exclusive. This is important to enforcement of the agreement, because only exclusive “choice of court” clauses are entitled to enforcement under Article 5. Under Article 8, however, judgments of courts, which took jurisdiction on the basis of any valid choice of court agreement that is “exclusive” within the meaning of the HCCCA, are entitled to recognition and enforcement.

In Old North, as noted above, the trial judge held that the contractual provision committing the parties to attorn to British Columbia was not an exclusive choice of forum clause. Rather, the trial judge held, and the Court of Appeal affirmed, that the provision granted concurrent jurisdiction to British

41. Id. at 351.
42. See HCCCA, supra note 1, art. 22 (addressing reciprocal declarations on non-exclusive choice of court agreements) (“A Contracting State may declare that its courts will recognize and enforce judgments given by courts of other Contracting States designated in a choice of court agreement concluded by two or more parties that meets the requirements of article 3, paragraph c), and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, a court or courts of one or more Contracting States (a non-exclusive choice of court agreement.”)).
Columbia courts with any other court in which the matter was properly brought. The contractual language interpreted by the British Columbia courts as non-exclusive would have been deemed exclusive pursuant to Article 3 of the HCCCA and thereby would have qualified for recognition and enforcement under Article 8. Thus, the North Carolina Court would not have had jurisdiction to grant default judgment against the Canadian defendant. British Columbia would have had exclusive jurisdiction as the only jurisdiction listed in the contracting parties' choice of forum clause. Further, pursuant to Article 11 of the HCCCA, the British Columbia court would have had the discretion to refuse recognition and enforcement of the North Carolina judgment on the basis that the punitive and treble damages awarded by the Court over-compensated the plaintiff for actual loss or harm suffered. Article 11 provides:

Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Interestingly, the HCCCA has a narrower damages provision than the Uniform Act, which specifically allows the enforcing court to reduce a compensatory damages award. Until quite late in the drafting process, versions of the HCCCA provided for the reduction of compensatory damage awards;

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43. "A choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise.

44. HCCCA, supra note 1, art. 11 (emphasis added).

45. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, DRAFT REPORT OF PRELIMINARY DRAFT CONVENTION ON EXCLUSIVE CHOICE OF COURT AGREEMENTS (Prel. Doc. No. 25), art. 10(2), Mar. 2004, available at http://www.hcch.net/upload/wop/jdgm_pd25e.pdf (last visited Mar. 6, 2006), which reads as follows:

Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, recognition and enforcement may be limited to a lesser amount.

In no event shall the court addressed recognize or enforce the judgment in an amount less than that which could have been awarded in the requested State in the same circumstances, including those existing in the State of origin.

Similarly, subsection 6(2) of the Uniform Act, supra note 3, which was based on these earlier drafts, reads as follows:

Where the enforcing court, on application by the judgment debtor, determines that a foreign judgment includes an amount of compensatory damages that is excessive in the circumstances, it may limit enforcement of the award, but the amount awarded may not be less than that which
however, those provisions were removed on the basis that, where parties had validly agreed on a certain court, there was no reason to interfere with the compensatory component of that court’s decision.\textsuperscript{46}

Though the HCCCA will go a long way in ensuring predictability and upholding the reasonable expectations of sophisticated parties to international business contracts, Article 21 may stand in the way of the Convention’s ultimate effectiveness. Article 21 was originally proposed by the Canadian delegation—then draft Article 20—to minimize the domestic impact of asbestos-related litigation in the United States: “Upon ratification, acceptance, approval or accession, a State may declare that it will not apply the provisions of the Convention to exclusive choice of court agreements in asbestos-related matters.”\textsuperscript{47}

Other delegations subsequently proposed that the provision refer to additional specific subject matters such as natural resources and joint ventures. After continued discussion and drafting, the delegations agreed on a new provision, which became Article 21 of the HCCCA, as enacted, giving Contracting States a much broader, and seemingly unlimited, power to effectively contract out of the HCCCA.\textsuperscript{48}

The only counterweight to the potential sweep of Article 21 declarations—but it may be a substantial one—is the reciprocity language within it. This language short-circuits the HCCCA for enforcement purposes in other Contracting States, with respect to the reserved subject matter, where the enforcing court could have awarded in the circumstances.

\textit{Id.}


\textsuperscript{48} \textsc{HCCCA, supra} note 1, art. 21.

Declarations with respect to specific matters:

1) Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

2) With regard to that matter, the Convention shall not apply;

a) in the Contracting State that made the declaration;

b) in other Contracting States, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration.

\textit{Id.}
exclusive choice of court agreement designates the courts of the State that made the reservation at first instance. So the potential chilling effect goes both ways, ensuring that States reap the consequences of what they sow.

IV. CONCLUSION

Writing on a similar topic for this publication in 2004, one of the present authors observed: “At this time, Canada taken as a whole and specifically in individual provinces, is one of the most hospitable jurisdictions in the world for the recognition and enforcement of judgments from foreign jurisdiction.” Adoption of the HCCCA throughout Canada would neither fundamentally alter nor undermine that appraisal. What the HCCCA would accomplish, however, is amelioration of some of the harsher effects of the current Canadian common-law regime and its treatment of Canadian defendants in relation to incoming foreign judgments, at least those arising from exclusive choice of court agreements. To the extent that the HCCCA becomes an understood and appreciated tool by international commercial lawyers, ensuring that it will apply may become a new drafting point for corporate counsel—but that is a subject for another forum.

In the absence of the HCCCA taking hold, the Uniform Act may fulfill a similar role as general law not confined to exclusive choice of court agreements. It remains, however, that a unilateral statutory substitute for a multilateral treaty instrument obviously lacks the same spirit of comity as a new international treaty on point. The premise of the Uniform Act to give ground in the field(s) occupied by any subsequent treaty instrument(s) appears to vindicate this view. While the HCCCA is much more limited in scope and coverage than originally envisaged, and may be disappointing to many of the state actors who invested close to a decade of time and considerable effort in the Special Commission's project, it is nevertheless an achievement that should be welcomed and embraced by member states of the Hague Conference.

In general terms transcending the particular elements singled out for discussion above, the HCCCA is a good start. From the Canadian point of view presented here, that we hasten to add is ours and not necessarily that of any Canadian government, there is also every good reason for Canada to welcome the HCCCA and no compelling reason we can think of why Canada should not do so.

49. Fairley, supra note 23, at 316.
THE 2005 HAGUE CONVENTION ON CHOICE OF COURT CLAUSES

Andrea Schulz*

I. THE HISTORY ............................................. 433
II. THE 2005 CONVENTION ON CHOICE OF COURT AGREEMENTS .... 435
   A. General Overview ........................................ 435
      1. Scope ........................................... 435
      2. Exclusive Choice of Court Agreements .............. 436
      3. Three Basic Rules .............................. 437
      4. Exceptions .................................... 437
   B. Some Particular Issues Highlighted .................... 439
      1. Litigation Concerning Intellectual Property Rights .... 439
      2. Insurance Litigation ............................. 440
      3. Relationship with Other Instruments ................ 440
III. APPENDIX ............................................ 442

I. THE HISTORY

On June 30, 2005, the Twentieth Session of the Hague Conference on Private International Law unanimously adopted a new Convention on Choice of Court Agreements.1 This new treaty is now open for signature and ratification, or accession, by all States, regardless of whether they are Member States of the Hague Conference or not. It is hoped that the Convention will do for choice of court agreements (forum selection clauses) and the resulting judgments what the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards2 does for arbitration agreements and the resulting awards.

At the origin was a proposal made by the United States of America in 1992 to include a convention on recognition and enforcement of foreign judgments

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in the agenda of the Hague Conference. European Member States of the Hague Conference, on the other hand, were more interested in harmonizing jurisdiction rules at a global level, and in particular in limiting U.S. long-arm jurisdiction. Following some preparatory discussions, formal negotiations started in 1996. In 1999, a so-called “preliminary draft Convention” was adopted by vote.\(^3\) The intention was that the negotiating States should consult their stakeholders back home on the text and return for one last meeting, the Diplomatic Conference convened with a view to adopting the Convention. The 1999 text was a comprehensive “mixed convention” attempting to divide bases of jurisdiction into three categories: 1) the “good grounds” explicitly listed in the Convention, which would lead to judgments entitled to recognition and enforcement under the Convention in other Contracting States; 2) the “bad grounds” explicitly prohibited by the Convention (which thereby strongly interfered with the internal law of Contracting States at the jurisdiction stage, and any judgment based on such ground would not be recognized and enforced in other Contracting States under the Convention or internal law); and 3) the “gray area” of bases of jurisdiction existing under national law which were neither incorporated in the Convention nor expressly prohibited. Recognition and enforcement of judgments based on such grounds would not be granted under the Convention but was still possible under national law.

Consultations on the 1999 text showed, however, that this attempt for global harmonization was too ambitious for its time. Procedural systems were too different; and this was reflected even in the drafting style. Moreover, there were opposing interests of stakeholders involved, and the growing importance of Internet and electronic commerce led to fierce discussions on which were the “right” rules to deal with the new digital economy. This was true for substantive law rules, e.g. on the liability of Internet service providers or on the infringement of intellectual property rights on the Internet, but also traditional choice of law rules and choice of jurisdiction rules were questioned. Therefore the formal Hague negotiations were suspended until 2001 to allow for informal discussions and further examination of these new questions. In 2001, a first part of the Diplomatic Conference was held, and it led to a text (known as the 2001 Interim Text)\(^4\) which tried to combine civil-law and common-law drafting styles and cover up differences between U.S. and European civil procedure. In an attempt to move to consensus-based negotiations rather than to rely on

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voting, square brackets were placed around the controversial items—which left little outside the brackets.

The Hague Conference is a Member-State driven organization which means that the work program and policy are decided once a year by its Member States at a so-called Special Commission on General Affairs and Policy of the Conference. In 2002, this meeting decided that a small Informal Working Group should examine the bases of jurisdiction in the 1999/2001 texts and search for consensus. After three meetings, the group submitted a draft text of a Convention on Choice of Court Agreements in B2B Cases, and Member States of the Conference agreed that this could be a good basis for formal negotiations. This change of scope and policy was strongly supported by the business world. The International Chamber of Commerce had in fact carried out an empirical research by circulating a questionnaire to its member companies through its more than ninety national committees, one of which is USCIB. The purpose was to find out when and how choice of court agreements and/or arbitration agreements were included into international commercial contracts, and what impact the existing legal instruments had on the use of one or the other clause. The business world stated that more choice would be welcomed, and that a parallel instrument to the New York Convention would be highly useful.

II. THE 2005 CONVENTION ON CHOICE OF COURT AGREEMENTS

A. General Overview

1. Scope

The new Convention was elaborated during two Special Commissions held in December 2003 and April 2004, and a Diplomatic Session held from June 14–30, 2005. It applies primarily to exclusive choice of court agreements in international B2B cases in civil or commercial matters (Article 1), with an optional extension on a reciprocal basis to judgments given by a court designated in a non-exclusive choice of court agreement (Article 22). Consumer and employment contracts, as well as a number of other matters such as family law matters, rights in rem in immovable property, insolvency, the carriage of passengers and goods, certain maritime matters, liability for nuclear damage, the validity of intellectual property rights other than copyright and related rights, claims for personal injury brought by or on behalf of natural persons, and tort or delict claims for damage to tangible property that do not arise from a contractual relationship are excluded from the scope of the Convention. The reasons for those exclusions are in most cases the existence of other, more specific international instruments, and of national, regional or international rules on exclusive jurisdiction for some of these matters. The first
reason applies, \textit{inter alia}, to the carriage of goods, and to maritime matters. The second reason applies to the validity of intellectual property rights, rights \textit{in rem} in immovable property, and insolvency. While due to the drafting technique used, this list appears rather long, in most cases it only states the obvious common denominator of what States would not want to leave to party autonomy. Should this not be enough for a particular State in an exceptional case, Article 21 allows for a declaration by that State, excluding any other specific matter from the scope of the Convention. In relation to all other States Parties, the State making such declaration will be considered like a non-Contracting State with regard to that matter. The drafters of the Convention expressed the strong wish that such declarations be limited to what is strictly necessary and be as narrow as possible.

2. Exclusive Choice of Court Agreements

An exclusive choice of court agreement is defined as follows in order to fall within the scope of the Convention (Article 3(a)):

\ldots an agreement concluded by two or more parties that meets the requirements of paragraph (c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts in one Contracting State to the exclusion of the jurisdiction of any other courts.\footnote{5. 2005 Hague Convention, \textit{supra} note 1, art. 3(a).}

So if the parties to a contract choose “the courts of France,” or “the courts of New York or San Francisco” (but not “the courts of New York or Ottawa”), the agreement is exclusive for the purposes of the Convention. More importantly, Article 3(b) contains an important “deeming rule” that will change the legal situation in particular in common law legal systems, and will greatly expand the scope of the Convention: “[A] choice of court agreement which designates the courts of one Contracting State or one or more specific courts in one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise.”\footnote{6. \textit{Id.} 3(b).}

This means that where the parties agree, \textit{e.g.}, that “the court in Ottawa shall decide all disputes arising out of this contract,” this choice is deemed exclusive. Paragraph (c) contains the Convention’s form requirement: The exclusive choice of court agreement must be “concluded or documented—}\footnote{5. 2005 Hague Convention, \textit{supra} note 1, art. 3(a).}
writing; or by any other means of communication which renders information accessible so as to be usable for subsequent reference."7

The wording of subparagraph (ii) is inspired by Article 6 of the UNCITRAL Model Law on Electronic Commerce (1996) and ensures that choice of court agreements concluded, for example, by an exchange of e-mails are covered.

3. Three Basic Rules

The Convention contains three main rules addressed to three different courts:

The chosen court must hear the case if the choice of court agreement is valid according to the standards established by the Convention (in particular there is no room for discretion/forum non conveniens in favor of courts of another State) (Article 5).8 Any court seized that is located in a State other than that of the chosen court must dismiss the case unless the choice of court agreement is invalid according to the standards established by the Convention (Article 6).9 Any judgment rendered by the court of a Contracting State which was designated in an exclusive choice of court agreement that is valid according to the standards established by the Convention must be recognized and enforced in other Contracting States (Article 8).10

4. Exceptions

There are exceptions to these rules: Article 6 lists situations where the court seized but not chosen may take the case in spite of the choice of court agreement. Articles 9, 10 and 11 list situations where a judgment given by the chosen court does not have to be recognized or enforced under the Convention in whole or in part.

The main exception for both courts is that the choice of court agreement is null and void. The Convention does not itself establish rules on consent and substantive validity. It was considered too ambitious to attempt a global harmonization of these important aspects of substantive contract law. However, no rule at all would have created a considerable threat to legal certainty, and to the foreseeability for the parties which the Convention is intended to enhance.

7. Id. art. 3(c).
8. Id. art. 5.
9. Id. art. 6.
10. 2005 Hague Convention, supra note 1, art. 8.
Allowing that the chosen court and another court seized, or the enforcement court, each evaluate the validity of the choice of court agreement under their own law and come to different results could lead to the following situation: the chosen court holds the choice of court agreement valid and bases its jurisdiction on it, but then another court seized holds the agreement invalid under its own law and also takes the case; which leads to parallel litigation and conflicting judgments; or the enforcement court refuses to enforce the judgment given by the chosen court because it holds the agreement to be invalid. In order to avoid double standards and the situations just described, the Convention takes a choice-of-law approach. All three courts (the chosen court, any court seized in spite of the agreement and the court requested to enforce a judgment given by the chosen court) have to assess the substantive validity according to the law (including the choice-of-law rules) of the State of the chosen court. Although this looks like a complicated rule at first sight, it is hoped that this can avoid the above situations to happen while keeping global harmonization of the law in this area to the essential minimum.

Another important rule can be found in Article 11, which is addressed to the court requested to recognize and enforce a foreign judgment. The provision reads:

1) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered. 11

2) The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings. 12

This Article contains a number of important messages. Firstly, judgments awarding damages are covered by the Convention just like any other judgment, as long as they fall within a choice of court agreement between the parties, and it was the chosen court that gave the judgment. Secondly, the non-compensatory part of the judgment may be “shaved off” under Article 11(1). This can both increase and reduce the enforcement of damage awards, as compared to the present situation. It can increase enforcement in those States which at present reject recognition and enforcement to the full extent, even if only part of the award is non-compensatory. It could reduce enforcement in those States that currently always enforce to the full extent and now get a tool to reduce the damages awarded to enforcing only the compensatory part if they

11. Id. art. 11(1).
12. Id. art. 11(2)
so wish. This is however not very likely because the Convention does not oblige them to do so, and enforcement to a larger extent under national law remains possible.

B. Some Particular Issues Highlighted

1. Litigation Concerning Intellectual Property Rights

As mentioned earlier, litigation having as its object/subject the validity of intellectual property rights other than copyright and related rights, is excluded from the scope of the Convention. Moreover, sheer piracy will normally not fall within the scope because pirates do not normally conclude choice of court agreements with the rightholder before infringing intellectual property rights. But in spite of these exclusions, there is still a large and economically important body of intellectual property litigation that remains within the scope of the Convention. This concerns first and foremost litigation over licensing contracts and other contracts for the transfer or use of intellectual property rights. Where one party sues the other for royalties, or for damages based on an exploitation that allegedly exceeds the license granted, litigation brought in contract is therefore clearly covered. In some countries, however, the plaintiff has to plead not only the facts but also identify the legal basis for his claim, and there may be reasons to bring a claim in tort rather than in contract, albeit based on the same facts as just described. Such tort litigation is also covered by the Convention, as long as the case could have been brought as well based on a contract between the parties (Article 2(2) (o)).

Where in litigation covered by the Convention, the invalidity of the intellectual property right is raised as a defense, this does not exclude the case from the scope of the Convention (Article 2(3)). If, in the above example, a money judgment awarding royalties or damages is given, this will normally be enforced in other Contracting States (Article 8). The preliminary (or implicit) ruling on validity in the reasoning of the court will not be given any effect (such as collateral estoppel or similar) under the Convention in other Contracting States (Article 10(1)). If the money judgment is to be enforced in the State where the intellectual property right was granted or registered, however, and there are proceedings pending on that State which have as their object the validity of the right as such, or it has already been held invalid by the competent authorities of that State, the money judgment does not have to be recognized and enforced there (Article 10(3)). This limited exception to the obligation to recognize and enforce judgments under the Convention protects the sovereignty of the requested State over intellectual property rights created or granted by it.
2. Insurance Litigation

Article 17 makes clear that insurance litigation is also covered by the Convention:

1) Proceedings under a contract of insurance or reinsurance are not excluded from the scope of this Convention on the ground that the contract of insurance or reinsurance relates to a matter to which this Convention does not apply.

2) Recognition and enforcement of a judgment in respect of liability under the terms of a contract of insurance or reinsurance may not be limited or refused on the ground that the liability under that contract includes liability to indemnify the insured or reinsured in respect of (a) a matter to which this Convention does not apply; or (b) an award of damages to which Article 11 might apply.\(^\text{13}\)

In other words, if a party takes out an insurance for nuclear liability, is then held liable for nuclear damages and sues its insurer who refuses to indemnify it under the insurance contract which contains a choice of court agreement, the proceedings will be covered by the Convention even though liability for nuclear damage as the object of the proceedings is excluded by Article 2(2)(i). The resulting judgment will be recognized and enforced under the Convention. The same applies where the insured party has taken out an insurance against having to pay damages, including non-compensatory damages, to others. Where this party is held liable to pay punitive damages and claims reimbursement from its insurer, the enforcement of the resulting judgment may not be refused under Article 11 with regard to the non-compensatory part of the damages that the insurance is supposed to cover.

3. Relationship with Other Instruments

Article 26 sets out in great detail how the new Convention relates to other treaties and other instruments. In general, the Convention strives for compatibility with other treaties, and it respects regional arrangements that may be based on greater harmonization of law in that region. The important connecting factor to look at is the residence of the parties. For example, where among a sub-group of States Parties to the new Hague Convention there exists another (earlier or later) treaty on the same subject-matter and the case is purely internal to those States bound by that other treaty because all the parties are resident either in those States or in States that are only Parties to the other treaty

\(^{13}\) Id. art. 17.
but not to the Hague Convention, the other treaty prevails (Article 26(2)). The same applies for rules adopted by a Regional Economic Integration Organization (e.g. for the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [the Brussels Regulation]). In case of a treaty conflict caused by Article 26(2) (this rule does not apply to rules of a Regional Economic Integration Organization), Article 26(3) allows a State Party to both instruments to comply with its obligations towards third States. Earlier and later treaties on specific subject matters may also prevail, provided that the State Party to both that treaty and the new Hague Convention makes a declaration to that effect (Article 26(5)). With regard to recognition and enforcement, other instruments may continue to apply, but enforcement may not be granted to a lesser extent than under the Hague Convention (Article 26(4)).

Among all these complicated rules, there is one which, in political terms, is highly important. It concerns the relationship between the new Hague Convention and European Community rules, in particular the Brussels Regulation. This Regulation, together with its predecessor, the Brussels Convention of September 27, 1968, harmonizes jurisdiction and enforcement of judgments in civil and commercial matters throughout the European Community with its twenty-five Member States. A judgment given in one of these States will be enforced in all others without the jurisdiction of the first court being examined at the enforcement stage. According to its terms, the Regulation, which also contains an Article 23 on choice of court agreements, is applicable as soon as one of the parties is domiciled within the European Community. For non-EU States such as the United States, it would not be very interesting to conclude a new Hague Convention if being told at the outset that the EU Member States will continue to apply the Brussels Regulation even if one party is domiciled in the EU and the other in the United States. So, reasonably enough, the EU and its Member States agreed that in such a case, the Hague Convention should apply. This covers only cases where the State in which the non-EU party is resident—in our example the United States—is also a Party to the Hague Convention; a further incentive to join this new treaty.

Currently, the co-Reporters Trevor Hartley (United Kingdom) and Masato Dogauchi (Japan) are preparing the Explanatory Report, an article-by-article commentary on the new Convention which is based on the deliberations that took place during the Diplomatic Session in June 2005. Informal consultations have already started, and as soon as the Report is final, it is expected that formal consultations with a view to signature and ratification or accession will begin in the States that participated in the negotiations, and any other interested States.
III. APPENDIX

Final Act of the Twentieth Session

The undersigned, Delegates of the Governments of Argentina, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Canada, China, Croatia, Czech Republic, Denmark, Egypt, Finland, France, Germany, Ireland, Israel, Italy, Japan, Republic of Korea, Latvia, Luxembourg, Mexico, Morocco, Netherlands, New Zealand, Norway, Panama, Peru, Poland, Portugal, Romania, Russian Federation, Slovenia, South Africa, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, Ukraine, United States of America and Venezuela, convened at The Hague from 14-30 June 2005, at the invitation of the Government of the Netherlands, in the Twentieth Session of the Hague Conference on Private International Law.

Following the deliberations laid down in the records of the meetings, they have decided to submit to their Governments—

A The following Convention—

CONVENTION ON CHOICE OF COURT AGREEMENTS

The States Parties to the present Convention,

Desiring to promote international trade and investment through enhanced judicial co-operation,

Believing that such co-operation can be enhanced by uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters,

Believing that such enhanced co-operation requires in particular an international legal regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements,

Have resolved to conclude this Convention and have agreed upon the following provisions—
CHAPTER I—SCOPE AND DEFINITIONS

Article 1 Scope

1. This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters.

2. For the purposes of Chapter II, a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.

3. For the purposes of Chapter III, a case is international where recognition or enforcement of a foreign judgment is sought.

Article 2 Exclusions from scope

1. This Convention shall not apply to exclusive choice of court agreements—
   a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party;
   b) relating to contracts of employment, including collective agreements.

2. This Convention shall not apply to the following matters—
   a) the status and legal capacity of natural persons;
   b) maintenance obligations;
   c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
   d) wills and succession;
   e) insolvency, composition and analogous matters;
   f) the carriage of passengers and goods;
   g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;
   h) anti-trust (competition) matters;
   i) liability for nuclear damage;
   j) claims for personal injury brought by or on behalf of natural persons;
   k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship;
   l) rights in rem in immovable property, and tenancies of immovable property;
   m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
n) the validity of intellectual property rights other than copyright and related rights;

o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;

p) the validity of entries in public registers.

3. Notwithstanding paragraph 2, proceedings are not excluded from the scope of this Convention where a matter excluded under that paragraph arises merely as a preliminary question and not as an object of the proceedings. In particular, the mere fact that a matter excluded under paragraph 2 arises by way of defence does not exclude proceedings from the Convention, if that matter is not an object of the proceedings.

4. This Convention shall not apply to arbitration and related proceedings.

5. Proceedings are not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party thereto.

6. Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3 Exclusive choice of court agreements

For the purposes of this Convention—

a) "exclusive choice of court agreement" means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;

b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;

c) an exclusive choice of court agreement must be concluded or documented—

i) in writing; or
by any other means of communication which renders information accessible so as to be usable for subsequent reference;
d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

Article 4 Other definitions

1. In this Convention, "judgment" means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

2. For the purposes of this Convention, an entity or person other than a natural person shall be considered to be resident in the State—
a) where it has its statutory seat;
b) under whose law it was incorporated or formed;
c) where it has its central administration; or
d) where it has its principal place of business.

CHAPTER II—JURISDICTION

Article 5 Jurisdiction of the chosen court

1. The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.

2. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.

3. The preceding paragraphs shall not affect rules—
a) on jurisdiction related to subject matter or to the value of the claim;
b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has
discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

Article 6 Obligations of a court not chosen

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless—

a) the agreement is null and void under the law of the State of the chosen court;

b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;

c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;

d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or

e) the chosen court has decided not to hear the case.

Article 7 Interim measures of protection

Interim measures of protection are not governed by this Convention. This Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures.

CHAPTER III – RECOGNITION AND ENFORCEMENT

Article 8 Recognition and enforcement

1. A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

2. Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.
3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

4. Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.

5. This Article shall also apply to a judgment given by a court of a Contracting State pursuant to a transfer of the case from the chosen court in that Contracting State as permitted by Article 5, paragraph 3. However, where the chosen court had discretion as to whether to transfer the case to another court, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin.

Article 9 Refusal of recognition or enforcement

Recognition or enforcement may be refused if—

a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;

b) a party lacked the capacity to conclude the agreement under the law of the requested State;

c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,
   i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or
   ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

d) the judgment was obtained by fraud in connection with a matter of procedure;

e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the
judgment were incompatible with fundamental principles of procedural fairness of that State;

f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or

g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

Article 10  Preliminary questions

1. Where a matter excluded under Article 2, paragraph 2, or under Article 21, arose as a preliminary question, the ruling on that question shall not be recognised or enforced under this Convention.

2. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded under Article 2, paragraph 2.

3. However, in the case of a ruling on the validity of an intellectual property right other than copyright or a related right, recognition or enforcement of a judgment may be refused or postponed under the preceding paragraph only where—

   a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State under the law of which the intellectual property right arose; or

   b) proceedings concerning the validity of the intellectual property right are pending in that State.

4. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded pursuant to a declaration made by the requested State under Article 21.

Article 11  Damages

1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.

2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.
Article 12 Judicial settlements (transactions judiciaires)

Judicial settlements (transactions judiciaires) which a court of a Contracting State designated in an exclusive choice of court agreement has approved, or which have been concluded before that court in the course of proceedings, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.

Article 13 Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce—
   a) a complete and certified copy of the judgment;
   b) the exclusive choice of court agreement, a certified copy thereof, or other evidence of its existence;
   c) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
   d) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;
   e) in the case referred to in Article 12, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.

2. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require any necessary documents.

3. An application for recognition or enforcement may be accompanied by a document, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.

4. If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 14 Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of
the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.

Article 15  Severability

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.

Chapter IV—General Clauses

Article 16  Transitional provisions

1. This Convention shall apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court.
2. This Convention shall not apply to proceedings instituted before its entry into force for the State of the court seised.

Article 17  Contracts of insurance and reinsurance

1. Proceedings under a contract of insurance or reinsurance are not excluded from the scope of this Convention on the ground that the contract of insurance or reinsurance relates to a matter to which this Convention does not apply.
2. Recognition and enforcement of a judgment in respect of liability under the terms of a contract of insurance or reinsurance may not be limited or refused on the ground that the liability under that contract includes liability to indemnify the insured or reinsured in respect of—
   a) a matter to which this Convention does not apply; or
   b) an award of damages to which Article 11 might apply.

Article 18  No legalisation

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality, including an Apostille.

Article 19  Declarations limiting jurisdiction

A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.
Article 20 Declarations limiting recognition and enforcement

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State.

Article 21 Declarations with respect to specific matters

1. Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

2. With regard to that matter, the Convention shall not apply—
   a) in the Contracting State that made the declaration;
   b) in other Contracting States, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration.

Article 22 Reciprocal declarations on non-exclusive choice of court agreements

1. A Contracting State may declare that its courts will recognise and enforce judgments given by courts of other Contracting States designated in a choice of court agreement concluded by two or more parties that meets the requirements of Article 3, paragraph c), and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, a court or courts of one or more Contracting States (a non-exclusive choice of court agreement).

2. Where recognition or enforcement of a judgment given in a Contracting State that has made such a declaration is sought in another Contracting State that has made such a declaration, the judgment shall be recognised and enforced under this Convention, if—
   a) the court of origin was designated in a non-exclusive choice of court agreement;
   b) there exists neither a judgment given by any other court before which proceedings could be brought in accordance with the non-exclusive choice of court agreement, nor a proceeding pending
between the same parties in any other such court on the same cause of action; and
c) the court of origin was the court first seised.

Article 23 Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 24 Review of operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for—

- review of the operation of this Convention, including any declarations; and
- consideration of whether any amendments to this Convention are desirable.

Article 25 Non-unified legal systems

1. In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention—

   a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;
   b) any reference to residence in a State shall be construed as referring, where appropriate, to residence in the relevant territorial unit;
   c) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;
   d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.

2. Notwithstanding the preceding paragraph, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

3. A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting
State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

4. This Article shall not apply to a Regional Economic Integration Organisation.

Article 26  Relationship with other international instruments

1. This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2. This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, in cases where none of the parties is resident in a Contracting State that is not a Party to the treaty.

3. This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention entered into force for that Contracting State, if applying this Convention would be inconsistent with the obligations of that Contracting State to any non-Contracting State. This paragraph shall also apply to treaties that revise or replace a treaty concluded before this Convention entered into force for that Contracting State, except to the extent that the revision or replacement creates new inconsistencies with this Convention.

4. This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.

5. This Convention shall not affect the application by a Contracting State of a treaty which, in relation to a specific matter, governs jurisdiction or the recognition or enforcement of judgments, even if concluded after this Convention and even if all States concerned are Parties to this Convention. This paragraph shall apply only if the Contracting State has made a declaration in respect of the treaty under this paragraph. In the case of such a declaration, other Contracting States shall not be obliged to apply this Convention to that specific matter to the extent of any inconsistency, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the Contracting State that made the declaration.
6. This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention –
   a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;
   b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

CHAPTER V—FINAL CLAUSES

Article 27 Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States.
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open for accession by all States.
4. Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 28 Declarations with respect to non-unified legal systems

1. If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
2. A declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
3. If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.
4. This Article shall not apply to a Regional Economic Integration Organisation.

Article 29 Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept,
approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3. For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 30 that its Member States will not be Parties to this Convention.

4. Any reference to a “Contracting State” or “State” in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation that is a Party to it.

**Article 30 Accession by a Regional Economic Integration Organisation without its Member States**

1. At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

2. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a “Contracting State” or “State” in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

**Article 31 Entry into force**

1. This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 27.

2. Thereafter this Convention shall enter into force—
a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

a) for a territorial unit to which this Convention has been extended in accordance with Article 28, paragraph 1, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 32  Declarations

1. Declarations referred to in Articles 19, 20, 21, 22 and 26 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2. Declarations, modifications and withdrawals shall be notified to the depositary.

3. A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.

5. A declaration under Articles 19, 20, 21 and 26 shall not apply to exclusive choice of court agreements concluded before it takes effect.

Article 33  Denunciation

1. This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.
Article 34  Notifications by the depositary
The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 27, 29 and 30 of the following—

a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 27, 29 and 30;
b) the date on which this Convention enters into force in accordance with Article 31;
c) the notifications, declarations, modifications and withdrawals of declarations referred to in Articles 19, 20, 21, 22, 26, 28, 29 and 30;
d) the denunciations referred to in Article 33.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on 30 June 2005, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Member States of the Hague Conference on Private International Law as of the date of its Twentieth Session and to each State which participated in that Session.
APPLICATION OF HUMAN RIGHTS TREATIES EXTRATERRITORIALLY TO DETENTION OF COMBATANTS AND SECURITY INTERNEES: FUZZY THINKING ALL AROUND?

Michael J. Dennis*

I. DOES EITHER INTERNATIONAL HUMANITARIAN OR HUMAN RIGHTS LAW COVER EXTRATERRITORIAL DETENTION DURING PERIODS OF ARMED CONFLICT? 461
   A. Scope of Application Provisions of the ICCPR and ECHR 462
   B. Preparatory Work of ICCPR 463
   C. Subsequent Practice Concerning ICCPR 464
   D. Subsequent Practice Concerning ECHR 468
   E. Article 43 of the Hague Regulations 470
II. IF BOTH HUMANITARIAN AND HUMAN RIGHTS LAW APPLY, DOES THE FORMER PREVAIL AS LEX SPECIALIS? 472
III. IF HUMAN RIGHTS LAW APPLIES, WHAT IS THE PERMISSIBLE SCOPE OF POSSIBLE DEROGATIONS? 475
    A. Suspension of Rights Generally 476
    B. Permissible Scope of Derogations 477
IV. IF ONLY HUMANITARIAN LAW APPLIES, WHAT CONSTRAINTS DOES IT IMPOSE ON DETENTIONS? 479
V. CONCLUSION 480

The issue before our panel today is a subpart of a larger question: Are obligations assumed by states under international human rights treaties applicable extraterritorially during periods of armed conflict and military occupation? Do the protections provided by the international human rights treaties normally apply extraterritorially, outside the government-governed relationship? If so, what is the precise relationship between the protections provided under human rights instruments and international humanitarian law (the law of war) in cases of armed conflict or military occupation?

* Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State. The views expressed herein are solely those of the author. Part of the material contained in this paper was previously published in Michael J. Dennis, Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation, 99 Am. J. Int'l L. 119 (2005). This article is a revised reproduction of oral remarks presented at the International Law Weekend 2005, held at the House of the Association of the Bar of the City of New York, from October 20–22, 2005.
Even though the atrocities committed during World War II served as a catalyst for the development of the International Covenants on Human Rights as well as the Geneva Conventions of 1949, the linkage between human rights and humanitarian law has never been clear. The traditional view has been to distinguish the two: "the two systems are complementary," Jean Pictet observes, but "humanitarian law is valid only in the case of armed conflict while human rights are essentially applicable in peacetime." Proponents of this position have noted that the original paradigm of human rights governed relations between the state and its own nationals; on the other hand, the law of war dealt with those concerning the state and enemy nationals, and humanitarian law was intended primarily to protect enemy noncombatants. More recently, a conflicting school of thought has concluded that "[t]he conventional division between the law of war and the law of peace is no longer tenable" and that "the law of war no longer automatically excludes the application of the law of peace." Last year, the International Court of Justice indicated in its advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, that the provisions of the Covenants and the Convention on the Rights of the Child applied extraterritorially during military occupation and that "the protection offered by human rights conventions does not cease in case of armed conflict, save through the provisions for derogation of the kind to be found in Article 4 of the [ICCPR]."

In my view, this comment by the Court is not consistent with state practice concerning the application of human rights treaties extraterritorially during times of armed conflict and military occupation. For example, during the

recent military occupation of Iraq, the Commission on Human Rights called
upon parties only "to abide strictly by their obligations under international
humanitarian law, in particular the Geneva Conventions and the Hague
Regulations including those relating to essential civilian needs of the people of
Iraq." Similarly, in Resolution 1483, the Security Council, acting under
Chapter VII of the Charter, called upon "all concerned to comply fully with
their obligations under international law including in particular the Geneva
Conventions of 1949 and the Hague Regulations of 1907." Subsequently, in
Resolutions 1511 and 1546, again acting under Chapter VII of the Charter, the
Security Council authorized the multinational force "to take all necessary
measures to contribute to the maintenance of security and stability in Iraq." Both resolutions also refer to the obligation of states to comply with
international humanitarian law. However, no mention is made of any obligation
on the part of states to comply with international human rights instruments.
During the briefing and argument of the Wall case, most states addressed only
jurisdictional issues, while a few summarily argued that Israel had violated the
Covenants, without substantively addressing the relationship between the two
bodies of law.

The Chairperson of our panel has posed several excellent questions
concerning the applicable law with regard to extraterritorial detention during
periods of armed conflict and military operation. I will use those questions as
a framework for my presentation this morning.

I. DOES EITHER INTERNATIONAL HUMANITARIAN OR HUMAN RIGHTS LAW
COVER EXTRATERRITORIAL DETENTION DURING PERIODS OF ARMED
CONFLICT?

As indicated above, states have considered the extraterritorial detention of
individuals during armed conflict or military occupation to be covered by
international humanitarian law. It is generally acknowledged that "[t]he
humanitarian law conventions offer far more protection than do the general

Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of
International Armed Conflict, 1125 U.N.T.S. 3 (hereinafter Protocol I), and Protocol; Additional
to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International
Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609 (hereinafter Protocol II) [collectively Additional
Protocols of 1977].

Conventions, supra note 7, and the Regulations Respecting the Laws and Customs of War on
Land, annexed to Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat.
2277, 1 Bevans 631 [hereinafter Hague Regulations].


S/RES/1546 (June 8, 2004).
guarantees of the human rights conventions." For example, with respect to detention, the protections in international human rights instruments generally focus on restrictions to freedom following a criminal offence, where a final decision has not been made in such cases by domestic courts. On the other hand, these protections are defined in a far more precise manner in international humanitarian law instruments for persons detained in situations of armed conflict or military occupation. The Third Geneva Convention, as well as the customary law of armed conflict, provides specific guidance concerning the treatment of prisoners of war and enemy combatants, while the Fourth Geneva Convention provides detailed rules concerning internment of civilians of enemy nationality. Moreover, if international human rights treaties apply extraterritorially, then the possibility of conflict with international humanitarian law is all the greater. For example, Article 5 of the European Convention on Human Rights (ECHR) lists the cases when a person may be deprived of liberty, but fails to mention the capture of prisoners of war or the internment of civilians.12

The two human right instruments that are most relevant to our inquiry concerning the application of human rights law to extraterritorial detention are the ICCPR (with 155 states parties) and the ECHR (with forty-five states parties). This presentation assumes that the relevant criteria for ascertaining whether the standards set forth in these instruments apply to extraterritorial detention must begin with the ordinary meaning of each instrument in its context and in light of its object and purpose, its preparatory work, and state practice thereunder—in short, the standard tools of treaty interpretation as set forth in the Vienna Convention on the Law of Treaties.13

A. Scope of Application Provisions of the ICCPR and ECHR

While both the ECHR and the ICCPR reflect a territorial notion of jurisdiction, their specific scope of application is different. Article 1 of the ECHR states that "the High Contracting Party shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of the Convention." On the other hand, Article 2(1) of the ICCPR stipulates that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without discrimination of any kind."

11. Schindler, supra note 3, at 940.
13. Vienna Convention on the Law of Treaties, May 23, 1969, art. 32, 1155 U.N.T.S. 331. While the U.S. is not a party to this Convention, the principles for treaty interpretation are recognized as part of customary international law.
Hence, on the basis of the plain and ordinary meaning of the scope of application provisions, the reach of the ECHR would appear to be broader than that of the ICCPR. The ECHR applies to anyone within the jurisdiction of a state, while the ICCPR applies to individuals who are both within its territory and subject to its sovereign authority.

**B. Preparatory Work of ICCPR**

What was the reason for the difference in the scope of application provisions of the two instruments? The preparatory work of the Covenant actually establishes that the reference to “within its territory” was included in Article 2(1) in part to make clear that states were not obligated to secure the rights therein in territories under military occupation. In 1950 the draft text of Article 2 then under consideration by the Commission on Human Rights, like Article 1 of the European Convention on Human Rights, would have required that each state ensure Covenant rights to everyone “within its jurisdiction.” The United States, however, proposed the addition of “within its territory.”

Eleanor Roosevelt, the U.S. representative and then-chair of the Commission, emphasized that the United States was “particularly anxious” that it not assume “an obligation to ensure the rights recognized in it to the citizens of countries under United States occupation” or in what she characterized as “leased territory.” She explained:

> The purpose of the proposed addition [is] to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of the contracting states. The United States [is] afraid that without [the proposed] addition the draft Covenant might be construed as obliging the contracting State[s] to enact legislation concerning persons, who although outside its territory were technically within its jurisdiction for certain purposes. An illustration would be the occupied territories of Germany, Austria and Japan: persons within those countries were subject to the jurisdiction of the occupying States in certain respects, but were outside the scope of legislation of those States. Another illustration would be leased territories; some countries leased certain territories from others for

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limited purposes, and there might be a question of conflicting authority between the lessor nation and the lessee nation.16

Several delegations spoke against the U.S. amendment, including René Cassin (France) and Charles Malik (Lebanon). They argued that a nation should guarantee fundamental rights to its citizens abroad as well as at home.17 However, the U.S. amendment was ultimately adopted at the 1950 session by a vote of 8–2 with five abstentions.18 Subsequently, after similar debates, the United States and others defeated French proposals to delete the phrase “within its territory” at both the 1952 session of the Commission19 and the 1963 session of the General Assembly.20 As Egon Schwelb concludes:

The words “within its territory” amount to a limitation of the scope of the Covenant in regard to which the Covenant differs, e.g., from the European Convention on Human Rights, by Art. 1 of which the High Contracting Parties undertook to secure the rights “to everyone within their jurisdiction.” Misgivings about this restriction were felt both in the United Nations Commission on Human Rights and in the General Assembly. In a separate vote on the words “within its territory” these words were retained, however.21

C. Subsequent Practice Concerning ICCPR

Initially, commentators endorsed a literal reading of Article 2(1), and further argued that Covenant obligations applied, in the context of armed conflict, only with respect to acts of a state’s armed forces executed within that territory.22 The Human Rights Committee first departed from this literal

22. See, e.g. Manfred Nowak, The Effectiveness of the International Covenant on Civil and
reading of Article 2(1) in several early decisions on individual communications (cited with approval by the International Court of Justice in its *Wall* opinion), where it found that it had jurisdiction in "exceptional instances" when state agents had taken unlawful action against *citizens* of that state living abroad. However, these opinions support the position that the provisions of the ICCPR do not apply extraterritorially in situations of armed conflict and military occupation. In two of those cases (*López Burgos v. Uruguay* and *Celiberti v. Uruguay*), involving exceptional instances where Uruguayan state agents abducted citizens living abroad into Uruguayan territory, Committee member Christian Tomuschat observed that "[t]he formula [within its territory] was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations." He specifically cited occupation of foreign territory as an "example of situations which the drafters of the Covenant had in mind when they confined the obligation of States parties to their own territory." More recently, the Human Rights Committee in its General Comment No. 31 (May 2004) abandoned the literal reading altogether, taking the position that the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals . . . who may find themselves *in the territory or subject to the jurisdiction of the State Party*. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national

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24. *López Burgos v. Uruguay*, and *Celiberti de Casariego v. Uruguay*, *supra* note 23, appendix. Tomuschat further stated:

Never, was it envisaged . . . to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad. Consequently, despite the wording of article 2(1), the events which took place outside Uruguay come within the purview of the Covenant.

*Id.*
contingent of a State Party assigned to an international peace-keeping or peace enforcement operation.  

The ICJ’s conclusion in its Wall advisory opinion that the ICCPR extends to the West Bank and Gaza appears to have been based upon the unusual circumstances of Israel’s prolonged occupation. The Court did not cite General Comment No. 31 in its opinion. Instead, it relied on earlier concluding observations of the Committee concerning “the long-standing presence of Israel in [the occupied] territories, Israel’s ambiguous attitude toward their future status, as well as the exercise of effective jurisdiction by Israeli forces therein” and the Committee’s conclusion that

in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party’s authorities or agents in those territories that affect[s] the enjoyment of rights enshrined in the Covenant and fall[s] within the ambit of State responsibility of Israel under the principles of public international law.

Indeed, the Court’s specific holding was founded on ICCPR Article 12(1), which contains an express territorial limitation: “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.” Thus, arguably the most logical reading of the Court’s advisory opinion is that it was based only on the view that the West Bank and Gaza were part of the “territory” of Israel for purposes of the application of the Covenant.

The Committee’s recent interpretation of Article 2 in General Comment No. 31, while departing from the territorial approach clearly intended by the negotiators, nonetheless finds support in the work of some distinguished commentators who argue that the phrase “within its territory and subject to its jurisdiction” should be read as a disjunctive conjunction. However, Manfred Nowak, in his commentary on the ICCPR, disagrees:


[The] grammatical (re)interpretation in the sense of a “disjunctive conjunction” fails, however, to convince because States are not responsible for all violations of the Covenant on their territory (e.g., by insurgents, by occupation forces, etc.). The correct interpretation, which is oriented on the purpose of the Covenant in light of its historical background, was convincingly presented by Tomuschat in individual opinions in López Burgos v. Uruguay, No. 52/1979, and Celiberti v. Uruguay, No. 56/1979.

The effective control rationale employed by the Human Rights Committee in concluding that Israel was responsible for implementing Covenant rights in occupied territory is also doubtful, especially outside the context of a long-term occupation. As Professor Tomuschat observes, “Normally a state lacks consolidated institutions abroad that would be in a position to provide to an aggrieved individual all the guarantees, which in particular, Articles 9 and 14 CCPR require.” In all events, as he points out, the position taken by the Human Rights Committee, that Israel is responsible for implementing the Covenant in the occupied territories “to the extent that it exercise[s] ‘effective control,’” is not supported by the text of the ICCPR. “[T]his broad construction of Article 2(2) may give rise to serious doubts as to the proper role of the [Committee]. Is it authorized to interpret the CCPR in an authentic fashion? The language of Article 2(2) is relatively clear.”

States have also expressed disagreement with the Committee’s view that the Covenant applies to acts of a state’s armed forces performed outside that state’s territory. For example, in its recent periodic report to the Committee on Human Rights concerning the implementation of ICCPR, the United States has once again taken the position that the provisions of the treaty do not apply outside the territory of a State at any time. Earlier, the Netherlands challenged a request by the Committee on Human Rights to provide information about the fall of Srebrenica. The Netherlands told the Committee that:

30. Id.
The Government disagrees with the Committee's suggestion that the provisions of the International Covenant on Civil and Political Rights are applicable to the conduct of Dutch blue helmets in Srebrenica. Article 2 of the Covenant clearly states that each State Party undertakes to respect and to ensure to all individuals "within its territory and subject to its jurisdiction" the rights recognized in the Covenant, including the right to life enshrined in article 6. It goes without saying that the citizens of Srebrenica, vis-à-vis the Netherlands, do not come within the scope of that provision.

What is even more important, although various overseas military missions involving states parties have been undertaken since the adoption of the Covenant, most recently in Iraq, Bosnia and Herzegovina, and the former Federal Republic of Yugoslavia (FRY), not one state has indicated, by making a derogation from those rights as provided under Article 4 of the Covenant, a belief that its actions abroad constituted an exercise of jurisdiction under the Covenant. All derogations under Article 4 have been lodged with respect to internal laws only.

D. Subsequent Practice Concerning ECHR

In its recent decision in Bankovic v. Belgium, the Grand Chamber of the European Court of Human Rights relied upon similar state practice with respect to derogations in finding that victims of the extraterritorial acts by NATO forces in bombing the headquarters of Radio Television Serbia were not "within the jurisdiction" of the member states for purposes of Article 1 of the ECHR. The European Court stated that "Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case." Perhaps most significant for present purposes, the Court described the territorial scope of Article 2 of the ICCPR as having been "definitively and specifically confined" by the drafters. "[I]t is difficult to suggest," the Court observed, "that exceptional recognition by the Human Rights Committee of certain instances of extra-territorial jurisdiction (and the applicants give one example only

36. Id. ¶ 37.
(Lopez Burgos v. Uruguay]) displaces in any way the territorial jurisdiction expressly conferred by" Article 2(1). 37

By contrast, in its earlier decisions involving Cyprus and Turkey, the European Court had concluded that a state's responsibility may be engaged where, as a consequence of military action, whether lawful or unlawful, it exercises effective control outside its national territory. 38 In Bankovic, however, the Court pointed out that in contrast to the situation in Cyprus, the FRY had not ratified the European Convention prior to the bombing and that "the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention." 39

One of the key conclusions of the European Court in Bankovic was that the obligations of Article 1 of the ECHR could not be divided under the effective control rationale. The Court observed that: "The wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 ... can be divided in accordance with the particular circumstances of the extraterritorial act in question." 40 Subsequently, the Court also confirmed in Ilascu v. Moldova and Russia that if the ECHR applies under the effective control rationale, a state's responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration. 41

Recently, two courts struggled with the application of the ECHR in Iraq. Although it ultimately rejected the case on other grounds, a chamber of the European Court cast doubt on the significance of Bankovic in Issa v. Turkey, a case involving a large-scale cross-border raid by Turkish military forces into northern Iraq. The Chamber relied on the views of the Human Rights Committee in Lopez Burgos and Celiberti (which, as discussed above, had been cited with approval by the ICJ in its Wall opinion) as evidencing a broad jurisdictional exception—that "the Convention cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory." 42 Even more recently, in Al Skeini & Others v. Secretary of State for Defence, which involved alleged violations of rights under the ECHR by British occupation forces in Iraq, the England and Wales High Court concluded that the "broad

37. Id. ¶ 54.
40. Id. ¶ 75.
dicta” of Issa were “inconsistent with Bankovic.” The High Court found, inter alia, that it did not have “broad, world-wide extra-territorial personal jurisdiction” over “the case of deaths as a result of military operations” since “it would drive a coach and horses through the narrow exceptions” recognized in Bankovic and because “there would be nothing to stop jurisdiction arising, or potentially arising, across the whole range of rights and freedoms protected by the Convention.” The Court did find that the case of an individual who had been arrested by British forces on charges of terrorism and was being held in “a British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities,” and not as a “prisoner of war,” “falls within a narrowly limited exception exemplified by embassies, consulates, vessels and aircraft, and in the case of Hess v. United Kingdom, a prison.”

E. Article 43 of the Hague Regulations

Is Article 43 of the Hague Regulations of any relevance? It specifically provides that an occupying power must take “all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” Where the territorial sovereign has not ratified a treaty prior to the commencement of the occupation, is the administrator of the occupied territory required to preserve the rights of the territorial sovereign, which chose not to ratify the particular treaty? Should Israel be deemed responsible for implementing the provisions of the Covenants and the CROC in the West Bank and Gaza, even though those treaties were not ratified by the territorial sovereign prior to the occupation? If the treaties apply extraterritorially, should Israel for that reason remain residually responsible for implementing the full range of rights and freedoms protected in those instruments where it transferred most responsibilities for civil government in the Gaza Strip and parts of the West Bank to the Palestinian Authority?

44. Id. ¶ 269, 284, 285. As a result the High Court dismissed appeals by relatives of five Iraqis who died in shooting incidents in the southern Basra area.
45. Id. ¶ 286–87.
46. As Oppenhein points out: “There is not an atom of sovereignty in the authority of the occupant...” L. Oppenhein, The Legal Relations Between an Occupying Power and the Inhabitants, 33 L.Q. REV. 363, 364–65 (1917).
47. In its appearances before the international human rights treaty bodies, Israel has consistently maintained that as a result of the May 1994 Gaza-Jericho Agreement and the 1995 Interim Agreement on the West Bank and the Gaza Strip that it “has no say, control, or jurisdiction” over the Gaza Strip and in Areas A and B of the West Bank, where the vast majority of the Palestinian population resides, and thus that it has no ability to implement the rights enshrined in these treaties. See, e.g., STATE OF ISRAEL, IMPLEMENTATION OF THE CONVENTION THE RIGHTS OF THE CHILD IN ISRAEL: RESPONSE OF ISRAEL TO THE “LIST OF ITEMS TO BE TAKEN UP IN CONNECTION WITH THE CONSIDERATION OF THE INITIAL REPORT OF ISRAEL,” ¶ 43 (2002),
By way of example, the Coalition Provisional Authority did not attempt to implement the provisions of the Convention Against Torture in Iraq, as Iraq had not ratified the treaty prior to the occupation. The Committee Against Torture, in contending that the U.K had an obligation to implement the provisions of the Convention in Iraq, "observe[d] that the Convention protections extend to all territories under the jurisdiction of a State party and considere[d] that this principle includes all areas under the de facto effective control of the State party's authorities." Nonetheless, the United Kingdom continued to maintain with respect to application of the Convention Against Torture in Iraq that it "could not have taken legislative or judicial measures of the kind envisaged since legislative authority was in the hands of the CPA and judicial envisaged was largely in the hands of the Iraqi courts."

The Human Rights Committee will no doubt face an uphill struggle in seeking to implement its views on the extraterritorial application of the ICCPR in situations of armed conflict and military occupation, even after the ICJ decision. Unlike judgments of the European Court of Human Rights, the views of the Human Rights Committee under the First Optional Protocol to the ICCPR are not considered to be legally binding. In any event, the Committee's position in its General Comment No. 31 and in its concluding observations concerning Israel is at odds with the plain meaning of Article 2(1), the practice of states that have ratified the Covenant, and the original intent of the negotiators.

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50. Al Skeini, [2004] EWHC (Admin) 2911, ¶ 103. At the close of the negotiations on the Convention Against Torture in 1984, the United States maintained that the treaty "was never intended to apply to armed conflicts and thus supersede the 1949 Geneva Conventions on humanitarian law in armed conflicts and the 1977 Protocols additional thereto." Commission on Human Rights, Report of the Working Group on a Draft Convention Against Torture, UN Doc. E/CN.4/1984/72 at ¶ 5. No delegation contradicted the U.S. statement. See also Report of the Secretary-General, UN Doc. A/39/499, at 15 (1984) (statement of Norway) ("For these kinds of armed conflicts, the Geneva Conventions and the First Additional Protocol established a system of universal jurisdiction and of implementation that must be considered equal to the system of the convention against torture.").

51. Article 46(2) of the European Convention, supra note 12, gives the Committee of Ministers authority to ensure enforcement of any final judgments.

II. IF BOTH HUMANITARIAN AND HUMAN RIGHTS LAW APPLY, DOES THE FORMER PREVAIL AS LEX SPECIALIS?

What explains the lack of notice of derogations by states concerning the extraterritorial application of the Covenant and the European Convention during periods of armed conflict and military occupation as discussed above? Two possible legal theories suggest themselves: that states believe that the obligations assumed under these instruments apply only within their territory and not to acts of armed forces executed outside their territory; or that the *lex specialis* of humanitarian law suspends the extraterritorial application of the instruments during periods of armed conflict and military occupation. At times, the United States has maintained both positions. For example, with respect to the detainees in Guantanamo, the United States has taken the position that "the ICCPR would not govern this case if it were otherwise privately enforceable and applicable outside U.S. territory. . . . [The ICCPR] . . . is intended to secure "civil and political rights"—that is, the rights and obligations between a government and the governed." Noting that the Guantánamo detainees are being held under the law of war, which "applies during armed conflict to regulate interactions between governments and members of enemy forces," the U.S. position states that this separate law of war "addresses specifically and in detail obligations with respect to detainees seized in combat" and is the law that "covers the detainees."\(^5\)

The ICJ Wall advisory opinion apparently recognizes that the *lex specialis* of international humanitarian law may exclude the general application of the provisions of the ICCPR during situations of armed conflict and military occupation. The Court suggests that the specific protections provided by the two categories of instruments could be split into three groups of rights: "some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."\(^5\) However, the Court did not offer specific guidance on how to subdivide the rights into these categories. Without further analysis of the *lex specialis*, the Court determined that Israel’s security barrier "impede[s] the liberty of movement of the inhabitants of the Occupied Palestinian Territory . . . as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights."\(^5\)

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53. Brief for Appellees at 45–46, Coalition of Clergy, Lawyers & Professors v. Bush, 310 F.3d 1153 (9th Cir. 2002) (No. 02-55367). Plaintiffs had argued that the ICCPR creates judicially enforceable rights that may be properly invoked in habeas corpus proceedings. The Ninth Circuit dismissed the case without reaching the issue.


55. *Id.* ¶ 134.
One important doorway to understanding the Court’s opinion is its factual determination that “the military operations leading to the occupation of the West Bank in 1967 ended a long time ago.”\(^{56}\) Under Article 6 of the Fourth Geneva Convention, the provisions of the Convention ceased to apply in the territory of Israel when the military operations ended and one year later in the occupied territories. Thus, the Court’s logic left it with a highly unusual situation; while under Article 6 some of the provisions of the Fourth Geneva Convention continued to apply to the extent Israel exercised the functions of government, many other protections provided under the Convention relating to civil and political rights were no longer applicable. In fact, the Court’s finding rendered inapplicable two provisions of the Fourth Geneva Convention that would appear to be in conflict with the relevant provisions of the ICCPR. Articles 42 and 78 permit internment or placement in assigned residence of protected persons where the security of the detaining power makes it absolutely necessary.

In its earlier advisory opinion in *Legality of the Threat or the Use of Nuclear Weapons*, the Court also observed in abstract terms that “the protection of the International Covenant on Civil and Political Rights does not cease in wartime, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.”\(^{57}\) The Court further cautioned, however, that the “most directly relevant applicable law . . . is that relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities” and that “whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.”\(^{58}\) Hence, based on the reasoning employed by the ICJ in its *Nuclear Weapons* advisory opinion, even if the provisions of the ICCPR could be said to apply during periods of armed conflict, whether the detention of combatants seized in armed conflict or the internment of civilians is "arbitrary" under Article 9 of the ICCPR could only be decided by reference to international humanitarian law.

Moreover, as the UN independent expert on the protection of human rights in countering terrorism (Robert Goldman) recently observed, while the “[h]uman rights treaty bodies have no common approach on how human rights law relates to rules of international humanitarian law,” the Inter-American Commission on Human Rights (IACHR) has “looked to rules and standards of

\(^{56}\) *Id.* ¶ 125.

\(^{57}\) *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8).

\(^{58}\) *Id.*, ¶ 25, 34.
international humanitarian law . . . as the *lex specialis* in interpreting and applying the American Convention or the American Declaration in combat situations." 59 For example, in the context of a case involving the Guantanamo detainees the IACHR observed that:

In certain circumstances, however, the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law including the jurisprudence of the Commission, dictates that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis*. 60

In short, it would appear that the best reading of the interrelationship between the ICCPR and international humanitarian law at least with respect to detention of combatants or the internment of civilians, is the more traditional view that international humanitarian law should be applied as the *lex specialis* in determining what a state’s obligations are during armed conflict or military occupation.

Before turning to the question of derogations, I would like to consider briefly the role that the Security Council has played in resolving possible differences within the international community over what specific rules of international law govern extraterritorial detention by multinational forces. The Council has authority under Chapter VII, when necessary "to maintain or restore international peace and security," to authorize measures that may be inconsistent with otherwise applicable treaties. Under Article 103 of the UN Charter, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

For example, the extraterritorial security detention currently employed by the MNF in Iraq has been authorized by UN Security Council resolution 1546. The resolution "[d]ecides that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution." The


letter from the U.S. Secretary of State annexed to the resolution states that the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security in Iraq, including "internment where this is necessary for imperative reasons of security."

Recently, the United Kingdom's High Court of Justice issued an important decision that addresses the authority of the MNF to detain security internees under UNSCR 1546 and the relationship of that authority to the human rights protections provided under Article 5 of the ECHR concerning arbitrary detention. In *Al Jedda v. Secretary of State for Defense*, a British citizen who had been detained for nine months by British forces in Iraq on security grounds challenged the detention as inconsistent with the United Kingdom's domestic law implementing Article 5 of the ECHR. The Court concluded that by UNSCR 1546 the Security Council authorized the MNF "to continue the powers exercisable in accordance with Article 78 of Geneva IV but inconsistent with Article 5 of the ECHR" and "to intern those suspected of conduct creating a serious threat to security in Iraq." The Court further found that since the resolution was made under the provisions of the Charter, in particular those authorities established under Chapter VII, "the resolution does . . . in principle override Article 5 of the Convention in relation to the claimant's detention in Basra."

III. IF HUMAN RIGHTS LAW APPLIES, WHAT IS THE PERMISSIBLE SCOPE OF POSSIBLE DEROGATIONS?

As noted at the outset, the ICJ concluded in its *Wall* advisory opinion that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights, and that Israel had forfeited its right to derogate from the right to liberty of movement because of its failure to give other states proper notification of such an intent. The Court repeatedly emphasized that Israel’s notification of intent to derogate involved only Article 9 of the Covenant, "which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention." The other Articles of the Covenant therefore remained applicable not only on Israeli territory, but also on the Occupied Palestinian Territory.

Two issues would appear to present themselves in the context of our discussion concerning extraterritorial detention: would states be able to

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62. *Id.* ¶¶ 92–93.
63. *Id.* ¶ 122.
64. *Wall Opinion*, *supra* note 4, ¶ 127.
derogate from rights automatically if they are involved in an armed conflict or military occupation; and could they derogate entirely from the protections provided under international human rights instruments concerning arbitrary detention.

A. Suspension of Rights Generally

Article 4(1) of the ICCPR, like Article 15 of the ECHR, provides that states “may take measures derogating from their obligations” under the Covenant “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.” The article was based on the constitutions or emergency legislation of states, including the United Kingdom, empowering the head of state or government to declare a state of emergency and suspend domestic rights, such as through denial of liberty of movement, detention without trial, press censorship, and the creation of special tribunals. The Uruguayan representative, during the negotiations of Article 4, appears to have reflected the views of most delegations by emphasizing that the executive is authorized to suspend constitutional guarantees “in most national legislations.”

As pointed out above, states in actual practice have notified other states under ICCPR Article 4(3) of the suspension of their domestic laws during periods of internal disturbance. But not one state has submitted a notice of derogation suspending the application of the Covenant extraterritorially during periods of international armed conflict or military occupation. Indeed, it is difficult to see how generally states contributing troops to multilateral forces would be able to suspend civil and political rights during periods of armed conflict and military occupation. The individual states contributing troops to a multinational force may or may not be party to the ICCPR, or, face a public emergency that threatens the life of that nation as required by Article 4(1) of the ICCPR. Could some members of a coalition suspend ICCPR rights extraterritorially on behalf of other members?

This “state of legal uncertainty” concerning the ability of participating states in a multinational force to derogate from international human rights instruments was one of the key factors that led the British High Court in Al Jedda to conclude that the provisions of UNSCR 1546 applied in lieu of Article 5 of the ECHR. The Court observed that individual states contributing troops to the MNF in Iraq might not face a “war or public emergency threatening the life of the nation” as required by Articles 15 of the ECHR and that “[p]articipating states need to know where they stand when faced with making

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decisions at very short notice.” The Court also relied on the fact that no state has derogated in relation to actions abroad at the invitation of the Security Council since 1951.

The extraordinary and unprecedented proposition in the ICJ Wall case that the provisions of international human rights instruments apply extraterritorially unless there has been a specific derogation appears to put at risk the participation by states in United Nations and other multinational operations outside their own territory, by placing them in the position of undermining, through their own liability, the human rights situations in territories where the operations are conducted.

B. Permissible Scope of Derogations.

With respect to the permissible scope of derogations, Article 4(2) of the ICCPR stipulates that no derogation may be made from Articles 6 (right not to be arbitrarily deprived of one’s life), 7 (prohibition of torture), 8 (prohibition of slavery and servitude), 11 (prohibition of detention for debt), 15 (prohibition of retroactive criminal laws), 16 (recognition as a person before the law), and 18 (freedom of thought, conscience, and religion). However, the Human Rights Committee in its General Comment No. 29 argued that the list of nonderogable provisions in Article 4 is not exclusive and it proceeded to list a number of additional rights from which no derogation could be made. For example, with respect to detention, the Committee stated that “in order to protect nonderogable rights, the right [under Article 9(4)] to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a state party’s decision to derogate from the Covenant.”

Nonetheless, states in actual practice have frequently derogated from Article 9 in its entirety with respect to their domestic legislation. As of October 12, 2005, twenty-seven states had submitted notifications under Article 4(3) of the Covenant, with seventeen states derogating from Article 9 completely. Moreover, the negotiating history of the Covenant establishes that states clearly intended that Article 9 of the ICCPR could be suspended in its entirety (if it is assumed that the provision applies to a particular conflict). During the 1950 drafting session of the Commission on Human Rights, the French proposed an amendment that would have included Article 9 within the listing of nonderogable rights under Article 4 of the ICCPR. At that time, Mrs. Roosevelt proposed a sub-amendment that would have included only Article 9(4) (right

68. Id., ¶ 16.
to challenge detention in court). France hastily withdrew its entire proposal, noting that it "was particularly opposed to the inclusion of paragraph [4] of Article 9, from which any country in time of war would be forced to derogate." During the negotiations, states were also particularly concerned that the catalog of nonderogable rights contained in Article 4(2) not interfere with the ability of states to intern enemy aliens. For example, at the 1950 session, states rejected a proposal that would have made Article 26 of the Covenant nonderogable (guaranteeing all persons equal protection of the law, and equal and effective protection against discrimination), after several delegations pointed out that it was impossible to treat enemy aliens on the same basis as citizens during periods of armed conflict. The representative of the Philippines stressed that "in time of war an early measure often taken by Governments was the segregation of enemy aliens in detention camps" and that while “[s]uch a measure constituted only temporary discrimination, . . . it was evident that while in such camps the persons in question could not avail themselves of the normal processes of law.”

When the General Assembly later reviewed Article 4 at its 1963 session, states examined whether it was appropriate to make Article 23(2) nonderogable as well (right of men and women to marry). The proposal was withdrawn after several states maintained that they must be entitled to prevent marriage domestically during periods of hostilities, because marriage would give enemy nationals their spouse’s nationality. The representative of the Netherlands specifically reminded delegations that when the Germans had invaded his country in May 1940, the “Government had found it necessary to intern persons of German origin living in its territory, . . . due to the need to protect the national security, and to the danger which Nazi infiltration had presented to the country.”

Thus, there is clear evidence in the negotiating record of the ICCPR that much thought was devoted to deciding what articles would be nonderogable and that omissions from the list in Article 4(2) were not inadvertent. In short, the proposition that there are other nonderogable rights in the ICCPR in addition

70. Id.
to the catalog of nonderogable rights provided in Article 4(2) is doubtful, even if it is assumed that states are obligated to derogate from the extraterritorial application of human rights instruments during periods of armed conflict and military occupation.

IV. IF ONLY HUMANITARIAN LAW APPLIES, WHAT CONSTRAINTS DOES IT IMPOSE ON DETENTIONS?

The answer to the question would vary depending upon a series of circumstances including, *inter alia*, whether:

1) The detention involves enemy combatants or civilian internees;
2) The conflict was international or of a non-international character;
3) The UN Security Council authorized the particular detention;
4) The state in question had ratified the Additional Protocols of 1977 (or if relevant provisions in those instruments are customary international law).

The adoption of the Additional Protocols of 1977 also supports the view that states did not intend that there be a general merger of human rights and international humanitarian law in situations of extraterritorial detention. Both Protocols include various derogable and nonderogable rights contained in the ICCPR. For example, Article 5 of Protocol II provides special and elaborated protections for persons whose liberty has been restricted, including by internment, while Article 75(3) of Protocol I expands on the derogable protections provided in Article 9(2) of the ICCPR concerning the need to inform detainees of the reason for their detention. On the other hand, states did not include other specific guarantees provided for in the ICCPR within either Protocol. As Dietrich Schindler concludes, "The adoption of the two 1977 Protocols additional to the Geneva Conventions is a proof that a separate set of rules for armed conflict is in fact what States want."

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74. Dietrich Schindler, *The International Committee of the Red Cross and Human Rights*, 208 INT'L REV. RED CROSS 3, 14 (1979). The ICRC gave the following reason for restating various provisions of the ICCPR in Protocol II:

The system of protection set up by international humanitarian law . . . differs from that provided by instruments on human rights. Nevertheless, the view was held that some basic provisions of the International Covenant on Civil and Political Rights—particularly those from which no derogation may be made even in time of public emergency which threatens the life of the nation—should be applicable in the context of armed conflict. . . . As every legal instrument specifies its own field of application, some of the Covenant's provisions have been restated within the framework of the draft Protocol.

V. CONCLUSION

Doctrinal clarity is likely to advance respect for international norms in conflict situations and specifically in the case of extraterritorial detention. This does not mean, however, that more law is necessarily better, or that the two branches of law—human rights and humanitarian law—should overlap. The obligations assumed by states under the main international human rights instruments were never intended to apply extraterritorially during periods of armed conflict. Nor were they intended to replace the *lex specialis* of international humanitarian law. This distinction is not a trivial one. Its importance was fully understood by the architects of the Covenants.

To ignore this distinction in favor of the application of international human rights instruments to situations of international armed conflict and military occupation is, in effect, to ignore what the international community has agreed upon. To ignore this distinction is to offer a dubious route toward increased state compliance with international norms.
FILLING THE VOID: PROVIDING A FRAMEWORK FOR THE LEGAL REGULATION OF THE MILITARY COMPONENT OF THE WAR ON TERROR THROUGH APPLICATION OF BASIC PRINCIPLES OF THE LAW OF ARMED CONFLICT

Professor Geoffrey S. Corn*

In 1961, the Supreme Court of the United States held in *Mapp v. Ohio* that the Fourteenth Amendment to the United States Constitution required imposition of the exclusionary rule for evidence improperly seized by State officials. In that case, the Court emphasized the significance of compliance with basic principles of legality when it noted "[N]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." Although this case had nothing to do with the legal regulation of military operations, the concept expressed by the Court is, in the opinion of this author, at the core of the issues addressed by the Panel on which I participated at the recent International Law Weekend. This Panel was called upon to address the sufficiency of international humanitarian law to deal with the treatment of individuals detained during the War on terror, and whether the application of international human rights norms was essential to regulate such activities.

Like the issue confronted by the Supreme Court in *Mapp*, the legal regulation of military operations related to the War on terror provides a

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2. *Id.*
profound example of the corrosive effect of adopting of policies that are inconsistent with the fundamental charter of an organization—in this case the armed forces. Unlike the domestic realm, this charter does not take the form of a constitution. Nor, in the opinion of this author, does it take the exclusive form the treaties, although these certainly reflect aspects of this charter. Instead, the “charter for the existence” of a professional armed force consists of the fundamental principles of the law of armed conflict (LOAC) developed over the centuries by warriors, diplomats, scholars, and humanitarian activists. These fundamental principles reflect a careful and delicate balance between the dictates of military necessity and the humanitarian goal of limiting the harmful effects of mortal combat, and provide the foundation for developing and maintaining the professionalism, discipline, and moral integrity of a military organization. Acknowledgment of these principles as non-derogable standards applicable to any military operation involving the application of force or the detention of opposition personnel is therefore essential to the legally legitimate execution of such operations.

While these principles are certainly reflected in numerous LOAC treaty provisions, in the opinion of this author, the failure to acknowledge their applicability even when the technical triggering requirements of the treaties in which they are codified have not been satisfied has manifested itself in the suggestion that certain aspects of the War on terror occur in a legally unregulated environment. This, I believe, has been reflected in much of the debate related to the applicability of the LOAC to individuals detained by United States armed forces as “enemy combatants” and has been a pervasive factor in the development of United States policy related to this issue. It was also a prominent aspect of the presentations by the various members of the ILW Panel.

This treaty “application analysis” approach has become the focal point of much of the debate and analysis related to the international legal regulation of the War on terror. Thus, proponents of expansive United States war execution powers assert the inapplicability of the Geneva Conventions to non-state actors captured during the trans-national war on terror. In response, proponents of humanitarian protections argue for a more protective interpretation of these treaties. In the alternative, many such proponents also assert that the inability of LOAC treaties to address every humanitarian issue related to the war on terror requires the United States to acknowledge the applicability of

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3. The term law of armed conflict will be used throughout this essay to refer to international treaty and customary law developed to regulate the means and methods of warfare and provide humanitarian protections for the victims of war. Although often referred to as international humanitarian law, in the opinion of this author, this characterization diminishes the significance of the means and methods prong of this body of law.
international human rights norms to the conduct of military operations, a position that is contrary to the traditional United States position vis-à-vis the scope of human rights law.

Each of these positions was represented by fellow panelists at the ILW conference, all of whom were called upon to address the sufficiency of LOAC to address the international legal regulation of the war on terror, with specific emphasis on detention. In response to this question, I asserted that the LOAC was sufficient to provide the essential framework of regulation for the military component of this struggle, but with one critical qualification—only if the non-derogable nature of basic LOAC principles⁴ is affirmatively acknowledged by United States policy makers. Such an acknowledgment is essential to ensure that the armed forces of the United States are never called upon to engage in operations involving the application of combat power in a legally unregulated environment; or, phrased differently, that they will never be called upon to engage in activities that are inconsistent with the basic charter of a professional and disciplined armed force reflected in these principles.

The United States must endorse such an interpretation of LOAC, and makes the fundamental principles of the LOAC the foundation for all policies, doctrine, and operational decisions related to execution of military operations by United States forces. Absent such an endorsement, these forces will continue to be required to engage in conduct that risks contravention of the most fundamental notions of humanity and professionalism. Such an outcome degrades not only international legitimacy, but also the discipline and effectiveness of our own force.

This dynamic has already been witnessed with regard to detention and interrogation directives indicating that humane treatment was merely a "policy" mandate, and not a legal obligation. Such an approach to the regulation of the armed forces presents a serious danger of debasing respect for the constraints on combatant conduct, and encouraging the instinct prevalent among so many military professionals throughout history: that military necessity is an unlimited source of authority for the execution of military operations. The potential consequence of such an approach to the regulation of hostilities poses significant dangers to the credibility of the overall United States effort to defeat

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⁴. A.P.V. Rogers, Law on the Battlefield 3 (2d ed. 2004) [hereinafter Rogers]. Stating that:
The great principles of customary law, from which all else stems, are military necessity, humanity, distinction, and proportionality. According to the UK Manual of Military Law, the principles of military necessity and humanity as well as those of chivalry have shaped the development of the law of war. Chivalry may, however, be classified as an element of the principle of humanity.

Id.
terrorist organizations, and is fundamentally inconsistent with the well-established limitation on the principle of military necessity.\footnote{U. S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 3 (July 1956).}

Unfortunately, the longstanding and well-established limited scope of the authority derived from the principle of military necessity has apparently been dismissed by policy makers adhering to a short-term cost/benefit analysis to determine appropriate conduct of the armed forces. In the opinion of this author, such an approach fails to consider a primary purpose of adhering to a framework of legal principles constraining the unlimited scope of the principle of necessity: protection of the moral integrity of the citizens called upon to serve our nation in uniform.

There are certain truisms in war that persist through time. First, war involves the deliberate infliction of suffering upon warriors, and the inevitable incidental infliction of suffering on the people and property of an opponent. Second, suffering is not inflicted for personal reasons, but because some national or organizational leadership entity directs such activity. Third, those who engage in mortal combat do not do so for profit or personal vendetta, but because they have been called upon to do so by the authority they serve. For the warriors who serve this nation, and many other nations, this results in an implied covenant between them and the nation under whose flag they fight, kill, destroy, and detain. The essence of this covenant is a willingness to inflict the suffering associated with warfare based on the belief that doing so will be consistent with the inherent values of the cause for which they serve. For most human beings, imbued with an inherent value for human life, preserving this covenant is essential to reconcile their innate sense of morality with the suffering their duty requires them to inflict.

Military professionals historically understood that preserving a sense of morality would be most severely stressed during armed conflict. As a result, they were at the forefront of developing non-negotiable rules to limit the brutality of warfare, and in so doing limit the corrosive moral consequence of conflict. Thus, another truism of war is that limitations imposed on the conduct of hostilities—limitations developed by warriors to limit the infliction of suffering to only that which is legitimately necessary—protect not just the adversary, but the moral and psychological integrity of the members of the

\footnote{Id.}
force regulated by such constraints. The significance the LOAC plays in preventing deviation from a standard of morality was clearly understood by the Telford Taylor, the Chief United States prosecutor at Nuremberg. According to Taylor:

Another and, to my mind, even more important basis of the laws of war is that they are necessary to diminish the corrosive effect of mortal combat on the participants. War does not confer a license to kill for personal reasons—to gratify perverse impulses, or to put out of the way anyone who appears obnoxious, or to whose welfare the soldier is indifferent. War is not a license at all, but an obligation to kill for reasons of state; it does not countenance the infliction of suffering for its own sake or for revenge.6

The great irony of the current debate related to the applicability of the LOAC to the military component of the war on terror is that it seems to reflect the lack of appreciation for this fundamental aspect of embracing expansive application of LOAC principles so effectively articulated by Taylor. It is equally ironic that proponents of expansive United States wartime power continually assert the “new paradigm” reflected in the war on terror. In the opinion of this author, this assertion is a subterfuge for those who seek to dispense with the constraints that result from good faith application of LOAC principles, and adopt an unlimited definition of military necessity—an idea that was flatly rejected following the Second World War. Instead of characterizing the war on terror as a new paradigm, it is more appropriate to consider why the framework of basic LOAC principles must be applied to any armed conflict, regardless of the nature of the enemy.

The possibility—if not probability—of engaging in armed conflict in a context not contemplated by the treaties regulating warfare was acknowledged in 1899 in the Preamble to the first multi-lateral treaty regulating the methods and means of warfare was adopted by the international community. Known as the Marten’s Clause (in recognition of the author of this provision, the Russian diplomat Feodor Martens),7 this provision required armed forces to comply with the “dictates of humanity” during all military operations, a mandate that has been replicated in subsequent law of war treaties.8 The exact language of the original clause stated: “in cases not covered by the attached regulations, the belligerents remain under the protection and the rule of the principles of the law of nations’ as derived from the usages established among civilized people, the laws of humanity and the dictates of the public conscience.”9

7. This was the name of the Russian representative who drafted the language. See ROGERS, supra note 4, at 6 n.36.
8. See id. at 7 n.37.
Describing the purpose of this clause, A.P.V. Rogers highlights the drafters intent to ensure humanitarian protections applied during warfare for all those affected by a conflict, not only civilians:

The purpose of the clause was not only to confirm the continuance of customary law, but also to prevent arguments that because a particular activity had not been prohibited in a treaty it was lawful. Humanity is, therefore, a guiding principle which puts a brake on the undertakings which might otherwise be justified by the principle of military necessity.°

It therefore appears that both the profession of arms and the international community have understood, for over a century, that when armed forces of a state engage in operations involving "combat" activities, even when such conflict falls outside the scope of treaty regulation, restraint consistent with basic notions of humanity apply ipso facto to such operations. Any other conclusion would require the armed forces to "disregard of the charter of its own existence." Thus, the basic principles of the LOAC - including both the authority derived from the principle of military necessity and the constraint on that authority derived from the principle of humanity, must serve as the framework for such operations. This balance between the necessity to destroy an enemy force and the dictates of humanity is summarized by one text as follows:

Not all means or methods of attaining even a 'legitimate' object of weakening the enemy's military forces are permissible under the laws of armed conflict. In practice, a line must be drawn between action accepted as 'necessary' in the harsh exigencies of warfare and that which violates basic principles of moderation.°

This proposition is in no way novel for the United States armed forces. Indeed, it has formed the basis for the Department of Defense law of war policy for more than two decades. This policy, reflected in the Department of Defense Law of War Program, mandates that the armed forces of the United States must treat any armed conflict as the trigger for application of the law of war.

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see also Department of the Army Pamphlet 27–1, THE LAW OF LAND WARFARE at 5 (December 1956).

10. ROGERS, supra note 4, at 7.


13. Id. at ¶ 5.3.1 (stating that the Heads of the Department of Defense (DoD) Components shall “[e]nsure that the members of their DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.”), see also Major Timothy E. Bulman, A Dangerous Guessing Game Disguised as an Enlightened Policy: United States Laws of war Obligations During Military Operations Other Than War, 159 Mil. L. Rev. 152 (1999) (analyzing the potential that the U.S. law of war policy could be asserted as
This mandate has been the foundation for application of the LOAC principles during every phase of the war on terror, and reflects the basic proposition that armed conflict requires application of these basic principles, no matter how the conflict is characterized. In the opinion of this author, the time has come to alter the characterization of “policy” attached to this mandate to that of “legal obligation.” This conclusion is justified by treating this mandate as a reflection of an underlying norm of customary international law; or, in the alternative, a reflection of a “principle of law recognized by civilized nations.” Such an endorsement would eliminate any uncertainty as to the application of basic principles of the LOAC, as a matter of legal obligation, during military operations associated with the war on terror.

With regard to application of these basic principles, the ILW Panel, like so many other experts who have been called upon to comment on United States policies, focused specifically on the treatment of detainees. This was certainly appropriate, as the issue of treatment of detained personnel who fail to meet the criteria for prisoner of war or protected civilian status truly serves as a metaphor for the broader application of this basic LOAC principle framework. There are few other situations where the tension between military necessity and the dictates of humanity is more profoundly stressed than when a member of an opposition force is captured and presumed to possess information of significant value to the capturing force. Indeed, it has been precisely this aspect of the current United States detention policy that has been cited by the Bush administration as the justification for considering, and in some cases endorsing, detention and interrogation standards that would not be permitted for prisoners of war. Classifying the humane treatment standard as a “policy” vice legal mandate has provided the purported legal flexibility to implement such policies.

Unfortunately, what this practice has failed to acknowledge is that the principle of humanity, and more specifically the obligation to ensure the humane treatment of all captured or detained personnel, is part of the basic non-derogable “charter” of the armed forces. It serves to limit the instinct to do all that is necessary to achieve a given military objective, no matter how
inconsistent with basic notions of humanity. In the realm of interrogation, that
instinct will almost invariably lead to proposals to adopt more and more
aggressive techniques against detainees perceived to be non-compliant.
Removing humane treatment from the realm of legal obligation and
downgrading it to policy is a dangerous invitation for commanders and policy
makers to endorse a "whatever it takes" approach. As we have witnessed since
9/11, such an approach will ultimately require members of the armed forces to
implement such techniques, which in turn will produce a conflict between their
basic sense of morality and their duty to obey what are characterized as lawful
orders (because of the exceptional nature of the subjects of interrogation).
This, in turn, can (and throughout history often has) lead to a dangerous erosion
of discipline within the force.

Treating humane treatment as a non-derogable obligation leads to a
different result, and reflects the approach that is, as this author stated during the
ILW presentation, essential for the maintenance of a disciplined and morally
grounded military. Once both necessity and humanity are acknowledged as
basic principles of the LOAC, applicable whenever and wherever the armed
forces are called upon to engage in operations against a hostile force possessing
military type capabilities (in short, "armed conflict"), the traditional process of
balancing these two principles will animate policy and operational decisions.
Although humane treatment is an ill-defined concept beyond providing the
basic incidents of life and health, a simple test will enable military
commanders to assess whether a proposed tactic or technique intended to
efficiently achieve the military objective will transgress the limitation of
humane treatment. This test asks whether the proposed technique, if used
against a "friendly" subordinate, would be considered improper. If so, it is
almost certainly inconsistent with the principle of humane treatment.

It is important to note the paternalistic aspect of this test. Because most
military personnel pride themselves on their ability and willingness to endure
brutal treatment in the service of their nation, the traditional "do unto others"
test will be ineffective. However, within the military culture, only mission
accomplishment is paramount to caring for subordinates. As a result, most
military leaders will possess a strong protective instinct over their subordinates.
Thus, framing the question as "would I consider this tactic improper if
employed against a soldier entrusted to my leadership" will create the proper
frame of reference for assessing the permissibility of the tactic. This flexible
and pragmatic approach has been the cornerstone of United States interrogation
document for decades, and as with the dictate of the Marten's Clause, there is no
justifiable reason to question the continuing validity of this approach.

15. See CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts et al. eds.,
2005).
The military aspect of the war on terror will no doubt continue to present complex challenges for our nation, and for the armed forces called upon to conduct operations in pursuit of national strategic objectives. But such complexity is not, as many critics of the LOAC posit, unprecedented in the history of warfare. Conducting military operations against highly organized non-state actors has been an aspect of the American way of war since the inception of the nation.\(^\text{16}\) What is new is the suggestion that the conduct of such operations is, because of the nature of the enemy, legally unregulated. Such a suggestion fundamentally undermines the basic "charter" of a professional armed force, creates a dangerous risk of encouraging the darkest instincts of those called upon to "deliver" results, and corrodes the moral integrity of the men and women who serve this nation. Only a rejection of this proposition, and an endorsement of the obligation to comply with a framework of basic principles of the LOAC during all military operations will restore and preserve the appropriate balance between the dictates of necessity and the interests of humanity, and prevent the conduct of such operations from degenerating into what appears more like personal vendettas that the application of force for reasons of state. The armed forces have historically, and continue to understand this. It is time that those who create policies they must conform to also recognize this fact, a necessity articulated so effectively by eminent law of war historian Geoffrey Best:

I do not fall into the most common, flattering and delusive of civilian assumptions, that civilian = good and military = bad. Far from it. So far as one can distinguish them from each other . . . civilians have often been ascendant in the political leadership under which . . . the military are seen to have done terrible things. Militarism . . . may be a nasty thing, but let the military man ponder on my conviction, that there can be no nastier a militarist than a civilian one.\(^\text{17}\)


\(^{17}\) Geoffrey Best, Humanity in Warfare 26–27 (1980).
INTERNATIONAL LAW AND THE HUMANITIES: DOES LOVE OF LITERATURE PROMOTE INTERNATIONAL LAW?

Daniel J. Kornstein*

Re-examining a basic assumption is always useful. This is so because many serious errors can flow from an assumption uncritically accepted. An example may be the relationship between international law and the humanities, specifically literature. A seemingly taken-for-granted assumption, long and deeply held, is that a love of good literature has a cultivating and civilizing effect that promotes humanistic values transcending national boundaries, an effect that, if only indirectly, humanizes international law and prevents atrocities. Today we ask: Is this assumption correct?

History and current events supply many examples of apparently highly civilized societies—where the reading of good books has been much esteemed—that have violated international law and acted with atrocious inhumanity. This gap between soothing assumption and harsh reality more than justifies re-examination of our premise. We need to call into question, we need to dig away at the foundations, we need to critically study, some of our deepest assumptions about the virtues of a passion for great literature. If we at least start this process, we may be surprised, perhaps even shocked, at what we find.

We may discover, contrary to our implicit, firmly embedded notions, that devotion to literature is not enough by itself to advance international law, that in fact too much reading of literature can, paradoxically and counter-intuitively, hurt rather than help international law.

I.

To say “reading is good” is extraordinarily trite. It is the most obvious sort of conventional wisdom, a cliché on the order of “the world is round.” Ever since we were children, we have been told the benefits of reading, especially reading good literature. Books supply us with riveting, arresting, life-changing experiences and insights. They teach us about people, about human nature,

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about social interactions, about emotions. As Thomas Carlyle put it, "All that mankind has done, thought, gained or been...is lying as in magic preservation in the pages of books."\(^1\)

The supposed benefits of literature for international law are easily outlined. Great literature, it is said, humanizes the reader, it makes people more human. Literature can lead to personal transformation, self-knowledge, and rich development of the individual's inner life. Reading gives us revelation and insight, new ideas and new understanding. Good books have a capacity to criticize and challenge life as it is, and often to gesture toward something better. Literature is thus a force for betterment.

Like all art and music, like all the humanities, literature contributes to international law by tapping primal energies, expanding cultural perspectives, and breaking down barriers between nations and peoples. It is a great unifier that reveals and encourages interconnectedness, a broad, enlightened vision as a universal human right. It affects our emotions, makes people more empathetic, more aware of cultural variety and the nuances of individual motivation. Literature can enlarge our consciousness and help us identify with varied characters and ambiguous situations, with different people in faraway lands, with other people in our own land. The result should be a sense that we each bear moral responsibility for all forms of degradation—repression, coercion, exploitation, torture, prejudice—wherever they occur.

For support, one could string many apt literary quotations. A particularly appropriate line that leaps to mind comes from our own Walt Whitman’s *Leaves of Grass*: "Whoever degrades another degrades me, and whatever is done or said returns at last to me."\(^2\) Or, from the same poem: "By God! I will accept nothing which all cannot have their counterpart of on the same terms."\(^3\) Sentiments like these, spoken on behalf of "many long dumb voices,"\(^4\) come from writers and inspire readers without borders.

More generally, literature can provide unique insights in morals and ethics. It can enrich, refine and stabilize moral perceptions and sensibilities. It can teach about ethics in law and promote greater ethical awareness. The fully experienced literary masterpiece tends to liberate. Great literature is rarely repressive.

Many of these observations form the core of the modern law and literature movement. Behind that movement lies the idea that literature helps us

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3. *Id.* at 211.
4. *Id.*
understand the underpinnings of law. Literature provides sources of understanding about legal ideas that are more accessible than traditional sources of legal philosophy.\(^5\)

Blessed with such benefits, a love of reading literature should, at least in theory, further international understanding and law. But the test is how the theory works in practice.

II.

Experience has not always borne out the benefits of literature for international law. Theory has not always matched reality. This unhappy track record raises the strange question whether the benefits of reading good literature—the benefits of culture generally—may have been oversold in terms of their humanizing and civilizing effects on the international stage.

We all know historical examples of societies famous for their distinguished culture that have engaged in war, persecution and torture. Germany in the 1930s and 40s is only the most obvious and oft-cited example. There are others, and, lest we become too self-satisfied, some of them uncomfortably close to home. Terms like “extraordinary rendition,” disheartening goings-on at places like Abu Ghraib Prison or My Lai, or current opposition to humane interrogation techniques—all these make us Americans uneasy. What does this mean for our assumption about the civilizing impact of a love of literature and the humanities?

One of the most perceptive and provocative comments on this point comes from eminent cultural and literary critic George Steiner, a man who has spent most of his life reading and writing about books. “The simple yet appalling fact,” wrote Steiner in his 1967 book Language and Silence, “is that we have little solid evidence” that reading good books does Avery much to enrich or stabilize moral perception, that they humanize.\(^6\) He went on to lament, “[w]e have little proof’ that such reading “in fact makes a man more humane.”\(^7\) In the end, Steiner, himself a champion of the humanities, found himself “unable to assert confidently that the humanities humanize.”\(^8\)

To illustrate his point, Steiner cited the familiar example of World War II: “When barbarism came to twentieth century Europe,” explained Steiner, “the arts faculties in more than one university offered very little resistance, and this is not a trivial or local accident. In a disturbing number of cases the literary

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7. Id.

8. Id.
imagination gave servile or ecstatic welcome to political bestiality." As a result, Steiner arrived at the sad conclusion that, "literary values and the utmost of hideous inhumanity could exist in the same community," even "in the same individual sensibility."  

These remarks from so cultivated and astute an observer as George Steiner are troubling and seriously undermine our assumption about love of literature and international law. And Steiner is by no means alone. Although he wrote almost forty years ago, his disquieting attitude has been echoing hauntingly ever since. "People to whom literature is important may prefer to obtain their knowledge of human nature from books rather than from living people," commented Judge Richard Posner of the Seventh Circuit in his stimulating 1988 book *Law and Literature.* But whether books are superior to life as a source of such knowledge is an undemonstrated and not especially plausible proposition." Judge Posner questioned whether literature is an "essential source" of either "psychological or moral knowledge."  

Similar questions rose to the surface in 1990, in connection with, of all things, a Supreme Court appointment. David Souter has always been an avid, voracious reader of good books—literature, history, philosophy as well as law. His fondness for books struck some people as a threat to the Republic and as a reason not to confirm him when he was nominated the Supreme Court by President Bush I. According to *Time* magazine in 1990, the "more serious question" about Souter was "whether a man who seems to prefer books to people can empathize with and understand the problems of ordinary people." On the New York Times Op-Ed Page, a professor worried whether Souter's reading of so many books precluded him from developing what all judges should have a: "genuine feel for the human condition." 

Doubts about the virtues of reading have continued to be heard from some unexpected quarters. In 2003, in an essay in, of all places, the prestigious New York Times Book Review, Laura Miller complained, "I can't say I've seen much evidence to support the notion that reading is good for you." Less than a year later, the same publication ran a similar essay by Christina Noring entitled *Books Make You a Boring Person.* In that essay, Noring wrote of "a

9. *Id.*
10. *Id.*
12. *Id.*
13. *Id.*
new piety in the air: the self-congratulation of book lovers . . . . [B]ookworms have developed a semi-mystical complacency about the moral and mental benefits of reading.\textsuperscript{17}

What is happening here? Why is reading—one of our most highly prized values—coming under attack? These comments by Steiner, Posner, Miller and Noring are not anti-intellectual, philistine attacks on reading or on culture generally. They are serious, heart-felt, subtle, even profound criticisms, from leading thinkers and writers in respectable literary publications. They need to be explored a bit. Why does the flagship book review in America publish two essays, one in 2003 and one in 2004, questioning the benefits of reading? And how does this bear on international law?

III.

We can begin to offer at least a few tentative, primarily psychological explanations.

First is the possibility that too much reading can alienate us from life and experience. Reading, as happened with Emma Bovary, “can even spoil your appetite for real life.”\textsuperscript{18} Overmuch genteel reading of books can create a collective indifference. A genuine distinction exists between reading about something and actually experiencing or feeling it. Unlike books, human interaction supplies first-hand, face-to-face experience, which often makes a deeper, more emotional, more indelible impression that merely reading about the same thing. To suffer a broken heart is much more intense than to read about it in \textit{Wuthering Heights}; to experience an unwanted pregnancy is a far cry from reading \textit{The Scarlet Letter}.

Preoccupation with books, taken to an extreme, can distance readers from real people and juices of real life. This can dull how we react to real-life situations. “The focusing of consciousness on a written text,” Steiner explained, may “diminish the sharpness and readiness of our actual moral response.”\textsuperscript{19} If we “give psychological and moral credence to the imaginary, to the character in a play or a novel, to the condition of spirit we gather from a poem,” added Steiner, “we may find it more difficult to identify with the real world, to take the world of actual experience to heart.”\textsuperscript{20}

In a trenchant and powerful insight, one that lingers in the mind of any serious reader, Steiner noted, “The capacity for imaginative reflex, for moral

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\textsuperscript{17} Christina Nehring, \textit{Books Make You a Boring Person}, \textit{N.Y. Times}, June 27, 2004, at 23.
\textsuperscript{18} Miller, \textit{supra} note 16.
\textsuperscript{19} \textit{Steiner, supra} note 6.
\textsuperscript{20} \textit{Id.}
risk in any human being is not limitless."\textsuperscript{21} Such qualities, rather, "can be rapidly absorbed by fictions."\textsuperscript{22} The consequence could be, in Steiner's words, that "the cry in the poem may come to sound louder, more urgent, more real than the cry in the street outside. The death in the novel may move us more potently than the death in the next room."\textsuperscript{23} Steiner's conclusion, the far-reaching implications of which have yet to be fully appreciated, is absolutely devastating. "Thus," he wound up his disconcerting discussion, "there may be a covert, betraying link between the cultivation of aesthetic response and the potential of personal humanity."\textsuperscript{24}

Wow! Steiner's pathbreaking comments, translated into everyday language, become the tremendously unsettling message that: The more you read, the more you may become an immoral or amoral monster because you are only a passive observer rather than an active participant; you are unfettered to real people and real life. An individual can be remarkably insensitive to others not only despite but precisely because of having studied stacks of novels.\textsuperscript{25} This is revolutionary and deeply disheartening. Steiner's trailblazing thesis ranks with those of Copernicus, Darwin and Freud in its power to overthrow generally accepted truths.

While not on the same level of Steiner's devastating analysis, other possible drawbacks to overmuch reading exist. There is, for example, the danger of second-hand thinking and living. "By filling yourself up with too much of other folk's thoughts," wrote Christina Noring, "you can lose the capacity and incentive to think for yourself."\textsuperscript{26} Rather than becoming creative, compulsive readers may be rigid thinkers.\textsuperscript{27}

Books do not necessarily make for better people. "There's not much indication, either," wrote Noring, "that reading substantially improves anyone's character, in fact, it often seems to have the opposite influence."\textsuperscript{28} Nor, she added, "does it sweeten the disposition."\textsuperscript{29} People who read literature do not appear to have higher ethical standards than people who do not.

There is also the danger of elitism. People who are passionate about reading tend to be well educated and somewhat intellectual. Books could thus be a status symbol, a way to distinguish those who regard themselves as

\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} STEINER, supra note 6.
\textsuperscript{25} Nehring, supra note 17, at 23.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
cultured thinkers from the mere bourgeoisie or lower classes. The upshot may be a class attitude of disrespect or even resentment for those who lack the same devotion or who are more mesmerized by material things than by ideas. The tone of the anti-reading comments by Miller and Noring, for instance, carry a distinct whiff of snooty elitism, as if reading good literature should not be experienced—and can never be properly experienced—by the masses.

Whether we agree or disagree with these observations, they at least cast some doubt on the supposedly beneficial relationship between love of literature and its civilizing effect on international law.

IV.

What we have here is a nice little Hegelian dialectic. The thesis is that love of literature promotes humanistic values and therefore facilitates international law. The antithesis is that reading too many books may actually dehumanize and lead to violations of acceptable international behavior. The task now is to try to formulate a plausible, creative synthesis. Such a tentative synthesis might turn on the simple, fundamental concept of balance, of keeping the impulse to read within limits, of combining reading with life.

The problem may ultimately be one of harmony. The trouble may not be reading, but too much reading, reading at the expense of living, at the expense of human interaction. This may be an example where you can have too much of a good thing. Life is lived not only through books.

In this sense of a good thing that can be overdone, reading may have something in common with religion. Like reading, religion can be and has been an important force for betterment. Most, if not all, religions have an uplifting and comforting ethical and moral core. Taken to extremes, however, even religion can be dangerous. The world has seen too many wars, persecutions and intolerance in the name of religion—some of which are happening even today—not to be wary of religious extremism. Extremism in the defense of reading or religion may be a vice; moderation in the pursuit of both may be a virtue.

That at least seems to be Wordsworth's point about reading when he says, "Close up those barren leaves" and "Up up my friend and quit those books." Book smarts only go so far. Reading without what Daniel Goleman calls "emotional intelligence" is counterproductive. Of course, reading is much too important, much too vital to trash the way Laura Miller and Christina Noring do, and one wonders if they themselves really believe what they say. In any


event, here as well as elsewhere, the solution may be to search continuously for the right balance in one’s life.

Exactly here is where lawyers play a special and prominent role. By virtue of their profession, lawyers have traditionally tried to balance the contemplative life with the active life, a life of study with a life of action. That is what lawyers do; they engage with life. Lawyers are scholarly types who give up the peace and quite of the study for the rough and tumble of the courtroom, the back and forth of the negotiating table, the stresses and strains of real people’s problems. It was Cicero, a Roman combination of lawyer, statesman and philosopher, who famously said, “The whole glory of virtue is in activity.”

The proper combination, the right blend, of reading and living is what counts. One without the other, or too much of one and too little of the other, is not good. Louis Brandeis, for all his vast and compulsive reading, understood this point perfectly. The key to practicing law, he once wrote, “can never come from books.” “The controlling force is the deep knowledge of human necessities . . . no hermit can be a great lawyer . . . a lawyer who does not know men is handicapped.” To avoid becoming stunted, we need human contact, from people, from life.

Justice Brandeis’s comments apply equally to literature and international law. His perspective may point the correct way to thinking about literature and international law—one should read great books but one should also devote as much energy to living too and to dealing with real people. In the end, it all comes down to balance. We do indeed need to steer clear of any “semi-mystical complacency about the moral and mental benefits of reading.” And that final insight makes re-examination of our basic assumption worthwhile.


34. Nehring, supra note 17.
THE ROLE OF INTERNATIONAL ARBITRATORS

Susan D. Franck*

I. PARTY EXPECTATIONS .......................................................... 502
II. ARBITRATORS AS ADJUDICATORS ........................................ 504
   A. The Paradigm Shift ....................................................... 504
   B. Arbitrators Adjudicatory Function .................................. 505
   C. Functional Distinctions Between Arbitrators and Judges ...... 507
      1. Adjudicatory Role ................................................... 508
      2. The Administrative Function ....................................... 512
III. OPPORTUNITIES TO ADDRESS MISCONDUCT .......................... 513
   A. During the Proceedings ............................................... 513
   B. After the Proceedings ................................................ 515
   C. Market Forces .......................................................... 516
      1. The Arbitrator Marketplace ...................................... 516
      2. Market-based Incentives ........................................... 517
      3. Institutional Incentives ............................................ 518
IV. THE FUTURE ROLE OF ARBITRATORS ................................. 519
V. CONCLUSION ...................................................................... 521

With the advent of the global economy, arbitration has become the preferred mechanism for resolving international disputes. Today international arbitrators resolve billions of dollars worth of disputes.1 Arbitration has taken

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1. Billions of dollars are at stake in international commercial arbitration. See Michael D Goldhaber, Big Arbitrations, AMERICAN LAWYER, Summer 2003, at 22 (focusing on only 40 arbitrations with a European connection that were worth over $200 million and describing a single arbitration related to a merger worth up to US$26 billion and another claim related to a Kuwaiti project worth up to US$7 billion); see also Joseph M. Matthews, Consumer Arbitration: Is It Working Now and Will It Work in the Future, 79-APR. FLA. B.J. 22, 24 (2005) (referring to significant amounts of money usually involved” in international arbitration); INTERNATIONAL CHAMBER OF COMMERCE, ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 16:1, at 12 (2005) (indicating the amount in dispute in arbitration cases pending before the International Chamber of Commerce and noting that the proportion of cases where the amount in dispute was between US$1-50 million had increased to 52.4%). There are also significant amounts at stake in investment treaty arbitration. Susan D. Franck, The Legitimacy Crisis in Investment Arbitration: Privatizing Public International Law Through Inconsistent Decisions, 73 FORDHAM L. REV. 1521 (2005) [hereinafter Franck, Inconsistent Decisions] (noting that there are “billions and billions” of dollars of claims at stake in investment arbitration); see also Michael D. Goldhaber, Arbitration Scorecard:Treaty Disputes, AMERICAN LAWYER,
on such prominence in the international context that commentators express "little doubt that arbitration is now the first-choice method of binding dispute resolution" and has "largely taken over litigation."²

Arbitration has historically been extolled as a confidential, quick, and cost-efficient method for resolving disputes, which creates an internationally enforceable award. Those virtues, however, have eroded with the expansion in the number of parties using arbitration, the increasingly adjudicative nature of the process and the shift in the group serving as arbitrators, which has grown beyond the "grand old men" to a younger generation of arbitration technocrats.³

Instead, arbitration may now take just as long and be just as costly as litigation before national courts.⁴ Confidentiality has eroded as institutions such as the American Arbitration Association (hereinafter "AAA") and International Centre for Settlement of Investment Disputes (hereinafter

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4. See CHRISTIAN BÜHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 140-48 (1996) (noting the mixed evidence as to the decreased cost and efficiency of international arbitration and suggesting that generally arbitration is not less expensive but it may be quicker); see also Jack J. Coe, Jr., Toward A Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch, 12 U.C. DAVIS INT'L L. & POL'Y 7, 11 (2005) (observing that arbitration “has come to resemble in many respects common law style commercial litigation, albeit without the procedural predictability engendered by codes of civil procedure and established rules of court” and arbitrators may do little to expedite a complicated proceeding). This may, however, depend upon the type of the speed of the particular national court. For example, in one case, the courts of India would allegedly take twenty-five years to resolve a dispute. Bhatnagar v. Surrenda Overseas Ltd., 52 F.3d 1220, 1227 (3d Cir. 1995) (referring to expert evidence that the "Indian legal system has a tremendous backlog of cases—so great that it could take up to a quarter of a century to resolve this litigation if it were filed in India."). In these circumstances, arbitration is likely to be faster than court litigation. In contrast, Australian courts can be much more efficient. See Andy O'Donaghoeh, Small Claims Division Established: Fast, Cheap, Informal Arena for Dispute Resolution, 30 N. WALES L.A W SOC'Y J. 61 (1992) (describing Australia's small claims court system, its utilization of various ADR techniques and noting the the speedy resolution of disputes); Fiona Tito Wheatland, Medical Indemnity Reform In Australia: "First Do No Harm", 33 J.L. MED. & ETHICS 429, 437 (2005) (referring to Australia's various "litigation streamlining processes to reduce the time and cost of litigation . . . [implemented] under the court management reforms that have been continuing at different speeds through most Australian jurisdictions over the past decade." ). In such an instance, the national courts of Australia may be more likely to resolve disputes quickly and cheaply. During her remarks on the panel for which this paper was prepared, Sherry Williams, a senior counsel at Halliburton, explained that in her experience arbitrations take less time and cost half as less as litigation before U.S. national courts.
Franck

ICSID) draft rules with presumptions in favor of the public disclosure of arbitral awards. Perhaps more significantly, the recent signing of the Hague Convention on Choice of Courts means arbitration awards do not have the same monopoly on streamlined enforcement mechanisms.

Given these shifts in arbitration's paradigm, what is left to make arbitration preferable to national court litigation? It is neutrality, but neutrality in two different senses. First, there is neutrality of forum, where the place of dispute resolution does not unfairly benefit either party or create a "home court" advantage. One might call this international arbitration's function as a geographical half-way house. Second, there is the neutrality of the decision-making process. In other words, having arbitrators who are bound to and selected by the parties, but are nevertheless required to render decisions in an "independent" or "impartial" manner, offers adjudicative neutrality.

These remarks consider this second aspect of neutrality and the appropriate role of arbitrators in the context of international arbitration. This issue is neither new nor unique to international commercial dispute resolution. As long ago as the 1930s and the 1940s, domestic U.S. labor arbitrators asked similar questions about the appropriate role of arbitrators. Thirty-seven years

5. AMERICAN ARBITRATION ASSOCIATION, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES art. 27(8), available at http://www.adr.org/sp.asp?id=22090 (last visited Dec. 8, 2005) [hereinafter AAA International Rules] (stating that unless the parties agree, the AAA "may publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties and other identifying details or that have been made publicly available in the course of enforcement or otherwise"); International Centre for Settlement of Investment Disputes, Suggested Changes to the ICSID Rules and Regulations 9 (May 12, 2005) (Working Paper of the ICSID Secretariat), available at http://www.worldbank.org/icsid/052405-sgmanual.pdf (last visited Mar. 10, 2006) (introducing a presumption for the publication of redacted arbitration awards) [hereinafter Working Paper].

6. Instead, parties can now sign up to exclusive choice of court clauses, and when the Convention is ratified, parties will have an opportunity to have those foreign court judgments enforced in the same way as a sister state judgment. Hague Convention on Choice of Court Agreements, art. 3, June 30, 2005, 44 I.L.M. 1294 (2005); see also Jason Webb Yackee, Fifty Years Late to the Party? A New International Convention For Non-Arbitral Forum Selection Agreements, INT'L LIT. QUART. (forthcoming 2005). The Convention is not yet in force, however, and there are also a variety of reservations which countries could adopt to narrow the Convention's scope.

7. BÖHRING-UHLE, supra note 4, at 148 (describing international arbitration's "metamorphosis from a 'gentlemen's game,' where commercial disputes were resolved informally among peers, to a highly sophisticated judicial procedure with amounts at stake that are 10 to 100 times larger than they used to be 30 years ago").


10. Labor arbitration specialists have explored whether arbitrators act as independent adjudicators
ago, the U.S. Supreme Court in *Commonwealth Coatings* also grappled with the appropriate role of arbitrators. At that time, Justice White wrote that "the Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from the marketplace, that they are effective in their adjudicatory function." Given the evolution of international arbitration, however, it is now useful to re-consider the appropriate role of international arbitrators.

Subject to the parties' clear agreement to opt for commercial determinations or partisan decision-making, arbitrators must provide independent, adjudicative services in order to both honor the parties' expectations and contribute to the legitimacy of international arbitration. This symposium piece first addresses the expectations of the parties and describes how these contribute to a conception of the proper role of international arbitrators. Second, it describes the adjudicatory functions of international arbitrators and discusses the importance of impartiality. Third, the piece considers potential mechanisms for regulating arbitrator conduct. Finally, it speculates on the future opportunities to promote the integrity of arbitrations and enhance the legitimacy of international arbitration.

I. PARTY EXPECTATIONS

Arbitration is a creature of contract. This means that parties can contract for what they want and expect from their dispute resolution process. Parties articulate minimal expectations about the proper role of arbitrators by picking a specific dispute resolution mechanism. This typically happens when parties choose particular institutional rules, under which arbitrators must exercise their discretion, or subjecting their agreement to national laws, which articulate standards of appropriate arbitrator behavior. Such articulation creates a set

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of shared understandings and manages party expectations about the appropriate role of decision-makers.

If parties wish to have a decision-maker who is an expert in a particular industry who exercises commercial judgment but does not engage in legal analysis, they might avoid arbitration entirely and instead choose expert determination. If parties do not want neutral adjudicators but instead want partisan arbitrators, they might adopt rules that do not require arbitrator impartiality and independence. In other words, parties who want a commercial decision or partisan decision-making can and should specifically contract to do so.

But these processes are not international arbitration as we know it. The modern reality is that parties do not generally want the open-textured discretion of international arbitration's past or rampant partisanship of decision-making. Rather, they prefer the outcomes of their disputes to be warranted by a record

arbitration clauses, and specifying procedures to address dispute resolution); Volker Vietcbauer, Arbitration in Russia, 29 STAN. J. INT'L L. 355, 434–36 (1993) (discussing the choice between available arbitral institutions and ad hoc arbitration in Russia); Michael G. Weisberg, Note, Balancing Cultural Integrity Against Individual Liberty: Civil Court Review of Ecclesiastical Judgments, 25 U. MICH. J.L. REF. 955, 995 (1992) (explaining that a “formal agreement to arbitrate requires a minimum standard of appropriate conduct from the arbitrators in order for the proceeding to be legally valid.”).

14. See Dr. Loukas A. Mistelis, ADR in England and Wales, 12 AM. REV. INT'L ARB. 167, 202-04 (2001) (discussing expert determination as a form of ADR and alternative to litigation that is especially appropriate to disputes in technical areas such as intellectual property or valuation); see generally JOHN KENDALL, EXPERT DETERMINATION (2001). But see Alan Scott Rau, Contracting Out of the Arbitration Act, 8 AM. REV. INT'L ARB. 225, 233 (1997) (suggesting the proposition that “arbitration has its greatest utility in providing expert determinations of contested matters of fact” is antiquated); Alan Scott Rau, The Culture of American Arbitration and the Lessons of ADR, 40 TEX. INT'L L.J. 449, 487, 492 (2005).


and independent legal analysis—with a fair process that justifies the expenditure of significant legal fees on dispute resolution in pursuit of broader commercial objectives.17

II. ARBITRATORS AS ADJUDICATORS

A. The Paradigm Shift

Historically, arbitration awards were not revered so much for their legal analysis, but more for their sense of fairness and industry knowledge.18 But with the proliferation of alternative dispute resolution, or ADR, mechanisms, international business has become more sophisticated resolution of disputes.19 Arbitrators are no longer prized for their capacity to reach compromise outcomes, particularly where other ADR mechanisms, such as mediation and negotiation, can achieve this objective more efficiently.20 Today, businesses use international arbitration to provide a neutral, adjudicative dispute resolution process where arbitrators independently apply the law to facts, and this in turn promotes the legitimacy of international arbitration.21

17. See Rogers, Vocation, supra note 16, at 991–92; see also BÜHRING-UHLE, supra note 4, at 204–07 (explaining that international businesses need to calculate risks and take decisions in order to reduce their risks and have effective conflict management and noting the concern parties express when arbitrators do not act upon the basis of the record and try to mediate disputes); Delissa A. Ridgway, International Arbitration: The Next Growth Industry, 54-FEB. DISP. RESOL. J. 50, 50–51 (1999) (suggesting that international commercial arbitration is a growth industry because of parties' perceived fairness in the process and the predictability and certainty of the result).


19. See Van Anderson & Biff Sowell, Staying Ahead of the ADR Curve in South Carolina, 16-JUL. S.C. LAW 37, 38 (2004) (observing that “the proliferation of ADR in our system of justice has dictated a more thoughtful approach to dispute resolution” and discussing the obligation of lawyers to counsel their clients on ADR options); see also BÜHRING-UHLE, supra note 4 at 392–94 (noting international businesses have a variety of dispute resolution options open which can be used dynamically to achieve the best result).


B. Arbitrators Adjudicatory Function

Adjudicators perform common core functions. Adjudication is a decision-making process that permits party participation by submitting evidence and offering reasoned arguments; it requires an adjudicator to render a final and binding decision that is supportable based upon the record and the adjudicator's independent judgment and legal analysis. When adjudication is infected with partiality, it is not based upon reasoned application of applicable legal rules or premised upon the parties' proofs—but rather on a decision-maker's personal relationships, preconceptions, objectives, and interests.

Modern international arbitration requires the objective application of rules to facts and the exercise of bounded discretion to ensure that the process and final outcome is warranted. While parties may pick arbitrators with particular

apply mandatory rules of applicable law as it supports the legitimacy of international arbitration).

22. See, e.g., Restatement (Second) of Judgments § 83 (1982) (referring to adjudicative functions); Black's Law Dictionary (8th ed. 2004) (referring to adjudication as the "legal process of resolving a dispute"); see also Rogers, Standards of Conduct, supra note 18, at 59-60 (describing the adjudicatory function of international arbitrators and the link between impartial adjudication and normative legitimacy); Carrie Menkel-Meadow, Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not, 56 U. Miami L. Rev. 949, 959-60 (2002) [hereinafter Menkel-Meadow, Ethics] (suggesting arbitrators share the desire to be fair and impartial but arguing that this requires adoption of a standard code of ethics); Rogers, Vocation, supra note 16, at 987 (arguing "modern international arbitration outcomes are like judicial outcomes in that they are produced by an objective tribunal's reasoned application of established rules to facts."); but see Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 n.12 (8th Cir. 1986) (suggesting that the arbitration system is an inferior system of justice "structured without due process, rules of evidence, accountability of judgment and rules of law"); Benjamin N. Cardozo, The Nature of the Judicial Process 19-23 (1921) (describing the process of applying precedent to unique legal and factual situations).

23. Rogers, Standards of Conduct, supra note 18, at 69; see also Jules L. Coleman & Brian Leiter, Determinacy, Objectivity and Authority, 142 U. Pa. L. Rev. 549, 565 (1993) (suggesting that when judges are faced with the penumbra of general legal terms "a judge has no option but to help fix the meaning through the exercise of a discretionary authority") (citing H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 607-15 (1958)).

cultural and legal backgrounds and specific personal experiences, arbitrators also generally have an obligation to disclose those matters that would call into question their independence. Although all humans are inevitably influenced by their experiences, in international arbitration, parties ask arbitrators to put...
aside biases in order to fairly and impartially exercise their independent judgment and apply their expertise to the facts on the record to render a decision based upon the law.

C. Functional Distinctions Between Arbitrators and Judges

While the current literature suggests that arbitrators' urge to render neutral and impartial decisions reflects the "judicialization" of arbitration, arbitrators differ from judges in fundamental ways. But these distinctions need not detract from an international arbitrator's obligation to engage in impartial decision-making. Irrespective of whether the decision-maker is a national court judge or an arbitrator, the neutral adjudicative function should be fostered to encourage impartial analysis and decision-making.


30. Judges in different countries differ dramatically. While some may adhere to the rule of law, there are other jurisdictions where this is less likely to be true. Kif Augustine-Adams, Considering the Rule of Law: A Step Back from Threats and Dangers, 15-SPG EXPERIENCE 14, 16 (2005); see also Matthew J. Spence, American Prosecutors as Democracy Promoters: Prosecuting Corrupt Foreign Officials in U.S. Courts, 114 YALE L.J. 1185, 1187–88 (2005) (discussing the lack of adherence to the rule of law in developing countries, such as the Ukraine); Frank K. Upham, Who Will Find the Defendant If He Stays With His Sheep? Justice In Rural China, 114 YALE L.J. 1675, 1709 (2005) (noting that "basic court judges in rural China have little in common with the visions dancing in senators' heads when they condition aid on progress toward the rule of law"); Todd J. Zywicki, The Rule of Law, Freedom, and Prosperity, 10 SUP. CT. ECON. REV. 1, 2 (2003) (describing how in Eastern Europe "societies have struggled to rediscover the rule of law" and how in "impoverished kleptocracies of Africa, the challenge is even greater and the lack of even embryonic rule of law institutions is stark").


32. See Menkel-Meadow, Ethics, supra note 22, at 959–60 (recognizing that judges and arbitrators are adjudicators and that "impartiality and neutrality, are a necessary part of maintaining the integrity and legitimacy" of the dispute resolution process); see generally, IBA GUIDELINES, supra note 26; Dezalay & Garth, VIRTUE, supra note 3.
Conducting a functional analysis of the common adjudicative goals of arbitration and litigation can offer insights about the appropriate role of arbitrators. Judges and arbitrators share certain functional similarities, which relate to the adjudicative nature of their decision-making obligations. Some similarities implicate the nature of the decision-maker's mandate, the independence of adjudication and internal checks on discretion. Other functions implicate their administrative obligations, including effective case-management and providing parties notice and an opportunity to be heard. Irrespective of the external distinctions, these two core functions require both arbitrators and judges to perform their role in a fair, efficient, and impartial manner.

1. Adjudicatory Role

The mandate of arbitrators and judges relates to their jurisdiction and the entities to which they are responsible. There are subtle differences in the mandate of arbitrators and judges. Judges derive their jurisdiction and authority from the state, whereas arbitrators derive their jurisdiction from parties. Nevertheless, the state indirectly sanctions arbitration to the extent national legislation or judicial decisions permit arbitration. These differences are

33. Such an analysis can create an independent basis of arbitrator impartiality, which in turn "reinforces the normative legitimacy of the international arbitration system." Rogers, Standards of Conduct, supra note 18, at 59–60. This legitimacy encourages states to permit private resolution of important public issues, which might otherwise be resolved by courts and not permitted to be the subject of arbitration. See generally Thomas M. Franck, The Power of Legitimacy Among Nations (1990) [hereinafter Franck, Power of Legitimacy] (referring to various indicators of legitimacy); Thomas M. Franck, Fairness in International Law and Institutions (1995) [hereinafter, Franck, Fairness]; Deseriee A. Kennedy, Predisposed With Integrity: The Elusive Quest for Justice in Tripartite Arbitrations, 8 Geo. J. Legal Ethics 749, 768 (1995) (suggesting that if adjudication ignores "fundamental judicial precepts of neutrality and impartiality . . . [then] the integrity of the entire process is undermined."); see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633–34 (1985) (holding that anti-trust claims are arbitral and commenting favorably on the independence, impartiality and experience of the international arbitrators involved in the case); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 21 (1991) (permitting the arbitration of RICO claims and declining "to indulge [the] speculation that the parties and the arbitral body will not retain competent, conscientious, and impartial arbitrators, especially when both the [institutional] rules and the FAA protect against biased panels."); see also Commonwealth Coatings Corp. v. Cont'l Cas. Corp., 393 U.S. 145, 151 (commenting favorably on the impartiality and fairness of modern arbitrators) (White, J. concurring).


36. Kennedy, supra note 33, at 768–69; see generally, Richard C. Reuben, Constitutional Gravity:
minor and should not affect an adjudicator's capacity and willingness to render impartial decisions.

Arbitrators and judges also differ as to whom they are ultimately responsible. This distinction implicates both how decision-makers are remunerated and how they are selected. The government collects taxes to pay judges from parties who may or may not be litigants, whereas parties are directly responsible for the remuneration of arbitrators. On its face, a more direct financial relationship might appear to affect the outcome; nevertheless, this need not be the case, particularly where the parties have contracted for decision-makers who are independent and impartial. There are also distinctions related to the appointment process. Judges tend to be randomly assigned to cases, whereas parties have a hand in selecting their decision-makers. Presumably this means that parties using arbitration have a greater control in selecting a decision-maker whose professional, legal, and cultural experiences may predispose them to understanding evidence and arguments in a particular way. It does not, however, necessarily predispose the outcome, particularly where there may be the effect of balancing of such inherent biases by a three-member tribunal.

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37. Franck, Liability, supra note 31, at 23.


40. To the extent that parties believe that they have greater control over the process, they are more likely to buy-in psychologically to the dispute resolution process; this in turn is likely to decrease the parties' dissatisfaction with the process and lead to an award that a party is less likely to contest. See Tom R. Tyler, Procedural Fairness and Compliance with the Law, 133 SWISS J. ECON. & STATISTICS 219, 222–27 (1997) (suggesting that compliance with the law is linked to the legitimacy of the authorities and the procedural fairness of administering the law); ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 27 (2nd ed. 1981) (observing that if parties "are not involved in the process, they are hardly likely to approve the product" and instead arguing that parties should be given a stake in the process).

41. Judges, just like arbitrators, are human beings with a concomitant set of experiences and predispositions. See supra note 27, and accompanying text (referring to Justice Cardozo’s observations about the partiality of judges and human beings).

42. See S. I. Strong, Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?, 31 VAND. J. TRANSNAT’L L. 915, 929 (1998) (suggesting "arbitrators rule on the facts and legal or equitable principles before them, not
There are also distinctions in the checks placed upon judges’ and arbitrators’ exercise of discretion. Irrespective of the variances in how discretion is restricted, there is a common theme. The discretion of both arbitrators and judges has limitations, and such limitations do not prevent them from impartially and fairly adjudicating disputes.

One way to check the unfettered discretion of decision-makers is through adherence to the rule of law. For example, common law judges are bound by precedent. While arbitrators are not necessarily bound by precedent—nor do they create de jure precedent—adherence to precedent is not an indispensable element in the adherence to the rule of law. Judges in civil and Islamic law countries, for instance, are constrained by rules articulated in the civil code and rely less infrequently on precedent.

Arbitrators are subject to a slightly different check on their discretion; the parties’ agreement. More specifically, arbitrators are not only bound by the parties’ agreement about the extent of their discretion but they are also bound by the express or implied rules of law the parties have chosen. Where parties bring controlling law and persuasive authority to a tribunal’s attention—bound as they are by the parties’ agreement as to the scope of their authority—arbitrators can and should neutrally evaluate the relevant case law to render a fair and impartial decision. Adhering to traditional concepts of fair and

on party affiliation” and that the most lawyers “can do is make an educated guess, based on each candidate’s professional background, as to who might be more inclined toward a particular perspective.”). 43. See generally LEGAL RULES AND LEGAL REASONING (Larry Alexander ed., 2000); James Hardisty, Reflections on Stare Decisis, 55 IND. L.J. 41 (1979); Frederick Schauer, Precedent, 39 STAN. L. REV. 571, 589, 595–96 (1987); see also Scott T. Johnson, On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia, 10 INT’L LEGAL PERSP. 111, 118 (1998) (suggesting that a lack of precedent in courts with common law traditions is troubling).


consistent treatment both honors the parties' agreement and promotes the integrity of an adjudicative system.\footnote{Franck, \textit{Bright Future}, supra note 46, at 41-46 (suggesting that adherence to traditionally accepted norms and approaches is likely to increase the legitimacy of a methodology). Investment treaty arbitration, for example, is struggling with the proper application of law to fact this issue as tribunals are creating a body of \textit{de facto} precedent upon which parties rely in planning their conduct and to which tribunals refer when articulating the bases of their decisions. See Franck, \textit{Inconsistent Decisions}, supra note 1, at 1612; Franck, \textit{Bright Future}, supra note 46, at 57; see generally Franck, \textit{Power of Legitimacy}, supra note 33.}

Another way to check the discretion of decision-makers is to create a process which reviews their decision. While arbitrators and judges are subject to different review processes, both processes provide an opportunity to evaluate their conduct. Typically, judges' determinations are judicially reviewable for substantive and procedural errors.\footnote{Arthur D. Hellman, \textit{Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review}, 44 U. Pitt. L. Rev. 795, 796 (1983) (referring to the error correcting function of appellate courts); David W. Robertson, \textit{Allocating Authority Among Institutional Decision Makers in Louisiana State-Court Negligence and Strict Liability Cases}, 57 La. L. Rev. 1079, 1082 (1997) (indicating that appellate judges review various issues in a "variety of procedural and substantive contexts.").}

In contrast, while some jurisdictions do permit a limited evaluation of the legal merits of a tribunal's award,\footnote{In the United States, for example, courts can vacate arbitral awards where a tribunal "manifestly disregards" the law, specifically where a tribunal correctly states the law and subsequently ignores it. See Wilko v. Swann, 346 U.S. 427, 436-37 (1953) (articulating the "manifest disregard" dictum followed by subsequent courts) overruled on other grounds, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); see also Howard M. Holtzmann & Donald Francis Donovan, \textit{National Report on the United States, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION} 53, 58 (Pieter Sanders & Albert Jan van den Berg eds., 1998) (describing the "non-statutory ground of 'manifest disregard' as a basis for vacating an award in the United States") [hereinafter INTERNATIONAL HANDBOOK]; see generally Noah Rubins, \textit{Manifest Disregard of the Law} and \textit{Vacatur of Arbitral Awards in the United States}, 12 Am. Rev. Int'l Arb. 363 (2001) (describing the application of "manifest disregard" in various circuits). England also provides for limited review of arbitral awards. English Arbitration Act, supra note 26, § 69 (permitting, for example, appeal on a point of law where the appellate court agrees to hear the case, "determination of the question will substantially affect the rights of one or more of the parties" and "the decision of the tribunal on the question is obviously wrong"). \textit{But see} Robert Briner, \textit{National Report on Switzerland, in INTERNATIONAL HANDBOOK}, infra at 33-35 (noting that "even a clear violation of the law or a manifestly wrong finding of facts are as such not sufficient to constitute" a grounds for setting aside awards); UNCITRAL Model Law, supra note 26, arts. 35, 36 (failing to provide appeal on a point of law as a ground for \textit{vacatur} or denying recognition and enforcement).} the international trend is to review the procedural aspects of an arbitrator's award.\footnote{See Park, supra note 20, at 815 (explaining "most legal systems do \textit{not} impose merits review").}
Procedural review does not prevent a meaningful review of awards, however. Arguably, the various procedural mechanisms can be used as a substitute gauge of the appropriateness of the award. Moreover, arbitrators, like judges, do not like to have their awards annulled, set aside or denied enforcement, and arbitrators tend to exhibit a great deal of care to retain the integrity of the process. Ultimately, this suggests that the review process makes arbitrators and judges functionally similar, and such similarity suggests that arbitrator’s should strive to apply the applicable law in a neutrally and fair manner.

2. The Administrative Function

Both judges and arbitrators are being increasingly called upon to manage the dispute resolution process fairly and efficiently. The administration of the dispute resolution processes are different. Judges must adhere to rigid rules of civil procedure and evidence; whereas, subject to party agreement, arbitrators have discretion to articulate the applicable procedures. Nevertheless, both judges and arbitrators should manage the adjudicative process efficiently and fairly. Judges in the United States, for example, often have a great deal of discretion to engage in case management, and typically these decisions are only reversed upon a showing of an abuse of discretion. Arbitrators are held to a

51. Id. at 817.

52. See Guzman, supra note 45, at 1282 (observing arbitrators have an incentive to act properly “in order to develop a reputation as a desirable arbitrator”); Steven Walt, Decision By Division: The Contractarian Structure Of Commercial Arbitration, 51 RUTGERS L. REV. 369, 411–13 (1999) (observing international arbitrators have an incentive to behave impartially and properly in the resolution of disputes lest there be an adverse effect upon their reputation); but see Menkel-Meadow, Ethics, supra note 22, at 956 (suggesting that arbitrators may experience a conflict of interest where they may be repeatedly appointed by one parties and that they “must ‘satisfy’ or please the choosing parties sufficiently to be chosen again, particularly if the arbitrator is more or less a full time arbitrator who depends exclusively on arbitration for income”).


54. Alan Scott Rau & Edward F. Sherman, Tradition and Innovation in International Arbitration Procedure, 30 TEX. INT’L L.J. 89, 90 (1995); see LCIA RULES, supra note 24, art. 22; ICC RULES, supra note 24, art. 15; UNCITRAL Rules, supra note 24, art. 15; see also Kennedy, supra note 33 (suggesting that, unlike in arbitration, rules of evidence and procedure in court litigation result in consistent judicial processes and noting the flexibility inherent in arbitration).

55. See generally Garcia, supra note 53.

56. See Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1268–1269 (11th Cir. 2001) (noting a “court is entitled to establish proper pre-trial procedures and set an appropriate pre-trial schedule” and holding “the district court did not . . . abuse its discretion” in this case.); State ex rel. Appalachian Power Co. v. MacQueen, 479 S.E.2d 300, 305 (W. Va. 1996) (holding that the trial court did not abuse its discretion by formulating a trial-management plan to consolidate all pending asbestos premises-liability cases, and
different standard but with a similar objective of facilitating a fair process. Should arbitrators fail to abide by the parties' agreement in conducting the proceedings or exceed their discretion, the award can be set aside or denied enforcement.\textsuperscript{57} While there are critical distinctions between arbitrators and judges,\textsuperscript{58} the differences are not so broad as to prevent either type of adjudicator from evaluating the merits in a neutral manner and managing the process impartially.

III. OPPORTUNITIES TO ADDRESS MISCONDUCT

The formalization of the legal process is a function of international arbitration's impulse to promote the rule of law, recognize their vital role as neutral adjudicators and foster the internal integrity of the process.\textsuperscript{59} Nevertheless, human beings are not perfect. There are a variety of opportunities to address perceived misconduct and offer incentives to ensure that arbitrators maintain an independent and impartial role. These opportunities can occur during the proceedings, after the proceedings and through other informal mechanisms, or "market forces."

A. During the Proceedings

During an arbitration, there are opportunities to challenge arbitrators for inappropriate conduct based upon information—either disclosed or undisclosed stating that "this case is probably the best example of why a trial court should be given broad authority to manage its docket . . . ").


\textsuperscript{58} Arbitrators, for example, only have jurisdiction over the parties to an arbitration agreement; they have limited or no authority over non-parties. See, e.g., Jason F. Darnall & Richard Bales, Arbitral Discovery of Non-Parties, 2001 J. DISP. RESOL. 305 (2001) (discussing the split of opinion in U.S. courts over whether arbitrators should be able to order pretrial discovery from non-parties and advocating a broad-power approach). Judges, in contrast, have the authority over parties and non-parties subject to its general jurisdiction.

\textsuperscript{59} Although in the past the flexibility and lack of adherence to precedent has been a strength of arbitration, there is a growing literature to suggest this presumption may no longer be correct—particularly in the international context where users of international arbitration demand more certain and reasoned outcomes. Rogers, Fit and Function, supra note 16, at 366–67; Rogers, Vocation, supra note 16, at 976–80.
—which indicates arbitrators are not acting impartially or independently.\textsuperscript{50} Typically, these challenges can either be brought before an arbitral institution and/or a national court.\textsuperscript{61} The general trend is to challenge and remove arbitrators where there are circumstances that give rise to justifiable doubts about an arbitrator’s independence or impartiality.\textsuperscript{62}

Defining the meaning of “independence” and “impartiality” can be challenging. Arbitral institutions tend not to particularize these standards.\textsuperscript{63} The workings of the ICC Court, which evaluates arbitrator challenges, are confidential.\textsuperscript{64} National courts also give mixed guidance about the meaning of the phrase. For example, in the United Kingdom, the \textit{AT&T v. Saudi Cable} case suggested that Yves Fortier’s inadvertent non-disclosure of his role as a non-executive director with one of AT&T’s primary competitors was insufficient to lead to “real danger of bias.”\textsuperscript{65} In contrast, the U.S. Supreme Court in \textit{Commonwealth Coatings} held that inadvertent non-disclosure of a business relationship with a party did create an appearance of bias and partiality.\textsuperscript{66}

Some extreme cases do offer some guidance. The infamous case of \textit{Challenge to Arbitrators Kashani and Shafeiei} involved a physical attack in the Peace Palace against a Swedish arbitrator at the U.S. [you might want to do a

\textsuperscript{60} See Yu & Shore, supra note 34, at 963; see also ICC RULES, supra note 24, art. 11; LCIA RULES, supra note 24, art. 10; UNCITRAL Arbitration Rules, supra note 24, arts. 10–11; English Arbitration Act, supra note 26, § 24; Swiss Arbitration Law, supra note 57, arts. 179–80; UNCITRAL Model Law, supra note 26, arts. 12–13.

\textsuperscript{61} ICC RULES, supra note 24, art. 11 (permitting the ICC Court to rule on challenges to arbitrators); LCIA RULES, supra note 24, art. 10 (permitting the ICC Court to remove arbitrators if an arbitrator “dies, falls seriously ill, refuses, or becomes unable or unfit to act” or “if circumstances exist that give rise to justifiable doubts as to his impartiality or independence”); UNCITRAL Arbitration Rules, supra note 24, art. 12 (providing that challenges can be made by appointing authorities); English Arbitration Act, supra note 26, § 24 (providing that a court can remove an arbitrator if where “circumstances exist that give rise to justifiable doubts as to his impartiality”); Swiss Arbitration Law, supra note 57, art. 180(1)(c) (permitting party to challenge of an arbitrator in court where “circumstances exist that give rise to justifiable doubts as to his independence”); UNCITRAL Model Law Report, supra note 26, art. 13 (permitting courts to hear challenges to arbitrators).

\textsuperscript{62} For a discussion of the arbitrator independence and neutrality and comparison of the U.S. justifiable doubt standard with British real danger standard see generally Yu and Shore supra note 34; Orlandi, supra note 28, at 96–103 (comparing a variety of civil law and common law countries’ conceptions of arbitrator independence and impartiality).

\textsuperscript{63} See ICC RULES, supra note 24, arts. 7.2–7.3; LCIA RULES, supra note 24, arts. 5.2–5.3; UNCITRAL Arbitration Rules, supra note 24, arts. 6.4, 9.

\textsuperscript{64} ICC RULES, supra note 24, app. 1, art. 6.


\textsuperscript{66} Commonwealth Coatings Corp. v. Cont’l Cas. Corp., 393 U.S. 145, 150.
global check for punctuations in abbreviations of US and UK]-Iran Claims Tribunal by two Iranian arbitrators who claimed the neutral arbitrator was “already a corpse” because he had sided with the U.S.  

The removal of the Iranian arbitrators in this case suggests that where conduct “shocks the conscience” and undermines confidence in the integrity of the dispute resolution system, arbitrators will be dismissed.  

But perhaps what shocks the conscience of one legal culture with a strong tradition of the rule of law may be less likely to shock the conscience of someone from a different legal or cultural tradition.

B. After the Proceedings

Immediately after the tribunal renders an award, there are also opportunities to address inappropriate conduct. First, parties can seek to vacate the award at the seat for procedural irregularities. But some countries, such as England, provide limited opportunities to review awards for errors of law. Second, during enforcement proceedings, parties might use New York Convention grounds to argue arbitrator misconduct should result in the denial of recognition of the award.  

While arbitrators—similar to trial courts—do not like to have their awards vacated or denied enforcement, there is also a lack of clarity as to what arbitrator conduct is sufficient to affect the integrity of the award adversely.

67. Memorandum Re: Challenge to Arbitrators Kashani and Shafeifei by the Government of the United States of America, 7 IRAN U.S.-CL. TRIB. REP. 281, 292 (1986) [hereinafter Memorandum]. One Iranian judge was quoted as saying: “If Mangard ever dares to enter the tribunal chamber again, either his corpse or my corpse will leave it rolling down the stairs.”  


68. See Memorandum, supra note 67, at 296–98.


70. English Arbitration Act, supra note 26, § 69.


72. See David E. Robbins, Calling All Arbitrators: Reclaim Control of the Arbitration Process—The Courts Let You, 60 APR. DISP. RESOL. J. 99 (2005) (suggesting that “arbitrators are fearful that the courts, when reviewing their conduct, will vacate their awards”); Jack J. Coe, Jr., Taking Stock of NAFTA Chapter 11 in its Tenth Year: An Interim Sketch of Selected Themes, Issues and Methods, 36 VAND. J. TRANSNAT’L L. 1381, 1437 (2003) (indicating that “[w]hen vacatur occurs, the award’s flaws—and by extension, the arbitrators’ missteps—are typically made public, further discouraging ill-considered awards.”).

73. The FAA does articulate general standards as to what conduct is sufficient to lead to vacatur
While it might be useful to have a clearer set of guidelines as to what type of arbitrator misconduct will result in non-recognition or *vacatur* [you might want to run a global on the term vacatur—it's a term of art and is typically in italics], this will depend on the national law of the courts evaluating the award.\(^7\)

**C. Market Forces**

There are three different types of market forces that offer an opportunity to remedy arbitrator misconduct and provide guidance as to the appropriate role of international arbitrators. First, professional reputation and word of mouth in the arbitration marketplace can impact arbitrator conduct. Second, other market-based incentives can create incentives for appropriate behavior. Third, institutional incentives can provide guidance for arbitrator conduct and provide incentives for appropriate conduct and adverse consequences for improper conduct.

1. **The Arbitrator Marketplace**

The internal arbitrator marketplace, where professional credibility and word-of-mouth recommendations affect appointment and re-appointment of arbitrators, plays a significant role.\(^75\) Arbitrators can earn hundreds of
thousands of dollars from a single arbitration and gain personal prestige from having been involved in a significant case.\textsuperscript{76} For those "repeat-players," reputation and credibility as a fair, independent, and reasoned decision maker is vital. In multi-million and multi-billion dollar disputes, parties are likely to be unwilling to appoint an arbitrator who is likely to be challenged, who cannot fully consider fully the facts and laws at issue and who may be incapable of rendering an enforceable award.

Newcomers or "one-shot-arbitrators," who may not appreciate or be cognizant of these informal market mechanisms, present a greater challenge. There may also be "toxic" arbitrators who leak confidential tribunal deliberations to parties; and such disclosures may put a party, who may be dissatisfied with the application of the law to the facts, in a position to disrupt proceedings or challenge the award.\textsuperscript{77} Incentives beyond mere reputation and word of mouth are therefore necessary to deter inappropriate conduct.

2. Market-based Incentives

Second, market based incentives related to compensation play a role in shaping arbitrator conduct. For example, legislators might pass laws, such as those in Canada or South Africa, which prevent arbitrators from receiving remuneration where the have been removed for improper conduct.\textsuperscript{78} Likewise, arbitrators might be held personally liable for damages related to a failure to adjudicate disputes impartially and independently.\textsuperscript{79}

Particularly for toxic arbitrators, such financial incentives may be necessary to encourage proper execution of their arbitral mandate. Whether the

\textsuperscript{76} See generally John Y. Gotanda, Setting Arbitrators' Fees: An International Survey, 33 \textit{VAND. J. TRANSNAT'L L.} 779 (2000); see also Garcia, supra note 53, at 352–53 (describing the compensation of arbitrators as "generous" and noting, in the context of investment arbitration, that arbitrators can be paid US $2,400 per day and referring to the prestige that accrues from sitting on an international arbitration panel); Guzman, supra note 45, at 1302–03 (noting that "arbitrators perform their function for private gain [can be] solely financial or a combination of financial compensation, prestige, and influence over events . . . ").

\textsuperscript{77} In one case, an arbitrator "unleashed his own wave of vituperative in what can only be described as a scathing dissent. In it, he broadly accuses the other two arbitrators—including a former President of the International Court of Justice, Judge Stephen M. Schwebel—of unethical conduct, including bias, and secretly colluding with one another and discriminating against him in a manner which deprived him of his opportunity to duly participate in the deliberations and preparation of the award." Garcia, supra note 53, at 351. This lead to a challenge of the award in the Svea Appellate Court in Stockholm where Judge Schwebel and the other two arbitrators provided testimony in court about the deliberations and the allegations of arbitrator misconduct; the challenge was dismissed. Id.; see also Czech Republic v. CME Czech Republic B.V., 42 I.L.M. 919 (Svea Ct. App. 2003) (Swed.).

\textsuperscript{78} Franck, \textit{Liability}, supra note 31, at 36–38.

\textsuperscript{79} See generally Id.; Guzman, supra note 45.
remedy is either in tort or contract, personal liability in appropriate circumstances can provide an incentive for arbitrators to perform their adjudicatory function independently and not take steps to disrupt the proceedings or make it impracticable to carry out their own mandate.

3. Institutional Incentives

Finally, institutions can play a role in creating incentives for appropriate conduct. For example, arbitral institutions can also play a market-based role in by removing arbitrators from their lists—or refusing to confirm arbitrators—who have violated specific ethical obligations. The AAA already takes this type of measure. Likewise, professional organizations might consider imposing sanctions against arbitrators who, in the past, have engaged in inappropriate conduct. In Ex Parte Armstrong, where an arbitrator had engaged in inappropriate conduct that did not rise to the level of "professional misconduct," an English court permitted the Chartered Institute of Arbitrators to require the arbitrator to submit all his decisions to the Chartered Institute in advance. Actions from institutions can therefore provide significant guidance as to the appropriate role for arbitrators and sanctions for non-compliance.

IV. THE FUTURE ROLE OF ARBITRATORS

Thomas Franck once wrote that having decision makers who are perceived to be legitimate enhances the legitimacy of the dispute resolution system. The


81. Rogers, Vocation, supra note 16, at 978–79; Rogers, Standards of Conduct, supra note 18, at 70–73.

82. See generally American Arbitration Association, Failure to Disclose May Lead to Removal From the National Roster of Neutrals, available at http://www.adr.org/sp.asp?id=22241 (last visited Dec. 15, 2005); see also Arbitration Law of the People’s Republic of China art. 38, 1995 (China), available at http://www.cietac.org.cn/english/laws/laws_5.htm (last visited Mar. 12, 2006) (providing that an arbitrator who has engaged in misconduct shall be responsible at law and will have their name stricken from the panel of possible arbitrators).


84. See generally Franck, POWER OF LEGITIMACY, supra note 33.
integrity and the legitimacy of international arbitration therefore depends, in large part, upon the perceived integrity of arbitrators as well as their independence and impartiality.

As the number of disputes continues to increase and the pool of arbitrators has continued to expand, the role of arbitrators has evolved. No longer are arbitrators a select pool of "grand old men" or a "gentlemen’s club" made up of those individuals with a close connection to a particular area of laws, a relationship to the parties and perhaps with pre-existing knowledge of a dispute whose independence was founded upon the notion of a personal sense of duty and honor. The intimacy and limited size that are typical prerequisites for informal social controls in the international arbitration community has given way to a host of other pressures brought by its growth and expansion. Today, international commercial arbitrators have transformed themselves into a group of technocrats who are experts in arbitration procedure and theory.

As the constituency of international arbitration has grown, there have been shifts in what is expected of arbitrators; not just by the parties but perhaps by arbitrators themselves, who come from an increasingly diverse group who may have different assumptions of what constitutes proper conduct. The


86. Rogers, Standards of Conduct, supra note 18, at 61–62; Dezalay & Garth, VIRTUE, supra note 3, at 36–38.

87. Dezalay & Garth, VIRTUE, supra note 3, at 36 (describing the shift from “grand old men” to technocrats and referring to interviews where people said the grand old man are “probably just more full of themselves than other people and the new generation of arbitration specialists are “technically better equipped in procedure and substance”); Menkel-Meadow, Ethics, supra note 22, at 958–59 (describing the shift away from grand old men to a technocratic, litigation oriented and ethically trained generation).

88. For example, the U.S. has a detailed approach to conflict of interests. See, e.g., AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.7–1.8 (2000) available at http://www.abanet.org/cpr/mrpc/mrpc_toc.html (last visited Mar. 12, 2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 121–35 (2000); Bradley Wendel, The Deep Structure of Conflicts of Interest in American Public Life, 16 GEORGETOWN J. LEGAL ETHICS 473 (2005). In contrast, the U.K. approach which is not as rule-based and is more flexible and open-ended. See THE LAW SOCIETY, THE GUIDE TO THE
International Business Association (the "IBA") Guidelines on Conflicts of Interest are a very useful starting place. Scholars, arbitrators, lawyers and parties should continue to evaluate their impact particularly as the conducts its own analysis of the Guidelines’ utility and courts throughout the world are beginning to use them to evaluate arbitrator behavior and misconduct.

As the international arbitration constituency continues to expand arbitrators should give into their impulse to professionalize the services they render. By seeking out opportunities to enhance their independence and impartiality, this will benefit the integrity of international arbitration by confirming the neutrality and fairness of the underlying process.

One might consider whether the time has come for parties to incorporate more particularized rules about independence directly into their arbitration agreements. This will permit the parties to set their common expectations and will put potential arbitrators on notice as to the manner in which the parties expect the arbitration process to be managed. This is precisely why the AAA and the Milan Chamber of Commerce have articulated ethical standards, which are incorporated in the arbitrator’s mandate. By clarifying an arbitrator’s role

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PROFESSIONAL CONDUCT OF SOLICITORS 313–22 (Nicola Taylor ed., 8th ed. 1999) (referring to the English rules related to conflicts of interest); see also Mary C. Daly, The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers, 32 VAND. J. TRANSNAT’L L. 1117, 1150 (1999) (noting that in some countries, professional ethics are handed down as an oral tradition, whose strictures address only the most obvious conflicts of interest). The author is grateful to Susan Poser for her comments on these issues.

89. See generally, IBA GUIDELINES, supra note 26.

90. E-mail from Mark Kantor to Susan Franck, Dec. 14, 2005 (on file with author).


92. See supra notes 32, 33 (referring to the legitimacy gained by having neutral and independent adjudicators).

93. Rogers, Standards of Conduct, supra note 18, at 72–73, 111; see also See Hans Smit, A-National Arbitration, 63 TUL. L. REV. 629, 631 (1989) (proposing language by which ethical codes can be incorporated into the arbitration agreement via reference to some national body of law); Dr. lur. Oliver Dillenz, Drafting International Commercial Arbitration Clauses, 21 SUFFOLK TRANSNAT’L L. REV. 221, 250n.71 (proposing contract language for parties to incorporate the International Bar Association, Ethics for International Arbitrators in their agreements). In the absence of such party agreement, U.S. courts hesitate to impose arbitrator codes of conduct. See, e.g., ANR Coal Co., Inc. v. Cogentrix of North Carolina, Inc., 173 F.3d 493, 502 (4th Cir. 1999) (concluding that there was no basis for setting aside awards based on nondisclosure because there were no applicable rules requiring disclosure); Al-Harbi v. Citibank, N.A., 85 F.3d 680, 682 (D.C. Cir. 1996) (concluding that there is no source for any such generalized duty in the absence of expressly applicable codes).

94. MILAN CHAMBER OF COMMERCE, INTERNATIONAL ARBITRATION RULES, CODE OF ETHICS OF ARBITRATORS arts. 1, 13 (2004), available at http://www.jus.uio.no/ilm/milan.chamber.of.commerce.international.arbitration.rules.2004/toc (last visited Dec. 14, 2005) (requiring acceptance of the code as a condition of appointment and permitting dismissal of the arbitrator as a penalty for noncompliance with the code); see generally AMERICAN ARBITRATION ASSOCIATION, CODE OF ETHICS FOR ARBITRATORS IN
in this fashion, institutions decrease the need for arbitrators to negotiate their professional obligations directly with the parties, which might otherwise create an adversarial relationship with the potential to set up a basis for challenging the arbitrator or eradicate the parties' trust in the arbitrator(s).

While not as advanced as the approach of the AAA and Milan, the ICC and even recent proposals for ICSID\(^5\) suggest another way to manage—namely by having arbitrators sign confirmations that they have continuing obligations to remain impartial and independent. Particularly for parties who are engaging in international arbitration for the first time, expanding and clarifying the expected code of conduct for arbitrators will undoubtedly decrease misperceptions and misunderstandings amongst parties, lawyers, and arbitrators.

V. CONCLUSION

Fostering the legitimacy of arbitrators is critical.\(^6\) They are the guardians of a system that is imperative for the flourishing of international trade and investment. Setting clear and reliable expectations about arbitrators' proper role will help promote the legitimacy of a system with a critical impact on the global economy.

Parties, arbitrators, and institutions should appreciate the respect to be gained by engaging in independent decision-making. They should therefore articulate clearly what conduct is expected of international arbitrators and provide incentives to avoid inappropriate conduct. In this way we can further arbitration's ultimate justice-promoting objectives and promote the integrity of a dispute resolution mechanism with critical international implications.


\(95.\) Recent proposals at ICSID would require arbitrators to sign the following statement: Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.

Working Paper, supra note 5. Expanding the disclosure requirements for arbitrators has become more important with the large number of new cases being registered by the Centre and the increased scope for possible conflicts of interest.

\(96.\) See generally Charles H. Brower II, Structure Legitimacy and NAFTA's Investment Chapter, 36 VAND. J. TRANSNAT'L L. 37 (2000); Franck, Inconsistent Decisions, supra note 1, at 1584–85; Franck, FAIRNESS, supra note 33, at 33–34; Franck, POWER OF LEGITIMACY, supra note 33.
WHAT IS WAR? TERRORISM AS WAR AFTER 9/11

Jane Gilliland Dalton*

This paper addresses the topic of terrorism as war after September 11th, 2001. Historically, "war" has generally been considered to be a state of hostilities between nations characterized by the use of military force. A declaration of war provided the formal and official announcement that a state of hostilities existed between two nations—although a state of hostilities characterized by the use of armed force could exist without a formal declaration.

In the post-United Nations Charter world, however, what matters is not whether one nation has declared "war" on another, but rather whether a nation has been the victim of an armed attack such that it is entitled to respond with armed force in self-defense. The United Nations Charter, by its terms, does not require that the armed attack emanate from another nation state. Article 51 provides solely that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."1 As will be discussed below, on September 11th, 2001 the United States was the victim of a horrific armed attack. The United Nations Security Council, the North Atlantic Treaty Organization (NATO), and the Organization of American States (OAS) all recognized that the United States was entitled to use force in self-defense in response to that attack. To provide a more comprehensive analysis of the legal issues involved, however, it is necessary to begin substantially prior to September 11th, 2001.

Under the traditional nation-state system, a state of hostilities could exist between two countries merely upon a declaration of war by one of them, whether or not armed engagements had actually begun. Consistent with that practice, one could argue that a state of hostilities existed between the United States and al Qaeda as early as 1992, when al Qaeda leadership issued a "fatwa" for jihad against United States forces located in Islamic territory.2 In

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1. U.N. CHARTER art. 51.
2. NATIONAL COMMISSION ON TERRORIST ATTACKS ON THE UNITED STATES, FINAL REPORT: THE
August 1996, Osama bin Laden issued another fatwa declaring war on the United States. Certainly by 1998, when Osama bin Laden issued his public Declaration of Jihad against Saudi Arabia and the United States, calling for the murder of "any American, anywhere on earth" as the "individual duty for every Muslim," American leadership would have had grounds to believe that the country was at "war," based solely on those issued pronouncements.

Particularly when analyzing the 1998 fatwa, one is struck by how truly monumental is the vision and expansive the goals it espouses. Osama bin Laden called on Muslims to kill Americans and their allies, civilian and military, in order to liberate the al Aqsa Mosque and the holy mosque in Mecca. The al Aqsa Mosque is located on the Temple Mount in Jerusalem. Despite the unprecedented withdrawal of Israel from Gaza in the fall of 2005, it is inconceivable that Israel would peacefully give up the Temple Mount without a struggle. Thus, bin Laden must have in mind an armed struggle if he intends to accomplish the objectives of the 1998 fatwa. In fact, the strategic scope of that fatwa has been compared with the strategic scope of the Russian revolutionaries or Mao Tse Tung's guerrilla warfare campaigns. Accordingly, it would not have been unrealistic for the United States to acknowledge that war in the literal sense had in fact been declared on the country based solely on the statements by Osama bin Laden and the al Qaeda leadership, beginning in 1992.

This author believes, however, that when dealing with a non-state actor more than mere declarations of war are required for a state to be authorized to respond with military force under the law of armed conflict (as opposed to dealing with the threat under domestic law enforcement authorities). Accordingly, one must look not only at the words of the al Qaeda network, but at its actions as well. Those actions since 1993 leave no doubt that, not only has war been declared on the United States by words, but the country has been the victim of an on-going series of attacks that have cost thousands of American and foreign national lives.

In 1993, Afghan-trained Arab militants attacked the World Trade Center in New York, killing six and injuring 1000 people. In addition, al Qaeda has attacked American embassies (Tanzania and Kenya in 1998), warships (USS THE SULLIVANS and USS COLE in 2000); financial centers (the World Trade Center in 2001), military headquarters (the Pentagon in 2001), and has attempted to decapitate the government (by the failed attacks on the White House and the Capitol in 2001). Almost 3000 people from over fifty nations

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3. Id. at 47.
5. Id.
died in the attacks of September 11th—more than were killed in the Japanese attack on Pearl Harbor on seven December 1941. There is some evidence al Qaeda was involved in or inspired the attacks on the Saudi National Guard facility in Riyadh in 1995, killing five Americans, and in the attack on Khobar Towers in 1996 that killed nineteen Americans and wounded 372.\textsuperscript{5} Al Qaeda is a multi-national enterprise with operations in sixty countries.\textsuperscript{7} In light of this continuing series of attacks, the letter seized in Iraq from Ayman al-Zawahiri to Abu Musab al-Zarqawi, reiterates the strategic nature of the terrorists’ campaign and reminds the world that this armed conflict is continuous and ongoing.\textsuperscript{8}

Misconstruing the scale of terrorism is dangerous and has cost the United States dearly. The 9/11 Commission Report concluded that “an unfortunate consequence” of the superb criminal investigative and prosecutorial efforts in the aftermath of the first World Trade Center bombing, “was that it created an impression that the law enforcement system was well-equipped to cope with terrorism.”\textsuperscript{9}

One of the major debates in the post-United Nations Charter world has been what constitutes an “armed attack”—because under the United Nations Charter, the question is not whether war has been declared, but whether the nation has been subject to an armed attack that entitles a response with armed force in self-defense. In some situations, the answer to that question has not been clear-cut—as was the case with the Caroline incident during the Mackenzie Rebellion in Canada in 1839. The diplomatic exchange surrounding that incident, though it preceded the United Nations Charter, is often cited as the classic description of an appropriate application of anticipatory self-defense, in a situation that was not completely clear-cut at the time it occurred.\textsuperscript{10}

6. 9/11 REPORT, supra note 2, at 60.


9. 9/11 REPORT, supra note 2, at 72. See also Civil and Political Rights, supra note 7, at 3 (“Al Qaida and related terrorist networks are at war against the United States. They have trained, equipped, and supported armed forces and have planned and executed attacks around the world against the United States on a scale that far exceeds criminal activity.”)

10. To prevent American sympathizers from using the steamboat Caroline to transport men and materiel to the Canadian insurgents, British forces boarded the vessel, set it afire, and sent it over Niagara Falls, killing and injuring several American citizens in the process. When the United States protested the violation of its sovereignty, the British Government invoked the right of self-defense. Secretary of State Daniel Webster, in a series of diplomatic notes during 1841–1842, maintained that for the claim of self-defense to be valid, Great Britain was required to show “a necessity of self-defense, instant, overwhelming,
But if the United States was unsure prior to September 11th, 2001 whether it had been the victim of an armed attack, there was absolutely no doubt after that date. NATO invoked Article 5 of the North Atlantic Treaty, and the Organization of American States invoked the equivalent provision, Article 3(1), of the Rio Treaty, providing that an armed attack against one or more of the parties shall be considered an attack against them all. United Nations Security Council Resolution 1368 invoked the inherent right of self-defense. And President Bush decided that it was time to break with the practice of treating terrorism as exclusively a criminal offense, and that the United States would respond with its armed forces and with every instrument of United States national power. Recall that President Clinton also took military action against al Qaeda training camps in Afghanistan and a chemical facility in Sudan in leaving no choice of means, and no moment for deliberation.” Yoram Dinstein, War, Aggression, & Self-Defense 218–19 (2003). Though the Caroline incident stands for the proposition that the right of anticipatory self-defense has long been recognized as an inherent right, the particular articulation of the standard (instant, overwhelming, no choice, no moment) has been criticized as too restrictive. Id.

11. NATO invoked Article 5 on September 12, 2001 but only provisionally, pending verification that the attacks had been directed from abroad. U.S. Ambassador Frank Taylor briefed the North Atlantic Council on October 2 on the results of investigations into the attacks. As a result of that information, the Council determined that the attacks had been carried out by the world-wide terrorist network of al Qaeda, headed by Osama bin Laden and protected by the Taliban regime in Afghanistan. NATO Update: Invocation of Article 5 Confirmed—Oct. 2, 2001, available at www.nato.int/docu/update2001; Convocation of the Twenty-Third Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser G, CP/RES. 796 (1293/01), Sept. 19, 2001; Convocation of the Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs to Serve as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, OEA/Ser G, CP/RES. 797 (1293/01), Sept. 19, 2001.

12. S.C. Res. 1368, U.N. Doc. S/RES/508/1368 (Sept. 12, 2001). It could be argued that the resolution’s recognition of “the inherent right of individual or collective self-defense” proves that the Security Council recognizes the war on terrorism as an international armed conflict. This author does not find that analysis dispositive.

13. Undersecretary of Defense for Policy, Douglas J. Feith, Remarks to the Policy Union, University of Chicago (Apr. 14, 2004), available at www.defenselink.mil/speeches/2004/sp20040414-0261.html (last visited Mar. 10, 2006) (“The President’s most basic decision after 9/11 was how to think about the attack. Keep in mind that for years Americans were hit by terrorists. There were hijackings, murders and bombings. In the 1990s, Americans died and were injured in the first World Trade Center bombing, the bombing of Khobar Towers in Saudi Arabia, the destruction of our East Africa embassies and the bombing of the USS Cole in Yemen. The U.S. Government’s response in those cases was to use the FBI to investigate. Our government was looking for individuals to arrest, extradite and prosecute in criminal courts. President Bush broke with that practice—and with that frame of mind—when he decided that 9/11 meant that we are at war. He decided that the US would respond not with the FBI and U.S. attorneys, but with our armed forces and every instrument of U.S. national power.”).
though he did not launch an all-out war against terrorism as did President Bush.

Traditionally, international law was concerned primarily with relations between states.\textsuperscript{15} A review of the history of conflict during the twentieth century, however, reveals that states, the entities that create international law, have adopted a decidedly more flexible stance. Some rules governing international armed conflicts have been extended to non-international conflicts—as in Additional Protocol II to the Geneva Conventions.\textsuperscript{16} And it has become more and more difficult to distinguish international armed conflicts, internal armed conflicts and acts of violence committed by private individuals or groups.\textsuperscript{17} It is those latter acts of violence that are generally considered to be subject to national laws or specific treaties governing the specified conduct, like terrorism. But that distinction is based on the assumption that the acts of violence are, as Article 2(2) of Additional Protocol II provides: "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."\textsuperscript{18} Since September 11th, 2001, there have been further brutal terrorist attacks in Bali (twice), Madrid, London, and Jordan. It is quite clear that the conflict with al Qaeda is not an internal disturbance, nor is it isolated or sporadic. As the Department of State advised the United Nations Commission on Human Rights, "To conclude otherwise is

\textsuperscript{14} On August 21, 1998, President Clinton informed Congressional leaders that he had ordered attacks on facilities in Afghanistan and Sudan connected with Osama bin Laden. The attacks were launched in exercise of the inherent right of self-defense as a "necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities," after receiving "convincing information from a variety of reliable sources" that the bin Laden organization was responsible for the August 7, 1998 attacks on United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania that killed over 250 people. \textit{Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, Aug. 21, 1998, in \textbf{PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES}-WILLIAM J. CLINTON, BOOK II 1464 (2000).}

\textsuperscript{15} The Case of the S.S. "Lotus," (Fr. v. Turk.) 1927, P.C.I.J. (Ser. A) No. 10, at 18 (Sept. 7) ("International law governs relations between independent states.")


\textsuperscript{17} \textit{See, e.g., International Tribunal for the Former Yugoslavia, Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeals Chamber, Oct. 2, 1995, ¶ 97.}

\textsuperscript{18} Additional Protocol II, supra note 16, art. 2(2). For more information on the development of international law as it relates to non-international armed conflict, see L.C. GREEN, \textit{THE CONTEMPORARY LAW OF ARMED CONFLICT} 54–57 (2000); see also Prosecutor v. Tadic, supra note 18, ¶¶ 96–127.
to permit an armed group with strategic designs to wage war unlawfully against a sovereign state while precluding that state from defending itself."

One of the concerns raised by some about the use of the "war" construct is that it purportedly permits killing suspected terrorists without warning and detaining suspected terrorists without end. That characterization is only half correct. Certainly the law of armed conflict does not require that notice be given to an enemy combatant before he is attacked. Concerning detention, however, detention is lawful only until the end of hostilities, not until the end of all time. The war on terrorism is no different than any other war in that its end cannot be predicted with any certainty. It is unlikely that the prisoners of war in detention on both sides in 1942, 1943 and 1944—when things were looking dark for the Allies—had any hopes of being repatriated by 1945, as ultimately occurred.

Department of State Legal Adviser John B. Bellinger, III, recently spoke to the International Institute of Humanitarian Law in San Remo, Italy. He emphasized there that the nation is in a war in every sense, citing the statements of one of the July 2005 London bombers—that "we are at war and I am a soldier in that war." The one very critical distinction is that al Qaeda is not a nation-state and the terrorists do not form the military forces of a nation-state that is a party to the Geneva Conventions. But that distinction makes all the difference. In accordance with common Article 2, the Geneva Conventions apply to armed conflicts which arise between two or more parties to the Conventions and to the occupation of the territory of a party to the Conventions. Further, non-party powers engaged in an armed conflict may agree to accept and apply the provisions of the Conventions. Assuming al Qaeda is a competent "power" to agree to accept and apply the Conventions, it has not

19. Civil and Political Rights, supra note 7, at 4. See also Nathaniel Berman, Privileging Combat? Contemporary Conflict and the Legal Construction of War, 43 Colum. J. Transnat'l L. 1, 32–33 ("... the worldwide conflict between Al-Qaeda and the United States... would seem to fit the far-reaching definition of armed conflict given by the International Criminal Tribunal for Yugoslavia... provided that the word 'protracted' includes a conflict that is both spatially dispersed and temporally discontinuous... ").


done so. Because of this expectation of reciprocal obligations and benefits, the
Conventions create an incentive to states parties to follow the rules. Providing
the benefits of the Conventions to those who violate every tenet of the law of
armed conflict simply undermines the Conventions and provides a disincentive
to abide by them.

Further, it is an affront to the men and women of the armed forces of all
nations who do comply with the laws of war to treat unlawful combatants as if
they are covered by the Geneva Conventions, particularly when such
combatants are grossly in violation of the laws of war and the principles of
international law that underlie those laws and customs.

This approach is consistent with long-standing practice dating centuries
before the Geneva Conventions came into effect. Both ancient Greece and
Rome actually followed basic rules and principles of war. But tellingly, those
rules and principles were applicable only to "civilized sovereign states properly
organized, and enjoying a regular constitution . . . governed with a view to the
general good, by a properly constructed system of law. . . . Hence barbarians,
savage tribes, bands of robbers and pirates and the like were debarred from the
benefits and relaxations established by international law and custom . . . ," parti-
cularly with respect to the laws of war. 23

Likewise, in the Middle Ages, international law scholars opined that "the
laws of war are not observed toward one who does not observe them." 24 During
the American Civil War, the Code written by Dr. Francis Lieber and
promulgated by President Lincoln as General Orders 100 contained the
following provision:

Men . . . who commit hostilities . . . without commission, without
being part and portion of the organized hostile army, and without
sharing continuously in the war, but who do so with intermitting
returns to their homes and avocations, or with the occasional assump-
tion of the semblance of peaceful pursuits, divesting themselves of the
character and appearance of soldiers—such men . . . are not entitled
to the privileges of prisoners of war, but shall be treated summarily as
highway robbers or pirates. 25

23. Leslie Green, What Is—Why Is There—the Law of War? in NAVAL WAR COLLEGE INTER-
LAW AND CUSTOM OF ANCIENT GREECE AND ROME 195, 207–12, 221–23 (1911).

24. Id., at 155 (quoting GENTILI, DE JURE BELLI lib. II, cap. III, VI, XXIII, at 142–4, 159, 272
(1612) (Carnegie trans., 1933).

25. Instructions for the Government of Armies of the United States in the Field (Prepared by Francis
Lieber, promulgated as General Orders No. 100 by President Abraham Lincoln, 24 April 1863), art. 82,
reprinted in THE LAWS OF ARMED CONFLICTS 3, 13 (Dietrich Schindler & Jiri Toman, eds., 2004) [hereinafter
Instructions for the Government of Armies].
As to the concept of "detention without end," the International Military Tribunal at Nuremberg made clear that since the Eighteenth Century captivity during time of war "is neither revenge nor punishment, but rather is solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war."\(^{26}\)

As John Bellinger so aptly asked the San Remo audience, "What would you have us do? Let them go?" The fact is that the United States has detained and screened over 83,000 individuals in Afghanistan, Iraq and elsewhere. The vast majority are freed shortly after initial questioning.\(^{27}\) There remain about 14,500 still in custody, primarily in Iraq, consistent with the Fourth Geneva Convention provisions concerning security detainees.\(^{28}\) Less than 700 individuals have been transferred to and detained in Guantanamo Bay, Cuba. The government has already released 245 Guantanamo detainees to twelve countries—and, unfortunately, the government has been wrong about ten percent of the time.\(^{29}\) It hardly seems to be in the interests of humanity at large to release individuals who intend to return immediately to the fight and kill more innocent men, women and children.

It has also been asserted that the detainees are held "incommunicado." That statement is simply incorrect. Over 14,000 pieces of mail were processed for the detainees in mid-2005. The International Committee of the Red Cross has access to the detainees, over 1000 journalists have visited, over 100 Congressional staff members and over forty members of Congress have observed the Guantanamo operations.\(^{30}\) Further, there are two processes in place to review every detainee's case to determine if there is a continued need to detain him.\(^{31}\)

\(^{26}\) Green, supra note 23, at 167 (quoting The Nuremberg Judgment, 1945, HMSO, Cmd. 6964, 65, 48 (1946)).

\(^{27}\) U.S. Has Held 83,000 In War On Terror, BALTIMORE SUN, Nov. 17, 2005.

\(^{28}\) Geneva IV, supra note 22, art. 5, 27, 41-43.

\(^{29}\) Bellinger, supra note 20. U.S. Department of Defense, Office of the Asst. Sec'y of Defense (Public Affairs), News Transcript—Defense Department Special Briefing on Administrative Review Boards for Detainees at Guantanamo Bay, Cuba, July 8, 2005, available at http://www.defenselink.mil/transcripts/2005 (last visited Mar. 10, 2006). Official Department of Defense sources report that the Department has detained and screened over 70,000 individuals. \textit{Id.} Only a very small percentage, about 700 total, were transferred to Guantanamo Bay, Cuba. \textit{Id.} About 234 of those have been released. \textit{Id.} There is evidence that perhaps a dozen or so have returned to the battlefield and continue to wage terrorism against the United States. \textit{Id.}

\(^{30}\) Bellinger, supra note 20.

\(^{31}\) The Department of Defense has established two processes to review the case of each detainee. As of September, 2005, all detainees had been reviewed by a Combatant Status Review Tribunal to determine whether they continue to meet the criteria to be designated as an enemy combatant. Over 160 detainees had been reviewed by an Administrative Review Board, which determines whether the detainee continues to pose
One also hears the argument that the detainees should be given access to the United States federal court system. Yet it defies logic to give to these detainees—whose goal is to kill innocent men, women and children in contravention of all the most basic values of human civilization—greater rights than are afforded by the law of armed conflict to legitimate combatants who become enemy prisoners of war. Even some critics recognize that would be "a perverse legal result."32

The United States has long been the leader in humane treatment of detainees, reaching back to the aforementioned Lieber Code,33 which became the forerunner of the Hague Conventions on Land Warfare. Though they are not entitled to prisoner of war, or greater, benefits, the detainees held by United States armed forces are being treated humanely and "to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva conventions."34 Despite the shrill cries of torture and abuse, the detainees are afforded, in practice, in this author’s opinion, essentially the basic protections found in common Article 3 of the Geneva Conventions (though the official position of the United States government does not invite comparisons to common Article 3). They are given three meals a day that meet Muslim dietary laws, state-of-the-art medical care, the opportunity to worship, clothing, shoes, shelter, soap and toilet articles and much more.35 Alleged abuses or mistreatment of detainees are investigated and appropriate action is taken against the offenders.36

Certainly in the aftermath of September 11th, in the Pentagon and the White House and the Department of State, there were debates whether the "War

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32. Berman, supra note 19, at 57 ("It would seem to be a perverse legal result if those who engaged in combat without complying with the relevant international rules were entitled to criminal trials, with their requirements of proof of individual acts, the presumption of innocence, and so on—before being detained for mere participation in hostilities, while their more scrupulous fellow combatants were consigned to POW camps without such requirements.").

33. Instructions for the Government of Armies, supra note 25.


35. Id.

36. As of February 2006, over 25 officers and enlisted personnel had been held accountable for the abuses at Abu Ghraib. One individual was sentenced to ten years in prison, another to eight years and another to three. In all, more than 100 individuals have been held accountable for alleged detainee abuse through court-martials, non-judicial punishments, reprimands and/or separation from the service. U.S. DEPT. OF STATE, U.S. HAS PROSECUTED ABUSES SHOWN IN NEWLY PUBLISHED PHOTOS, available at http://usinfo.state.gov/dhr/Archive/2006/Feb/17-831358.html (last visited Mar. 12, 2006).
on Terror” was the most appropriate way to label this particular armed conflict. One concern by those who recommended a different label was, no doubt, that use of the word “war” implies the military has the major, primary role. That is certainly one aspect of the war on terror that is misunderstood—it requires not just a military response, but a response by all facets of the United States and coalition governments—diplomatic, economic, law enforcement as well as military. This requirement for interagency and multinational cooperation in this war is a major theme of several significant policy documents that have been promulgated since September 11th, 2001—The National Security Strategy,37 the National Defense Strategy,38 the National Military Strategy,39 and the National Strategy for Maritime Security.40

Domestically, the concept of a “war” on terror raises additional issues. There is no clear agreement between the Department of Defense and the Department of Homeland Security on where to draw the line between homeland defense (the responsibility of the Department of Defense) and homeland security (the responsibility of the Department of Homeland Security). Additionally, the government is working to define the proper role of the military in homeland security—will the military always have a supporting role to civil authorities, or could it conceivably take a lead role in major incidents that overwhelm the capabilities of the civilian first-responders?

Admiral Timothy J. Keating, the Commander of United States Northern Command, has prepared war plans to guard against and respond to terrorist attacks in the United States, including multiple simultaneous attacks. Admiral Keating says the Department of Defense is “best positioned” of the eight Federal agencies that could be involved, to take the lead. Though touted as the “first ever” such war plans, that represent a “historic shift” for the Pentagon,41 as recently as June 2005 the Pentagon’s official position was that domestic security is primarily a law enforcement function.42

42. Id. ("The Pentagon's new homeland defense strategy, issued in June, emphasized in boldface
Secretary of Homeland Security Michael Chertoff clearly agrees. The day after the report was released on Northern Command's war plans, Secretary Chertoff noted that his office, not the Pentagon, would be in charge if the military is deployed inside the United States to respond to a terrorist attack. "The Department of Homeland Security has the responsibility under the President's directives to coordinate the entirety of the response to a terrorist act here in the United States," Chertoff said.43

This recent reporting simply reflects the very complex issues that are related to terrorism in the post-9/11 world. The issues don't turn simply on how the struggle is characterized. Just because the military has the people, the equipment, the plan or even the authority does not mean that the military is necessarily the first choice responder. Domestically, it is not. Overseas, it depends on the situation. In both cases, though, a cooperative inter-agency approach to the issues is required—law enforcement, economic, diplomatic— also seeking support from coalition partners and allies around the world.

Considering the United States "at war" is one approach that assists in keeping the proper perspective on the scope of the problem and ensuring options that are available and may be the most appropriate in a given situation are not unnecessarily precluded. In every sense of the word, including under the United Nations Charter, the United States was attacked by a vicious, global, networked, organization committed to its ultimate destruction. Criminal law tools have failed to eliminate the threat. The President is entitled, more importantly, he has a duty, to respond with all instruments of United States national power, including the armed forces. To do otherwise could jeopardize the national security of the United States.

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WHEN IS A WAR NOT A WAR? THE MYTH OF THE GLOBAL WAR ON TERROR

Mary Ellen O'Connell

I. UNDERSTANDING THE "WAR ON TERROR" ........................................ 536
II. UNDERSTANDING THE MEANING OF WAR IN INTERNATIONAL LAW 537
III. CONCLUSION ........................................................................ 539

The starting point of human rights law is the right of the individual, including the right not to be arbitrarily killed. The international law of armed conflict, which is very much older in its origins than human rights law, starts from totally different premises. The soldier has the right to kill another soldier.¹

Françoise Hampson's observation is a good place to begin a discussion of the "war on terror" proclaimed by President George H. Bush within hours of the September 11, 2001 attacks. She presents starkly the importance of accurately classifying situations as war or peace. First, as she notes, human lives depend on the distinction, but so do liberty, property, and the integrity of the natural environment. This brief article reviews the reasons why the Bush Administration declared war after September 11. It considers whether that declaration and related policies are consistent with international law as to the meaning of war. The conclusion here is that they are not. The President's "war on terror" does not meet the legal definition of war. Moreover, to the extent there is ambiguity, the United States should err on the side pursuing terrorists within peacetime criminal law, not the law of war. Not only does the criminal law better protect important human rights and other interests, it avoids elevating terrorists to the status of combatants in a war with the world's only superpower.

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I. UNDERSTANDING THE "WAR ON TERROR"

Within hours of the September 11 attacks President Bush declared that the United States was at war. Shortly thereafter, he said the "war" "will not end until every terrorist group of global reach has been found, stopped, and defeated."

Many of us in international law, even those of us who work on the international legal regulation of the use of force, were slow to take in that the President meant literally that the United States would act as though it were in an armed conflict in every part of the globe wherever a terrorist might be found. This was not the "war on drugs" or "war on poverty", this was "World War III."

On November 13, 2001, the Administration gave its first public indication that, indeed, it did consider the U.S. to be in an actual war. Executive Order, Detention, Treatment, & Trial of Certain Non-Citizens in the War Against Terrorism states that terrorist suspects will be tried before military tribunals and subjected to military detention, irrespective of whether they are captured in an armed conflict or not. Asked in October 2002 when the Afghan war detainees at Guantanamo Bay would be released, lawyers for the Administration answered not until every terrorist in the world has been found, killed or captured.

About a week later, the world learned how serious the Administration really was about treating the entire world as a war zone. On November 3, 2002, agents of the CIA, using an unmanned Predator drone, launched a Hellfire missile at a vehicle in remote Yemen, killing six men. Yemen recognized no armed conflict on its territory at the time of the strike, nor was the United States at war with Yemen. National Security Adviser Condoleezza Rice explained, however, that "We are in a new kind of war. And we've made very clear that it is important that this new kind of war be fought on different battlefields." The Deputy General Counsel of the Department of Defense for International Affairs said in the global war on terrorism the U.S. could target Al Qaeda suspects and kill them without warning wherever they are found. He indicated


that that included targeting persons on the streets of a peaceful city like Hamburg, Germany.\textsuperscript{6}

It is clear that the Administration following September 11 wanted the wartime privileges of killing without warning, detention without trial, and trials under wartime rather than peacetime rules. It has exercised all of these rights quite separately from the wars in Afghanistan and Iraq.\textsuperscript{7}

II. UNDERSTANDING THE MEANING OF WAR IN INTERNATIONAL LAW

A war or armed conflict, however, has two important components: It consists of two or more organized armed groups engaged in protracted and intense armed hostilities. In \textit{Prosecutor v. Tadić} before the International Criminal Tribunal for the Former Yugoslavia, the Tribunal defined “armed conflict” as existing “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.”\textsuperscript{8} The Additional Protocols to the Geneva Conventions also incorporate concepts of intensity and organized fighting for a situation to be an “armed conflict.” Additional Protocol II applies only to conflicts “more than situations of internal disturbances and tensions such as riots and isolated and sporadic acts of violence.” Even “many isolated incidents, such as border clashes and naval incidents, are not treated as armed conflicts. It may well be, therefore, that only when fighting reaches a level of intensity which exceeds that of such isolated clashes will it be treated as an armed conflict to which the rules of international humanitarian law apply.”\textsuperscript{9}

Nathaniel Berman suggests, however, that a worldwide struggle with Al Qaeda could meet the definition of armed conflict as long as “protracted” is deemed to include “a conflict that is both spatially dispersed and temporally discontinuous, waxing and waning by fits and starts for over ten years—and provided that such a discontinuous conflict is not disqualified as an armed


\textsuperscript{7} It is beyond the scope of this article to discuss the Administration’s conduct of its global war on terror. Suffice it to say that serious charges have been leveled that the Administration has not complied with the law of war.

\textsuperscript{8} Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

\textsuperscript{9} Christopher Greenwood, \textit{Scope of Application of Humanitarian Law}, in The HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 39, 42 (Dieter Fleck ed., 1995). “International humanitarian law” or “IHL” are the more common terms used for the law that applies to the conduct of hostilities and occupation.
conflict by describing it as 'sporadic.'"\textsuperscript{10} Outside the real wars of Afghanistan and Iraq, al Qaeda's actions and our responses have been too sporadic and low-intensity to qualify as armed conflict.

Some try to argue that a war began on September 11 because the attacks were an "act of war," or those attacks plus others by Al Qaeda during the previous ten years. Wars, however, do not begin with an attack. They begin with a counter-attack. States may have the right to engage in a war of self-defense following an attack. If they chose not to do so, there is no war. War, as discussed above requires exchange, intensity and duration.

Kenya, the United Kingdom, Indonesia and Spain have all been attacked by al Qaeda. They have all responded, but not with a military counter-attack. They have turned to their law enforcement agencies. None of these countries declared they were in a war. As the United Kingdom stated when it became a party to the 1977 Additional Protocol I to the Geneva Conventions: "... 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation."\textsuperscript{11}

In addition to the legal definition of war, governments have had strong policy reasons for avoiding calling terrorism "war." Governments typically prefer not to acknowledge that a terrorist group can challenge the state at the level of "war" rather than mere criminality. War connotes a loss of control. Crime, on the other hand, can remain under control. Every society has crime, while few are engaged in war and those few are perceived to have failed in some important sense. Nor do governments normally wish to extend the privileges of humanitarian law to armed groups. They prefer to apply national criminal law to their enemies and even to their own armed forces when fighting enemies within the state. Calling opponents "combatants" and declaring the struggle against them "war" elevates their status above that of mere criminals. According to Greenwood,

[i]n the language of international law there is no basis for speaking of a war on Al-Qaeda or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of criminals, and to treat it as anything else risks distorting the law while giving that group a status which to some implies a degree of legitimacy.\textsuperscript{12}

\textsuperscript{10} Berman, \textit{supra} note 1, at 32–33.

\textsuperscript{11} Reservation by the United Kingdom to art. 1, \textit{supra} note 9, at art. 96, \textit{supra} note 9, \textit{at} 3 of the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (\textit{cited in Marco Sassòli, Use and Abuse of the Laws of War in the "War on Terrorism," 22 LAW & INEQ. 195 (2004)}).

\textsuperscript{12} Christopher Greenwood, \textit{War, Terrorism and International Law}, 56 \textit{CURR. LEG. PROBS.} 505, 529 (2004); see also, Mary Ellen O'Connell, Enhancing the Status of Non-State Actors Through a Global War
When President Bush declared war on al Qaeda and other terrorist groups, he elevated Osama bin Laden to his own status, commander-in-chief, in a war with the world's only superpower.

It was a strategic blunder to have enhanced the status of terrorists through declaring a war on them. Apparently this was belatedly recognized in the Pentagon and an attempt was made in the summer of 2005 to back away from the policy. Secretary Rumsfeld and Chairman of the Joint Chiefs of Staff Myers began using the phrase "global struggle against violent extremism" (G-SAVE) instead of global war on terrorism (GWOT). President Bush, however, rejected the change, saying the U.S. was in a war. Without a war, there could be no wartime privileges to kill, detain without trial, and try without peacetime due process.

III. CONCLUSION

International law has a definition of war and it refers to places where intense, protracted, organized inter-group fighting occurs. It does not refer to places merely where terrorist suspects are found. Nevertheless, the definition may not be clear enough or comprehensive enough given the lack of international protest against the Bush Administration, especially following the Yemen strike. There appears to be some tolerance for a return to the old days of formalism when a government's declaration of war was all it took for international law to recognize a de jure war. Yet, in war human beings and the natural world lose important protections. Therefore, it is time to restate and strengthen a narrow definition of war. War should be considered an aberration. It should only be recognized when compelled by the facts: facts of real fighting and situations of emergency where normal peacetime law and protections cannot operate. Doubtful situations should be treated under the law of peace. The human right to life, to a speedy trial, to peacetime due process, and the duty to protect the environment should be respected unless the state is compelled by intense and protracted armed hostilities from doing so.


“WAR” IN THE AMERICAN LEGAL SYSTEM

Detlev F. Vagts∗

I. THE EMOTIVE MEANING OF “WAR” .......................... 541
II. THE LEGAL CONCEPT OF WAR ............................. 542
III. THE LEGAL CONSEQUENCES OF WAR ..................... 544

My role in this symposium is to analyze the concept of “war” as it has evolved in the American legal system. The idea that the “Global War on Terrorism” (GWOT) is a war in the historic sense has been effectively used to mobilize support for the administration’s actions in the struggle against terrorism, including electronic surveillance, protracted detentions, coercive interrogations, military commissions and the like. How a policy issue is “framed” has a great deal of bearing on its acceptance by insiders and by the public.1 We note how the political support for the abolition of a certain tax gained power when it was re-characterized as “death tax” rather than an “estate tax” or an “unearned receipts tax.” In much the same way, framing GWOT as a war has changed the political dynamics.

I. THE EMOTIVE MEANING OF “WAR”

War has a powerful emotional content. It draws upon a long and complex history. Those of us who are of a certain age still think of a war according to standards set in 1941 to 1945. Those of us who were not old enough to be in the services still vibrated with the sacrifices of those who were. They were linked to us by ties of family and friendship, a far cry from the small professional military we have known for the last three decades.

Sacrifices were imposed upon all of us. When we set out to fight in Iraq I asked my colleagues whether I was right in thinking that this was the first “war” accompanied by a major tax cut. The response was that I had gotten it half right, that at the start of previous wars there had been a tax increase, namely an excess profits tax. Teenagers were mobilized to pick fruit in the absence of drafted farmers. Civilians manned observation posts to track aircraft that might just possibly be Condor bombers on Hitlerite missions. We were


pressed to buy war bonds to prevent inflation. Our sugar, gas, meat and so forth were rationed. Cigarettes and coffee were scarce on the home front.

Less impressive wars followed—Korea and Vietnam. The armed forces were still connected to the rest of America by ties of kinship that made civilians follow events with close attention; it was remarkable how the tensions over the war in Vietnam dropped away when changes in draft procedures immunized so many young Americans from liability to service. GWOT came upon us differently. The fighting in Afghanistan and Iraq has been carried on by professionals quite removed from most individuals. The war seemed a small overseas incident that we could watch as a spectator sport. The movie "Fahrenheit 911" showed the amazement and disdain displayed by Congressional personnel when offered recruiting literature. Instead of being asked to sacrifice we were urged to spend and to travel so as to use the money spared for us by the tax cuts. From a psychological point of view GWOT does not qualify as a war in the traditional sense, even though some Americans are in peril overseas.

II. THE LEGAL CONCEPT OF WAR

We turn now to the legal concept of war. One starts with the Constitution that in Article I gives to Congress the power to declare war. This can be argued to be an exclusive grant of the power to start wars. That would parallel the argument my colleague Professor Laurence Tribe has made that the constitutional grant of the treaty power to the President and Senate is the exclusive mode of making international agreements.\(^2\) But the exclusiveness of the power to declare war was jettisoned early in our history. In 1800 in *Bas v Tingy*, the Supreme Court had to consider whether the maritime combat with France amounted to a war so that rules relating to vessels retaken from "the enemy" would apply.\(^3\) Congress had not declared war. Nonetheless, Justice Washington found that "hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons and things and this is more properly termed imperfect war... It is a war between the two nations..." Justice Paterson in his opinion said "[a]n imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations..."\(^4\) These early judicial reactions can be said to establish the original intent of the constitution as to the meaning of "war." In the following two centuries there have been only a few "perfect" wars—the Mexican war, the Spanish war and the two world wars. There has been a long list of imperfect wars, most


\(^3\) 4 U.S. (4 Dall.) 37 (1800).

\(^4\) *Id.* at 40.

\(^5\) *Id.* at 45.
conspicuously the Korean and Vietnamese conflicts. It is significant that the Cold War was never treated as a war, even an imperfect one, except during those two flare ups. It was only an “emergency,” one that lasted as a matter of law from 1950 to 1976.6

The opinions in *Bas v. Tingy* establishing the “imperfect war” concept speak of it as a war “between nations.” It is that boundary line through which the GWOT notion breaks. It is true that were brief periods when combat activities in Afghanistan and Iraq involved fighting with another nation. Both actions changed in quality when we recognized new governments in Kabul and Baghdad and began friendly relations with them. But GWOT began earlier and it has not ended. It is claimed that GWOT nonetheless comes within the scope of the idea of war. That claim has been widely accepted in public discourse and in some opinions of the courts, in ways that show that the momentousness of this boundary-crossing has not been appreciated.7

It is important to remember the consequences of extending war beyond state-to-state combat. GWOT has no definite beginning. Did it start with the 9/11 attack on the World Trade Center and the Pentagon? Did it start with the first attack on the World Trade Center? Or with the Khobar Towers attack in Saudi Arabia? Or even earlier, in the attack on marines in Lebanon? And when will it end? With the capture of bin Laden? Or of his last adherent? With a year of no terrorist attacks from any source? What if there are terrorist acts not executed inside the United States or aimed at it? The Civil War was deemed to have ended when the regular Confederate armies in the field gave up the fight, even though those terrorists who called themselves the Ku Klux Klan continued to kill union soldiers, blacks and white unionists.8

GWOT has no theatre of operations or any other spatial dimensions. Padilla can be picked up as a “combatant” (another war-linked term) in Chicago or presumably anywhere else in the United States. With no limits of time or space GWOT is quite precisely equivalent to the state of affairs George Orwell warned us about in 1949 in his classic *Nineteen Eighty Four: A Novel*. There the people acquiesce in the regime of Big Brother because of the persistence of intermittent combat that makes them tolerate thought control and other intrusions on their private life.

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7. A striking example is the application of wartime concepts to the bombing of a chemical factory in the Sudan that was thought to be an al-Qaeda operation. *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F. 2d 1346, 1362–65 (Fed. Cir. 2004). Some skepticism of the idea that fighting in Afghanistan, originally a state to state combat, can go on indefinitely being a “war” is expressed in *Hamdi. v. Rumsfeld*, 542 U.S. 507, 521-22 (2004).

III. THE LEGAL CONSEQUENCES OF WAR

What are the legal consequences of there being a war? There are quite a number of them since both the constitution and the statutes confer powers during wartime that are not available otherwise. Some of those rules seem to hinge on the presence of a perfect war. For example, there were statutes authorizing the seizure of industrial property involved in labor disputes that were available to President Roosevelt during World War II that were regarded as not available to President Truman during the Korean War. This was one of the issues in the Steel Seizure case.9 As Justice Frankfurter noted in his opinion, "In this case, reliance on the powers that flow from declared war has been commendably disclaimed by the Solicitor General."10 There is a statute dating to 1917 but still on the books that makes it a crime during time of war to send written messages into or out of the United States except through the postal service.11 This rule is designed to ease the task of censoring such messages. If it were in force today as a consequence of GWOT there would be many felons among the readers of this symposium. It would seem clear that such a statute would be held unconstitutional except in time of war and probably only during a perfect war. In the classic anti-censorship case, Near v. Minnesota, the Court was careful to distinguish cases arising "[w]hen a nation is at war."12 In wartime the publication of the sailing dates of troop transports can clearly be subject to prior restraint. The Court of Military Appeals has said that only in time of declared war can Congress extend court martial jurisdiction to persons accompanying the armed forces overseas.13 The power to order trials by military commissions would seem to be linked to the presence of a war.14 There is an important statute relating to enemy aliens which grants powers only in time of declared war.15

Certainly GWOT rises to the level of a national emergency and the presence of an emergency gives the government and the president a great deal of power. This includes the imposition of sanctions on trading with foreign aliens.
countries and currency controls. But those powers are not as sweeping as those available when there is a war in a legal sense.

Acceptance of the idea that GWOT is a war in the full constitutional and statutory sense is a major threat to civil liberties and democratic institutions. That is particularly true since the administration and its lawyers are making sweeping claims about the extent of presidential powers during war.\(^{16}\) Over the years, probably decades, in which GWOT will continue, citizens of the United States may find themselves in a long Orwellian epoch. There are powerful reasons for rejecting this concept and the consequences that follow from it.

\(^{16}\) Probably the most extravagant of these claims are to be found in John Yoo, *The Power of War and Peace: The Constitution and Foreign Affairs After 9/11* (2005).
U.N. REFORM AND THE INTERNATIONAL COURT OF JUSTICE: INTRODUCTORY STATEMENT

Ambassador Andrew Jacovides*

It is customary during anniversaries to devote some attention to introspection and stock taking. Looking back at my own writings on the subject of U.N. reform (during the fortieth, the fiftieth and now the sixtieth anniversary in 1985, 1995 and this year), I confirmed my long held conviction that the United Nations is indispensable and its Charter, in its basic provisions, has stood the test of time.

All Member States are legally bound by their signature to the United Nations Charter. If its principles and rules are often disregarded in practice, this is not the fault of the organization but of those Member States who fail to honour their solemn obligations. The Charter is based on sound foundations and has proven sufficiently flexible to allow, through progressive interpretation, substantial adjustments to meet emerging needs: peacekeeping and the limitations to domestic jurisdiction or sovereignty, especially in the protection of human rights, come readily to mind. While there is considerable room for improvement, restructuring and regeneration, the emphasis should not be on tinkering with the Charter but on organizational reforms. Even more importantly, there must be emphasis on implementing, effectively and consistently, its purposes and principles and more specifically the resolutions of its principal organs such as the Security Council and the General Assembly—a sore point, I might add, as a Cypriot who has seen numerous U.N. resolutions on Cyprus remain unimplemented. Obviously, there is considerable room for improvement in the Organization itself and in the Secretariat. Much can be done to eliminate cronyism and deadwood and prevent the erosion of the concept of the international civil servant who owes primary allegiance to the Organization. I refrain from going into specifics for this would go far beyond today’s topic and the time available.

Last year and especially this year, on the occasion of the sixtieth anniversary of the U.N., considerable activity has taken place at the United Nations itself, at the U.S. Association for the U.N. (USUN), at learned societies such as the American Society of International Law (ASIL) and such

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academic/political/diplomatic institutions as the Institute for the Study of Diplomacy (ISD) of Georgetown University, under the generic rubric of "UN Reform." A major study was also commissioned by the U.S. Congress on "American Interests and U.N. Reform" (issued on June 2, 2005 under the names of Newt Gingrich and George Mitchell) which makes several sound proposals.¹

A major contribution was made by a High-Level Panel of sixteen distinguished panelists—some more distinguished than others—from different countries proposing 101 recommendations on U.N. reform, including defining international terrorism, regulating the use of force, restructuring the Security Council, abolishing the Trusteeship Council, revamping human rights, etc.

Secretary-General Kofi Annan, in turn, came out with his carefully considered report "In Larger Freedom" on March 21, 2005, in a significant effort to effectively respond to the call for adjusting the United Nations to the 21st century needs, the more so in the wake of the debate on the legality of the Iraq war and the "Oil-for-Food" and other controversies currently burdening the Organization.²

Following considerable diplomatic activity in the past few months and facing the prospect of collapse because of competing interests and divergent views, especially on the highly controversial issue of the expansion of the Security Council, what could be rescued out of these major reform proposals was what was described as "The 2005 World Summit Outcome" (significantly not called a "Declaration"), adopted on September 15, 2005 by the High Level Plenary Meeting of the General Assembly.³ Even though falling far short of the earlier targets, it was a considerable achievement under the circumstances and a major effort is under way, spearheaded by President Eliasson, for it to serve as a stepping stone to meaningful reform in the areas it covers. This document was also described as "modest" (and, here, may I remind you of Sir Winston Churchill's saying of his political opponent, "Mr. Attlee is a very modest person—he has so much to be modest about!") Incidentally, Mr. Attlee was also described by Churchill as "a sheep in sheep's clothing"!). However, when it comes to references to international law and the rule of law the Outcome


document is not so modest, with a multitude of such references in several parts of the text:

[W]e emphasize the obligations of States to settle their disputes in accordance with Chapter VI of the Charter, including, when appropriate, by the use of the International Court of Justice. All States should act in accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Amongst States in accordance with the Charter.\(^4\)

This is an important reminder that the contents of General Assembly Resolution 2625 XXV (1970)—in the adoption of which I played a very modest role—are still valid and relevant in 2005 as they were thirty-five years ago.\(^5\)

More specifically and relevantly regarding today’s topic, in Paragraph 134 of the 2005 World Summit Outcome, under the rubric “Rule of Law,” it is stated that

Recognizing the need for universal adherence to and implementation of the rule of law at both the national and the international levels, we . . . Recognize the important role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States, and the value of its work, call upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute and consider means of strengthening the Court’s work, including by supporting the Secretary-General’s Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice on a voluntary basis.\(^6\)

When compared to the paper adopted, after much activity and debate but also much fanfare, by the High-Level Panel which, inexplicably and somewhat paradoxically, had nothing to say about the International Court of Justice while dealing with all five of the other principal organs of the United Nations (Security Council, General Assembly, Economic & Social Council, Trusteeship Council, Secretariat), this text is substantial.

However, when compared to the equivalent paragraph 139 of the Secretary General’s Report “In Larger Freedom” of March 21, 2005 (inserted after considerable efforts by the Court itself, U.N. Secretariat and others concerned

\(^4\) Id. ¶ 73.


\(^6\) Outcome, supra note 3, ¶ 134.
by the evident *lacuna* in the High-Level Panel’s text . . . ) it is less far reaching. Paragraph 139 of the Secretary General’s report reads as follows:

The International Court of Justice lies at the centre of the international system for adjudicating disputes among States. In recent years, the Court’s docket has grown significantly and a number of disputes have been settled but resources remain scarce. There is a need to consider means to strengthen the work of the Court. I urge those States that have not yet done so to consider recognizing the compulsory jurisdiction of the Court—generally, if possible or, failing that, at least in specific situations. I also urge all States to bear in mind, and make use of, the Court’s advisory powers. Measures should also be taken, with the cooperation of litigating States, to improve the Court’s working methods and reduce the length of its proceedings.  

When comparing the two texts, it should be noted that the World Summit Outcome document specifically makes reference to the Secretary-General’s Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice (a positive element generally and, I imagine, particularly welcome by the distinguished lawyers who habitually practice before the I.C.J., sometimes irreverently referred to as “the usual suspects”!). But, in other respects, it is less precise and specific than the equivalent paragraph 139 of the Secretary-General’s report. Most notably, there is no reference to the urging by the Secretary-General of “all parties to bear in mind, and make greater use of, the Court’s advisory powers.”  

I recall that in a well thought out statement before the Sixth Committee of the General Assembly, on November 5, 2004, the President of the I.C.J, Judge Shi (following earlier suggestions to the same effect by, for instance, Judge Sehwebel when President of the I.C.J) made some significant suggestions on the underutilization by States of the ICJ advisory jurisdiction and its potential for expansion. He stated that: “... the advisory procedure provides the Court with a very real way of participating and contributing to the overall objectives of the United Nations. In addition to offering legal guidance to the requesting bodies, it can play a role in international dispute resolution.” He also stated that: “the advisory procedure of the Court can also play an ‘indirect’

8. *Id.*  
part in preventing disputes and conflicts from developing, by clarifying the legal parameters within which a problem may be resolved."

Clarifying authoritatively by the I.C.J. of the legal aspects of pending international political disputes can go a long way towards lastingly resolving such disputes in a way consistent with the applicable rules of international law. For instance, in my earlier official capacity—and in the absence of a practical possibility for resorting to contentious proceedings—I have for many years advocated resort to the International Court of Justice, through a decision of the General Assembly or of the Security Council, for an Advisory Opinion clarifying the applicable rules of international law on several aspects of the Cyprus situation, such as the unilateral forcible intervention under Art. IV of the 1960 Treaty of Guarantee; the illegality of the 1983 UDI; the illegality of the establishment of settlers under the 1949 4th Geneva Convention and the 1998 Statute of the International Criminal Court; the applicable rules of State responsibility as, for instance, were applied on Iraq-Kuwait under S.C. Res. 687; violations of human rights etc. If this had been done, the contents of the recent U.N. (Annan V) plan would, I believe, have been drastically different and, quite possibly, it might not have been rejected, thereby becoming defunct and causing a backsliding of the process for a just solution to this long pending but solvable international problem.

I strongly feel that, in a comprehensive plan for a reformed and more effective United Nations, there exists ample room for such proposals for the fuller utilization of the International Court of Justice in general and of its advisory jurisdiction in particular. The recent Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, July 9, 2004, furnishes a concrete such example.10

In the same lecture Judge Shi, in a commendable attempt to stimulate debate among policymakers, cited a number of other possibilities. One is to broaden the field of application of the Court's advisory jurisdiction to intergovernmental organizations, perhaps through appropriate resolutions of the General Assembly or the Security Council. Another is to empower the Secretary-General on his own initiative to request advisory opinions, as already proposed by Mr. Boutros-Ghali in 1992 in his Agenda for Peace and by Mr. Kofi Annan in 2001.11 The issue was also raised in 1998 in the Charter


Committee Report (U.N. Doc. A/53/33). A third possibility is to authorize national supreme courts as well as international courts and tribunals to request advisory opinions on certain difficult or disputed questions of international law so as to allow for uniform interpretation for such rules and principles.

One other aspect I would very briefly comment on is the Court’s composition. We have all witnessed the great interest and acrimony over the expansion of the Security Council in order to meet the realities of power in the 21st century, an exercise the outcome of which is far from certain, and, yet, the Security Council was already expanded from eleven to fifteen members in the early sixties. By contrast, (under Art. 3 of its statute) the I.C.J. consists of fifteen judges in 2005 when the United Nations has 191 Member States, the same number as it had in 1945 with fifty-one Member States. During the same period other main organs of the U.N. have been expanded in order to meet emerging needs of representation. The ECOSOC expanded from eighteen to fifty-four, the Security Council (as I just said) from eleven to fifteen and now possibly to twenty-four, and the Secretary-General has acquired one Deputy and possibly another. The Law of the Sea Tribunal (set up in 1996 under the 1982 Law of the Sea Convention, currently some 148 States Parties) consists of twenty-one Judges. The International Law Commission was twice expanded from eighteen to twenty-five to the present thirty-four.

I recall that in the U.N. Charter Committee session of 1993, the issue was raised as something worth thinking about though not by a way of a specific proposal.

It would seem appropriate to also do the same in the context of U.N. reform, although I readily concede that, realistically, there is no support for any such initiative, in the I.C.J itself or politically among Member States and that different considerations apply to the Court’s composition than in the composition of other bodies. But is this not something to reflect upon and, perhaps, after proper reflection, to reject it if it is not so warranted and its minuses outweigh its pluses? It is noteworthy, that in a footnote to his article in the July 2005 American Journal of International Law (at page 637) on Security Council Reform, Professor Yehuda Blum writes: “while the question of the Court’s enlargement has not been raised by the [High-Level] panel (or subsequently), in the long term the Security Council enlargement may conceivably trigger demands for the Court’s expansion as well.”

This concludes my contribution on “U.N. Reform and the I.C.J.” It is my hope and expectation that, under the firm and able guidance of the General Assembly President, Jan Eliasson, sufficient progress will be made, with the World Summit Outcome 2005 document as a starting point, to meet at least

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some of the expectations of the international community for U.N. reform in general and more particularly of the International Court of Justice and on the rule of law, nationally and internationally.
I'm Andrew Strauss and welcome to our panel: "Is International Law a Threat to Democracy?" We are lucky this afternoon to have with us a very esteemed and ideologically diverse panel. First I'd like to introduce them and then give some context to the discussion that will follow.

Our first speaker will be Jeremy Rabkin. He is a professor of government at Cornell University, and a very prolific author of both popular and academic works. He is on the Board of Directors of the Center for Individual Rights, the Board of Academic Advisors of the *Harvard Journal of Public Policy* and the Board of Academic Advisors of the American Enterprise Institute. He is also on the Executive Committee of the International Law Section of the Federalist Society.

Our next speaker will be Carol Gould. Among our prolific panelists Professor Gould has written many articles in social and political philosophy, philosophy of law, feminist theory and applied ethics. She directs the Center for Global Ethics at George Mason University. She edits the *Journal of Social Philosophy* and is the Vice-President and President Elect of the American Section of the International Society for Philosophy of Law and Social Philosophy.

She will be followed by Peter Spiro. Professor Spiro is the Dean and Virginia Rusk Professor of International Law at the University of Georgia. He is a former Supreme Court law clerk to Justice Souter. He has also served as director for democracy on the staff of the National Security Council, as an attorney in the State Department’s Legal Adviser’s office and as a resident associate at the Carnegie Endowment for International Peace.

Our final speaker, Richard Falk, is the Albert G. Milbank Professor Emeritus of International Law at Princeton and currently Visiting Distinguished Professor of Global and International Studies at the University of California, Santa Barbara. Richard Falk has been extremely prolific as a scholar and during his extraordinary career has been at the helm of movements as diverse as championing the rights of indigenous people to promoting the successful

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campaign that led the International Court of Justice to rule on the legality of nuclear weapons. Professor Falk serves as Chair of the Nuclear Age Peace Foundation's Board of Directors, as honorary Vice President of the American Society of International Law, and as a member of the editorial board of The Nation.

Our topic this afternoon is whether the growth of the international legal system threatens democracy and, if so, what can be done about it. Our speakers are all public figures and are generally perceived as coming from very different places on the ideological spectrum. But all have in common a significant preoccupation in their writings with the extent to which international law is consistent with democracy.

And, I would add that all of them would see themselves as being promoters of democratic values. All in their writings profess support for pluralism, human rights (at least as limited to civil and political rights) and democratic approaches to decision-making. Where there does appear to be significant disagreement is over the extent to which international law is, or can become, a force consistent with democracy. More specifically, from their writings it would appear our panelists disagree over whether, on the one hand, our democratic future can be secured by the democratic evolution and empowerment of the global system. Or whether, on the other hand, democratic values can be best secured through the maintenance of an international system which ensures that sovereign states do not lose their prerogative to act as they choose.

Jeremy Rabkin in his recently published book, Law Without Nations? Why Constitutional Government Requires Sovereign States, argues that international law threatens democracy in at least two ways. First, it runs the risk of replacing clear, enforceable sovereign authority with ill-defined, unenforceable international authority. This potential for a new medievalism, Rabkin argues, could cause a breakdown of the constitutional systems upon which basic rights are secured. Second, he suggests that "increasing disorder... might not be the greatest danger of this trend," but the greater danger might lie in the authoritarian potential for people to begin to follow an international system that is not backed by a democratic constitutional structure.

Carol Gould in her Cambridge University Press book published last year, Globalizing Democracy and Human Rights does not necessarily disagree, at

2. Id. at 45–70
3. Id. at 69.
4. Id. at 69–70.
least to the extent to which she identifies certain ways in which the
international system is inconsistent with the promotion of democratic values.6
Gould, unlike Rabkin, however, does not wish to make a case against the
empowerment of the international system. Rather, she focuses her efforts on
exploring the extent to which there are contradictions between the growth of
international law and democracy and human rights.7 It will be interesting to see
whether there is any possibility that she and Jeremy Rabkin can find common
ground on democratic reforms of the international system that might allow for
its increasing growth.

Peter Spiro has contributed to this discussion with a quite distinct third
perspective. In articles such as his 2002, “Accounting for NGOs” in The
Chicago Journal of International Law8 he sees the international system, if
enhanced by increasingly empowered NGOs, as becoming more democratic.
And, in articles like his 2003 Stanford Law Review piece “Treaties,
International Law and Constitutional Rights,”9 he argues that human rights can,
at least some times, be best protected when treaty based rights are regarded as
supreme to the Constitution. This is in clear contrast to Jeremy Rabkin, who
he refers to critically as one of the “New Sovereigntists” in his well-known
Foreign Affairs article by the same title.10 If Spiro and Rabin disagree
fundamentally about whether international law is a bulwark for, rather than
threat to basic democratic rights, what is it about their differing understanding
of the interrelationship between the international and the domestic systems that
causes them to disagree so? And, does Carol Gould, with her concerns about
international law’s democratic problems find herself more in line with Spiro or
Rabkin?

Finally, Richard Falk shares concerns with our other speakers about the
international system’s democratic deficiencies. But his diagnosis of the
problem includes the threat to global democracy that can come from powerful
sovereign states including, perhaps especially, the world’s only super power.
And, in works such as his 1999 book, “Predatory Globalization”11 he adds to
our discussion a concern with the implications for global democracy of the
neoliberal global economic system. Finally, Richard Falk and I have in Foreign

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6. See, e.g., id. at 190–96.
7. Id.
   (2003).
Affairs\textsuperscript{12} and elsewhere\textsuperscript{13} added another element to the discussion, and that is whether the concerns about the international systems democratic deficit can be, at least to some extent, ameliorated by the creation of a popularly elected global parliament modeled on the European Parliament. What impact do Richard Falk’s contributions have on the thinking of our other panelists?

Well, all of this is certainly enough to keep us occupied for the next hour and twenty minutes. To encourage maximum interaction I will ask each panelist to speak first for ten minutes and then to respond to the other panelist with a shorter five minute presentation. With the remainder of the time we will bring you, the audience, into the discussion.

One caution before we begin, as I have said, we have an ideologically diverse panel, and I would ask us all to try to avoid the dysfunctional family at Thanksgiving dinner scenario where we act out our predefined role in our political family by pushing the same predictable buttons designed to elicit the same predictable responses. Our public discourse has gotten rather uninteresting with liberals and conservatives professing the same scripted outrage at each other night after night on cable television. Our time here will be more creatively spent if we can see whether on a topic that has not been much discussed in forums such as this, it is possible to move the ball forward by finding common ground, or in case of our inability to do that, to approach our endeavor in the spirit of inquiry as to why it is we disagree.

ON THE UNEASY RELATION BETWEEN INTERNATIONAL LAW AND DEMOCRACY

Carol C. Gould*

The question we are asked to address is as follows: "Is international law a threat to democracy?" As a political philosopher, my inclination is to suggest that the answer requires clarifying at the outset the sense in which we are using each of the main terms here. Thus, whether international law is or is not a threat to democracy depends on which aspect of international law is our focus and whether we are restricting our discussion to international law as it is or as it might come to be further developed. In like fashion, our judgment on this issue would vary with how "thin" a notion of democracy we are working with and in particular, whether we limit our conception to the very partial democracies characteristic of many "advanced liberal democracies." It addition, the answer will depend in part on whether we properly distinguish democracy from sovereignty and whether we are willing to extend our conception to include transnational democratic arrangements.

International law has been roundly criticized by certain United States theorists who seek to defend older ideas of state sovereignty, for example, Jeremy Rabkin.1 Such critiques from the standpoint of sovereignty are somewhat surprising, however, since international law in its modern forms is rooted in relations among sovereign nation-states, whether defined by treaties or by customary rules and practices. But the critics' objection can be seen as more consistent when we appreciate that their aim is often not to defend sovereignty per se but rather American sovereignty. Thus when they criticize the International Criminal Court, for example, or even the various Human Rights conventions, what such critics are most concerned with is the impact of these institutions or agreements on the United States. To the degree that this is the case, they have been characterized as defending what has been called American exceptionalism to international law.

Alternatively, a claim to the illegitimacy of such law may arise from a more universalistic and less narrow perspective that locates the problem not with sovereignty but in a deficit in regard to democracy itself. This standpoint

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(perhaps involved in the recent French rejection of the European Union Constitution) objects to the idea that political and legal elites should be able to draft international laws and agreements that are not fully based on national democratic decision making. Here, what comes into play is the recognition that the institutions of global governance, whether the EU or NAFTA or even more fully multilateral organizations like the WTO or the UN itself, do not have a sufficient grounding in the democratic decisions of the people affected by their laws, regulations, or policies. A complication here is introduced by the fact that the people affected are often situated at some distance and may live in other nation-states. So this version of the critique may emphasize either the lack of accountability of these transnational institutions to national democratic decision making or more fundamentally may stress that the decisions are taken by elites, unaccountable to the people affected, wherever these people may be located.

Yet another avenue of criticism of international law turns the first objection on its head and argues that international law may be illegitimate in certain aspects precisely insofar as it is still based on sovereign nation-states. This critique has several dimensions: It may point to the fact that such states are most often not very democratic inasmuch as they have reduced democracy to periodic elections, themselves sometimes usurped by the power of big money; or else it may be observed that states include ones that are not democratic at all, even in this thin, liberal mode. On these grounds it could be concluded that international law is illegitimate to the degree that it is made by, or seeks to protect, sovereign nondemocratic states of those sorts. Even apart from this critique, it is widely agreed that nation-states are no longer as exclusively dominant as before (including in international law) because of the importance of cross-border and transnational relations established through globalization, whether economic, technological, social, cultural, and political. The salience of these new transnational relationships also contributes to the lack of effectiveness of some aspects of international law itself. In this sense, it can be argued that to the degree that international law is tied to state sovereignty, it can hamper the development of new forms of transnational democracy. Further, because of its source in nation-states and their interests, international law currently lacks the means of dealing with crucial issues of global justice that are posed by the strengthening of economic globalization, led by transnational corporations, with their important economic and ecological effects.

In order to analyze these complex issues here, it may be helpful to begin by briefly comparing two different cases (or sorts of cases) of international law. The first set consists of various decisions under NAFTA regarding toxic waste dumping. In one, a NAFTA tribunal ruled that the Canadian government owed up to fifty million dollars in compensation to an Ohio toxic waste disposal company (S. D. Myers, Inc.). Since Canada bans the export of PCBs, this company was able to claim that it was denied the right to import hazardous PCB
waste from Canada. Canada argued that to permit such export would require it to violate the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, a UN treaty to which it is a Party. A related case was the NAFTA dispute tribunal’s finding (arrived at in secret) in favor of Metalclad Corp., which had sought compensation for not being able to open a hazardous waste landfill in Mexico near the border because of protests from the surrounding community members. Although both of these cases raise issues of the overriding of state sovereignty, they speak more strongly to the capacity of such rulings to overcome regulations that protect health and other human security factors, with consequences for people’s human rights. They also demonstrate a lack of democratic accountability of these tribunals to the people affected by their decisions, not only within a given nation-state but across borders. Instead, the multilateral organizations involved seem to function here almost exclusively to advance corporate interests, apparently at the expense of human rights.

We can contrast with these cases the important developments in international law designed to hold wrongdoers accountable for crimes against humanity and for war crimes, in the UN tribunals and now the International Criminal Court. Of great significance too are other efforts to strengthen and give teeth to protection of human rights across borders and to provide appeals for the protection of these rights even against the decisions of nation-states in regard to their own citizens. This is most evident in the European jurisprudence regarding human rights and the two European Courts that serve to protect these rights regionally. A weaker but not insignificant version of this is also found in the Interamerican Court of Human Rights. Nonetheless, this jurisprudence has not gone very far in interpreting the economic and social rights, or in assuring not only the protection of human rights but also enhancing people’s opportunities to fulfill them. Of course, it is clear that much of this effort would belong more within the domain of democratic decision-making by people and legislatures. So, it remains to consider how this sort of democratic provision of the opportunities for rights fulfillment can be made more effective and how to conceive the relation of democratic participation to international law more generally.


3. Veena Dubal et al., Why are some Trade Agreements Greener Than Others?, 16 EARTH ISLAND J. 44 (2002).

While I can only begin to address the difficult conceptual and practical issues involved here, I will make a few suggestions, starting from the account I give of the relation of human rights and democracy in my recent book *Globalizing Democracy and Human Rights*. Since human rights specify the basic conditions that everyone needs for their freedom and dignity, we can say that although these rights are subject to somewhat varying cultural and social interpretations, they ought to have priority within international law. In addition, they can rightly constrain democratic decisions that violate them in the same way that a national constitution, and especially a bill of rights, can serve to protect important rights of minorities if majorities seek to violate them. For human rights to be effective in this way, they need further institutionalization or even constitutionalization at regional levels, and regional courts of human rights would appear as a positive development in this perspective. One can speculate that if the EU constitution had remained with a specification and further institutionalization of rights, it could have gained wider assent. Needless to say, care must be taken not to overly narrow the scope of national or local democratic decision through such rights.

But the relation between democracy and human rights is more complex than this. Thus I argue that impact on the basic human rights of people at a distance serves as a criterion for giving these people some input into the decisions of international organizations. Without proposing that everyone ought to have input into every decision that affects them, which would be impossible, we can say that wider transnational participation and representation are required given the intensive interrelations and significant human rights impacts that follow on contemporary forms of globalization. Clearly, this implies opening up the decisions of organizations like the WTO not only by making them more transparent, but by enabling participation in them (including in the epistemic communities so important to their functioning) on the part of representatives of people affected by their policies. In the absence of new modes of such participation and representation, NGOs may serve in the near term to represent those seriously affected. But the NGOs would themselves have to be sure to operate by principles of democratic accountability to their members, which some, though not all already do. I also propose that the transnational organizations (including global corporations as well) should be required to prepare what I would call “human rights assessments,” to consider and respond to the impact of their rules, policies, and activities on the opportunities for human rights fulfillment by those affected.

7. GOULD, supra note 5, at 201–16.
Beyond this, we can say more generally that international law should regard itself as the handmaiden of democracy, where by democracy we mean democratic associations at all levels. This suggests that rules and laws need to be structured with the principle of subsidiary in view, so that decision-making can occur at the lowest level relevant, and should also show deference to the diversity of democratic forms of participation and representation at all levels. It is likewise important to leave room for some diversity in the cultural and social interpretations of norms. Inclusion of a wider sphere of interpreters, somewhat similar to what is happening in the sphere of human rights law, would be important, as would be opportunities for public deliberation about these norms and laws.

Other forms of transnational representation are also imaginable beyond simply opening up existing forums to NGOs. There are proposals like those of Philippe Schmitter for reciprocal representation in legislatures or Michael Saward’s promotion of cross-border referenda or forums. Preferably within the context of regional human rights protections, closer connections between national legislatures would be possible (including joint legislation by subcommittees within them), as would the development of democratic decision-making within new cross-border communities. More generally, the introduction of such democratic modes of decision making in transnational communities, whether economic, ecological, or simply communicative, as through the Internet, should be encouraged and facilitated by law (but only if regulations and laws are in fact necessary).

Proposals for a more representative global democratic assembly (Held) or a global parliament (Falk and Strauss) are useful additions to a system currently limited to representatives of states. But these very large scale institutions would have a hard time being fully representative on my view, and would need to avoid replicating the lack of real democratic participation so evident at national levels. They cannot replace the work of expanding democratic modes within the variety of associations at lower levels, increasingly of a transnational sort, and including not only political associations but economic and social ones as well. Such an expansion of democracy (in


10. HELD, supra note 4, at 110-11.


both procedural and more substantive senses) in this wide range of institutional contexts provides the greatest hope, in my view, for eventually instituting what has been called international law from below.
Ambassador Bernardo Alvarez Herrera*

Good morning. Thank you for inviting me to speak on this important subject.

First off, let me start by saying that contrary to popular belief, the freedom of expression and the press are alive and well in Venezuela. The country’s private media—forty-one television stations, more than 400 radio broadcasters, eight national newspapers, and 200 regional and local newspapers—vibrantly discuss and report on the issues of the day free from government interference. Human Rights Watch wrote the following of the Venezuelan media in 2003:

There are few obvious limits on free expression in Venezuela. The country’s print and audiovisual media operate without restrictions. Most are strongly opposed to President Chávez and express their criticism in unequivocal and often strident terms. No journalists are in prison for exercising their profession, and there have been few criminal prosecutions or successful civil suits against journalists in recent years.1

While President Chávez may not agree with what the media has to say, he does not question their right to say it, much less use government resources to punish them for saying it. We do, though, worry about how far a narrowly controlled media can go in acting against a democratic government.

The case of the media in Venezuela is of particular interest to this discussion. In few other instances has the media played such an overt political role, replacing an opposition defeated at the ballot box and paving the way for what was a brief coup against a democratically elected president. In that

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instance, privately held Venezuelan newspapers and television stations knowingly encouraged anti-democratic actions, manipulated information and events to further their cause, and refused to cover the country's return to constitutional order. While a far cry from the radio stations that helped provoke the Rwandan Genocide of 1994, the actions of the Venezuelan media raises serious questions as to how the power of the press is used, especially in countries experiencing political turmoil and where the ownership of the media is highly concentrated in few hands.

Permit me, now to pose another question: What is the proper role of the state when it is faced with a media whose power is roughly equal to that of the state, and when that power is used actively to destabilize a democratically elected government?

Venezuela's experience in this regard is instructive. Large corporate groups or families own the country's primary newspapers and television stations, which allow them substantial power in shaping public perception of events. Marta Colomina, a professor of communications at Catholic University Andrés Bello and former journalist with a critical opinion on the government of President Chávez, once said:

> Media owners are very aware of their power, and they know how to use it. In the United States or Europe, there are big corporate media groups that see themselves as serving the public interest. In Venezuela, media are in the hands of small groups of owners who tend to serve their own interests.²

These interests quickly aligned against the government of President Chávez in the aftermath of his election in 1998, breaking down the walls that often separate opinion and commentary from facts and reporting. Andres Cañizalez, the head of the Institute for Press and Society in Venezuela, has said the following of this situation: "But here you had the convergence in the media of two things: grave journalistic errors—to the extreme of silencing information on the most important news events—and taking political positions to the extreme of advocating non-democratic, insurrectional path."³ The reality is that this political posturing by the private media led to the coup against President Chávez that has come to be known as the world's first "golpe mediatico," a media coup. Newspapers and television stations encouraged anxious crowds to march on the presidential palace, where, as they noted, the

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“final battle” would occur. When unidentified snipers opened fire on opposition and pro-government protestors, television stations presented images that gave the impression that government supporters had done the shooting. After President Chávez was illegally detained and removed from office, the private media celebrated, with the newspaper El Universal going as far to loudly proclaim, “Se Acabó!”—“It’s Over!” As President Chávez was returned to office amidst widespread protests against the emerging dictatorship, newspapers and television stations remained absolutely silent—news of the return to constitutional order was only disseminated by CNN, word of mouth and online journalists.

Soon after the coup, The Economist stated the following of the media’s role:

In a desperate bid to hold on to power, the government’s media allies conspired to suppress all news of its difficulties. A regime that had seized power while waving the flag of press freedom spent its thirty-six hours in office doing its best to keep the truth from the public.4

This media activism goes beyond the coup. For sixty-four days over late 2002 and early 2003, the private media openly supported a general strike that shut down the country’s vital oil industry and cost the nation almost $14 billion in lost economic activity. They have accused President Chávez of plotting assassinations and bombings, sponsoring foreign terrorist organizations and leading anti-democratic movements across the hemisphere, and commanding an army of clandestine guerilla groups and slum militias. The lack of evidence rarely detracts from the publication of many of these fabrications, though the government is often forced to defend against them.

As I asked before, “What is a democratically elected state to do when faced with an assault by a powerful private media?”

Articles 19 and 20 of the International Covenant on Civil and Political Rights and Article 13 of the American Convention on Human Rights, both of which Venezuela is party to, recognize that speech that promotes hatred, encourages violence, or threatens public order and morals can be regulated by the state. While Venezuela forbids prior censorship, it does recognize the importance of being able to regulate speech that, as happened in Venezuela, may alter the constitutional order or threaten social peace. The bar on this regulation is set extremely high, and is subject to judicial review.

The actions of the private media in Venezuela test the limits of freedom of expression and the ethical responsibilities of the press. As was the case with the radio stations that helped provoke Rwanda’s shocking genocide, the media

in Venezuela has proved that words can have a direct and substantial impact on democratic institutions and public order. How far do we allow the media to go in promoting hatred, encouraging violence, or organizing against the constitutional order? How can we ensure that the media remains responsible, becomes more democratic, and is removed from the control of the few vested economic interests? Does Venezuela’s experience provide any guidance? Does Rwanda’s? Does the United States’, when people like Reverend Pat Robertson appear on television and call for President Chávez’s assassination?

I leave you with these questions.

Thank you very much.
Good morning and thank you for inviting me to participate in this conference.

Today I would like to address a very important and novel topic in the Americas—the issue of hate speech. I will first discuss hate speech in general as it is treated by the American Convention on Human Rights. I will then turn to some of the lessons that we can take from other legal systems on the topic of hate speech, given that the Inter-American system has yet to speak in depth on this issue.

Hate speech can be defined by both its intent and its target. With respect to intent, hate speech is speech designed to intimidate, oppress or incite hatred or violence. This speech must also be targeted directly against a person or group based on characteristics like race, religion, nationality, gender, sexual orientation, disability or other group characteristic.

Historically, hate speech knows no boundaries of time or place. It has been used by officials in Nazi Germany, by the Ku Klux Klan in the United States, and by a full range of actors in Bosnia during the 1990s and during the 1994 Rwandan genocide. But when it is used, hate speech has a common thread: it is used to harass, persecute and justify the deprivation of human rights. At its most extreme, hate speech can even be used to rationalize murder, as the world saw just a few years ago in Rwanda.

In the wake of the German Holocaust, and with the rise of the Internet and other media that can spread hate speech almost instantaneously, many governments and intergovernmental bodies have tried to limit the harmful effects of hate speech. But these efforts naturally collide with the treaties, constitutions and domestic laws that guarantee the right to freedom of expression.

In this hemisphere, the American Convention on Human Rights provides for a broad measure of freedom of expression. Article 13 of the Convention guarantees the right to "seek, receive and impart information and ideas of all

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kinds”¹ through any medium. Article 13 then protects this freedom by banning prior censorship and indirect restrictions on speech and by allowing for subsequent imposition of liability under an extremely limited set of exceptions. Still, Article 13’s broad mantle of freedom of expression is not absolute. Like many international and regional agreements, the American Convention declares hate speech to be outside the protections of Article 13 and it requires States parties to outlaw this form of expression. Paragraph 5 of Article 13 provides the following:

Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered offenses punishable by law.²

Hate speech has also been the topic of joint discussions among the Special Rapporteur for Freedom of Expression and his counterparts from the United Nations and the Organization for Security and Cooperation in Europe (OSCE). The three rapporteurs, who often meet to discuss freedom of speech issues, have said that expression inciting or promoting “racial hatred, discrimination, violence and intolerance” is harmful and they noted that crimes against humanity are often accompanied or preceded by these forms of expression. The rapporteurs then stated that laws governing hate speech—given that they interfere with freedom of expression—should do two things. First, they should be provided by law. Second, they should “serve a legitimate aim as set out by international law and be necessary to achieve that aim.” Finally, the joint statement laid out the minimum guidelines for regulations on hate speech. These guidelines say the following:

1) no one should be penalized for statements which are true;
2) no one should be penalized for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;
3) the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance;
4) no one should be subject to prior censorship; and

². Id.
5) any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.\textsuperscript{3}

Even though hate speech has been defined in the American Convention, the Inter-American Court and the Inter-American Commission have yet to interpret this area of the Convention in depth. It is useful, therefore, to look to the case law of the United Nations, European Court of Human Rights and other tribunals. These systems can help to illuminate the interpretation of this right in the Inter-American system.

Under international law beyond the Inter-American system, freedom of expression enjoys broad protection, but like in the Americas, it is not an absolute right. The International Covenant on Civil and Political Rights, or ICCPR, says that freedom of expression "carries with it special duties and responsibilities."\textsuperscript{4} These duties and responsibilities are defined to include what is necessary to respect others’ rights or reputation or to protect national security, morals or public order. The ICCPR also restricts freedom of expression by prohibiting war propaganda and the advocacy of national, racial or religious hatred. The U.N. Human Rights Committee has provided further guidance on the issue of hate speech under the ICCPR in a number of cases, which I will discuss later.

The European Convention for the Protection of Human Rights and Fundamental Freedoms also provides for restrictions on freedom of expression. This Convention says that its freedoms may be subject to the formalities, conditions, restrictions or penalties as proscribed by law that are necessary, among other aims, to protect the reputation or rights of others. The European Convention therefore does not expressly address speech of national, religious or racial hatred. But the European Court has considered the issue in a series of cases.

The jurisprudence of the European Union (EU) and the United Nations (UN), including the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia, suggest a number of principles on incitement to discrimination and violence. These principles can serve as guideposts in determining how far hate speech can be restricted under the American Convention.


One of the key principles found in legal systems outside the Americas is purpose. The ICTR, for example, has found that if the purpose of the speech is bona fide, it does not constitute incitement. Bona fide purposes can include the search for historical truth or the dissemination of news and information. To determine purpose, tribunals have looked to the actual language of the speech at issue. In one case, the UN Human Rights Committee found that the use of the words “magic gas chamber” in relation to Nazi Germany suggested the motivation was racism, not the search for historical truth and thus it was not protected speech. The European Court has also touched on this area in the realm of national security. In several cases involving Turkey, the European Court drew a line between language explaining terrorist activities and language that promotes terrorist activities.

A second principle of international tribunals is the context of the speech. The European Court found, for example, that a Turkish mayor’s comments about massacres were hate speech because they were made at a time when massacres were taking place, and thus were likely to “exacerbate an already explosive situation.” The European Court has also looked at whether the speech is occurring in the realm of political expression or criticism of the government, since both of these areas enjoy greater protection. By contrast, the European Court has said that national security issues have a wider “margin of appreciation” for authorities to restrict freedom of expression.

A third principle that can be taken from international jurisprudence is causation. International jurisprudence has not traditionally required a direct link between the expression at issue and the demonstration of a direct effect. The European Court has found that even if the expression at issue did not cause particular violence, it could still be considered hate speech. ICTR has suggested that the question is not the effect, but what the likely impact might be, because causation may be relatively indirect.

With these three principles in mind, I would like to emphasize a couple of final points about the use of jurisprudence from outside the Americas in defining hate speech under the American Convention.

First, it should be noted that there is a discrepancy between the English and Spanish versions of Article 13(5). In English, the text notes that hate speech “shall be considered as offenses punishable by law.” This suggests that hate speech can only be regulated through subsequent imposition of liability. In Spanish, meanwhile, the text uses the word “prohibir,” meaning that hate speech is to be prohibited by law, and this suggests that censorship of hate speech might be possible. A resolution of this issue requires looking to international law sources for the means of interpretation, and here, the Vienna

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Convention says that the full text of the article can be used to shed light on the meaning. If the full text of Article 13 is considered, it seems clear that paragraph 5 is governed by paragraph 2 and its imposition of subsequent liability. This view has been further supported by the Inter-American Court, which has said that censorship is only allowed for the purposes stated in paragraph 4. Hate speech, therefore, should be regulated like the other areas of expression in paragraph 2—through subsequent liability. The Inter-American Court has said that subsequent liability must fulfill four requirements.

1) there must be previously established grounds for liability;
2) there must be express and precise definition of these grounds by law;
3) third, the ends must be legitimate; and
4) fourth, there has to be a showing that the grounds of liability are “necessary to ensure” the aforementioned ends.7

Another point I would like to emphasize is that the jurisprudence of the UN and the EU should not be applied in a way that chips away at the Convention’s core freedoms. In particular, the Inter-American Court has said that if both the American Convention and another international treaty are applicable, “the rule most favorable to the individual must prevail.”8

Finally, I would like to highlight that Article 13(5) of the American Convention diverges from the ICCPR on a key point. The text of Article 13(5) discusses hate speech in relation to incitement of “lawless violence” or “any other similar action.”9 This suggests that the American Convention requires violence in order for speech to be hateful. The ICCPR and the European Convention, meanwhile, do not have any such requirement. The ICCPR outlaws speech inciting “discrimination, hostility or violence,” which suggests it covers a broader range of speech.10 The European Convention likewise allows for conditions and restrictions “necessary in a democratic society”11 and then lists a number of ends justifying these limits such as national security and public safety. It can be concluded then that while the UN or EU jurisprudence on hate speech can serve as guidance, not every example found by these systems to be hate speech would qualify as hate speech under Article 13(5) of

8. Id.
10. International Covenant on Civil and Political Rights, supra note 4, at art.20.
the American Convention. We must therefore be careful to apply the lessons of international tribunals only within the narrow limits allowed in this hemisphere.

In closing, I would like to emphasize again that the Inter-American Commission and the Inter-American Court have not yet considered the topic of hate speech, as they have done in the areas of criminal defamation and censorship. For this reason, the Office of the Special Rapporteur undertook an extensive study of this topic in other legal systems, and I have summarized some of this report’s conclusions today. For more details on the treatment of hate speech in other judicial systems, I invite you to consult the 2004 Annual Report of the Special Rapporteur for Freedom of Expression.

Thank you very much for your attention. I welcome your questions.
I. INTRODUCTION

Most states within the United States do not consider international law in their legislative process. The Constitution specifically prohibits states from concluding treaties. In fact, this power is expressly given to the President.

Law students reflect upon Missouri v. Holland, 252 U.S. 416 (1920), which suggests the treaty power is defined by those with the power and trumps states' rights.

Such an expansive reading would be antithetical to our system of checks and balances. It would give the federal government too much power to reach into areas that have traditionally belonged to states, such as court procedures. It also ignores states have the Constitutional power to conclude agreements with

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foreign powers (with the consent of Congress). International delegations often must be implemented locally in numerous ways. As a result of this assumption, states have not properly considered their obligations to implement treaties (and there is often more than one way to implement a treaty).

Connecticut has been markedly different from other states. Connecticut considers the United States’ treaty obligations when it enacts legislation. Legislation which violates the United States’ treaty obligations is not only void, but it may subject the United States to reparations claims by other countries. While some state legislators may consider the possibility their enactment may be void, they don’t consider the possibility their actions may subject the United States to a claim for reparations.

On the positive side, Connecticut has enacted a number of statutes which codify and implement Connecticut’s international law obligations. They have generally been codified in Title 50A in the Connecticut General Statutes.

II. CONNECTICUT GENERAL STATUTES: TITLE 50A

A. Uniform International Wills Act

The Uniform International Wills Act (a part of the Uniform Probate Code) regulates the formalities necessary for executing a valid will. It does not regulate the effect of a will, nor how a will is interpreted. The formalities necessary to execute a valid will have traditionally been regulated by states for hundreds of years.

The act is based upon the National Conference Commissions on Uniform State Law’s interpretation of what is necessary to implement the 1973 UNIDROIT Convention on the Form of an International Will. While the United States Senate has given its advice and consent for the United States to become a party, the instrument of ratification (signed by President Reagan) has not yet been deposited. The instrument of ratification is unlikely to be deposited until the United States Congress enacts the federal implementing legislation which would cover the citizens overseas, members of the military and so forth.

In the meantime, the following states have enacted the necessary implementing legislation: Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Minnesota, Montana, New Mexico, North Dakota, Pennsylvania, and Virginia. This was done even though the United States is not a party to the convention.

It should be noted Connecticut’s legislation did not provide for a will registry.

B. UNCITRAL Model Law on International Commercial Arbitration

Arbitration is the most effective way for resolving international commercial disputes because the United States is not a party to any international convention on the enforcement of judgments. While each country is generally convinced of the wisdom of its own laws, there is a need for predictability across countries in enforcing commercial obligations and to avoid a "race to the courthouse."

The Federal Arbitration Act (9 USC § 1, et seq.) is a rather "bare bones" piece of legislation. Much of its detail comes from decades of judicial interpretation. While Americans may be able to find and apply the judicial interpretations, foreign nationals are concerned because the details are not codified. Interpretations of the Federal Arbitration Act on important points can differ from circuit to circuit.

Connecticut responded to this by enacting the UNCITRAL Model Law on International Commercial Arbitration. The Federal Arbitration Act does not pre-empt this enactment because it mainly supplements the Federal Arbitration Act. In addition, the Federal Arbitration Act was enacted under the Constitution's commerce clause. Disputes being arbitrated in the United States which involve trade solely between other countries do not fall within the commerce clause, meaning Connecticut has the exclusive legislature competence to regulate in this area.

The experience in other countries under the Model Law can be used to aid in its interpretation.

C. Uniform Transboundary Pollution

The American Bar Association and the Canadian Bar Association adopted a report in 1979 prepared by a joint committee entitled "The Settlement of International Disputes Between Canada and the United States of America." Pollution was a major area of concern. Pollution damage pollution does not respect national boundaries. The primary legal problems are caused by the fact the polluter is usually outside the jurisdiction where the damages occur.

Actions for damages under common law concerning land could be brought only where the land was situated. This means a person whose Connecticut land suffers pollution damage could sue only in Connecticut. If the polluter was outside of Connecticut, the Connecticut plaintiff had to rely on the Connecticut "long arm" statute to obtain jurisdiction over the polluter.

The long arm statute does not provide jurisdiction if the pollution is an isolated event and the polluter has no other contacts with Connecticut. Under

5. CONN. GEN. STAT. §§50a–100–137.
such circumstances, the due process clause of the United States Constitution may prohibit Connecticut from exercising jurisdiction. If the polluter’s home jurisdiction is common-law based, it may refuse to hear the case because the land is in Connecticut and the damage was suffered in Connecticut. This means the victim has no effective forum, which is not a result lawyers should support. Canadian courts are not required to give full faith and credit to the actions of Connecticut courts. There is a very good chance that a Connecticut judgment based on this provision of the long-arm statute would not be honored by Canadian courts. A Canadian court might require the action to be re-litigated or refuse to hear the case at all.

A person owning land damaged by pollution may be unable to find any of the polluter’s assets where the land is located. Under present law, any judgment the injured party obtains in his home state may be unenforceable in the polluter’s state because of jurisdictional problems. The polluter’s home courts might not entertain an action because the harm was not done to land situated within their state. The end result is that a polluter may act with impunity and not suffer the consequences of his actions. This result defies common sense and moral justice. This Act was designed to eliminate this “Catch 22.”

The Act allows a suit to be brought in a reciprocating jurisdiction where the pollution originates. A “reciprocating jurisdiction” is one that has enacted the Uniform Transboundary Pollution Reciprocal Access Act or “provides substantially equivalent access to its courts and administrative agencies.”

Connecticut courts must use their own rules under the Act, excluding choice of law rules, to determine what constitutes pollution, whether there is a sovereign immunity defense and most other points.

D. Model Law on Conflicts on Jurisdiction

This Model Law was drafted by the American Bar Association and is used to determine which suit should protect when multiple suits are filed on the same topic.

E. Uniform Foreign-Money Claims Act

Whenever damages occur in a foreign transaction, the damages occur in a foreign currency. United States courts would not normally issue judgments denominated in a foreign currency because they didn’t have the power.

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This subjected plaintiff to unnecessary currency fluctuations. The National Conference of Commissioners on Uniform State Laws drafted the Uniform Foreign-Money Claims Act to address this problem, which as been adopted in twenty three states. A Connecticut court may now issue a judgment denominated in a foreign currency (except for local costs, which are always denominated and incurred in United States dollars).

To eliminate the currency risk, the conversion is done on the day before the date the Marshal obtains the funds. This means the plaintiff is more likely to be made whole.

**F. Uniform Foreign-Money Judgments Recognition Act**

This Uniform Act was also drafted by the National Conference of Commissioners on Uniform State Laws. It has been enacted in a number of states. Connecticut did not elect to reciprocity before it will enforce a foreign judgment.

**G. Registration of International Arbitration Awards**

The United States has an obligation under the 1899 Hague Convention, the 1907 Hague Convention and 1965 International Settlement of Investment Disputes to enforce decisions of the Permanent Court of Arbitration and ICSID arbitration panels. This appears to be a fairly discrete and self-executing obligation.

However, there are practical problems. The prevailing party submits an award to the local marshal. What will the marshal do? Probably nothing. The marshal will insist on an execution signed by a judicial authority the marshal recognizes.

So the prevailing party goes to a local court and tries to submit the award to obtain an execution. The court clerk has never seen such a thing and has no procedures for handling such an award. The legislation gives the prevailing party a procedure for enforcing the award.

Connecticut will enforce both interim measures of protection and final award. Federal legislation for ISCID awards does not allow the enforcement of interior measures of protection.

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H. Vienna Convention on Consular Relations

Connecticut recognizes its obligations under the Vienna Convention on Consular Relations to allow foreign nationals to contact their consul. While this convention leaves it up to the foreign national to determine if he was to contact his consul, certain bilateral conventions require notification even over the foreign national's objection.

Connecticut implemented the United States' obligations by a judicial department policy. Foreign governments are notified by fax when their nationals are being detained. The fax is preserved to show notification was actually given. Defendants are notified of this right in open court when they are read their rights.

I. Foreign Legal Consultants

The Connecticut General Assembly legislatively empowered to the Judicial Department to regulate foreign legal consultants. The Judicial Department responded by enacting a comprehensive scheme to allow foreign lawyers to practice foreign (but not Connecticut) law within Connecticut.

J. Overseas Service of Process

Although the United States became a party to the Hague Convention of Service of Process Abroad on February 10, 1969, there was no coordination of the Convention with court rules. Connecticut has taken that step.

K. Taking Evidence Abroad

Although the United States became a party to the Hague Convention on taking evidence abroad on October 7, 1972, there was no coordination of the Convention with court rules. Connecticut has taken that step.

L. Practicing Law by Foreign Lawyers During Arbitrations

After enacting the UNCITRAL Model Law on International Commercial Arbitration, it was only reasonable to expect international arbitrations to occur in Connecticut. As foreign parties begin to arbitrate, they will want to use their customary counsel.

13. CONN. GEN. STAT. §52–197b; CONN. PRACTICE BOOK §13–21.
14. CONN. GEN. STAT. §52–163a; CONN. PRACTICE BOOK §10–3(b).
Hong Kong first raised the issue of whether representing a party in an international arbitration constituted the unauthorized practice of law. Recognizing this restrictive interpretation would have international arbitration more than it helped the local bar, Hong Kong ultimately decided representing a party in an international arbitration does not constitute the practice of law.

The issue had never been raised in Connecticut before. Nevertheless, Connecticut agreed with Hong Kong's analysis. This decision was codified in the unauthorized practice of law statute. If an arbitration is an international commercial arbitration under the UNCITRAL Model Law, anyone (not just a qualified lawyer) may represent a party.

**M. Determining Foreign Law**

Foreign law is generally a question of fact to be determined by a judge instead of a jury. This doctrine was codified in the National Conference of Commissioners on Uniform State Laws Uniform Law for the determination of foreign law.

Connecticut's old statute required the foreign jurisdiction to deposit a certified copy of their laws. This was obviously not being done. The laws of many jurisdictions are available from a variety of commercial publishers. Under these circumstances, the parties should be able to rely on commercially available material instead of bringing in a foreign legal expert to testify.

**III. CONCLUSION**

The federal states within the United States have a real and significant role in implementing international law within their boundaries. It is a responsibility that should neither be taken lightly nor shirked.

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The question posed for this panel, about the relationship between weapons of mass destruction (hereinafter “WMD”) related noncompliance findings and what you have tactfully described as exceptional actions by states acting together or acting unilaterally, is a provocative and important one. In order to help enrich your deliberations, I would like to offer some observations upon these matters from the perspective of an official whose job it is at the State Department to do compliance assessments. To begin with, I’d like to say a few words to outline what we mean when we talk about a noncompliance finding.

I. THE COMPLIANCE ASSESSMENT PROCESS

I serve as Principal Deputy Assistant Secretary and as Deputy Assistant Secretary for Compliance Policy in something called the Bureau of Verification, Compliance, and Implementation at the U.S. Department of State (hereinafter “VCI”). VCI is a very young bureau, having been established by statute only in 1999, but it is in some ways the direct descendent of the
Intelligence, Verification, and Information Support Bureau (hereinafter “IVI”) of the former Arms Control and Disarmament Agency (hereinafter “ACDA”). Among our responsibilities is taking the lead role within the U.S. Government in arriving at compliance findings for arms control, nonproliferation, and disarmament agreements and commitments. This includes, most prominently, drafting the President’s congressionally-mandated annual report to Congress that identifies instances of noncompliance with such agreements and commitments, and outlines compliance concerns related thereto. The most recent report—the longest and most detailed ever, running to a total of over 700 pages in three versions published at different levels of classification—was just issued in August. You can find the unclassified version on our Bureau’s website.  

2. States planned or ongoing policies, programs, or actions that have a direct bearing on verification or compliance matters, including interagency intelligence committees concerned with the development or exploitation of measurement or signals intelligence or other national technical means of verification.” Id. § 1112(c)(2)(A). The Assistant Secretary was also to be “the principal policy community representative to the intelligence community on verification and compliance matters.” Id. § 1112(c)(3). Congress had disagreed with the State Department’s reorganization plan—which had proposed to divide the verification staff functions of the former Arms Control and Disarmament Agency (ACDA) between a “Special Advisor” to the Under Secretary for Arms Control and International Security and a Deputy Assistant Secretary within the then-Arms Control Bureau—and opted instead to give “the verification and compliance aspects of arms control agreements ... a voice at the most senior level of the Administration” by creating a purpose-specific Assistant Secretary. Id. “A true commitment to vigorous enforcement of arms control and nonproliferation agreements and sanctions,” said the Senate Foreign Relations Committee report, “cannot be maintained by submerging compliance analysis within other bureaus.” S. REP. No. 106-43, at 28 (1999); see also Jesse Helms & Joseph R. Biden, Jr., Letter to William J. Clinton, at 1 (Feb. 24, 1999) (expressing concern that “under your plan, the function of verification and compliance or arms control treaties would not be carried out by a separate bureau”). The leadership of the Senate Select Committee on Intelligence had also expressed similar concerns. See Richard C. Shelby & J. Robert Kerrey, Letter to Madeleine K. Albright, at 2 (Sept. 15, 1997) (urging creation of separate “Assistant Secretary of State for Verification and Compliance to maintain the integrity of the verification and compliance process, and to protect the credibility within the Senate of the Department’s assessments in this area”).

2. U.S. DEPARTMENT OF STATE, BUREAU OF VERIFICATION, COMPLIANCE, AND IMPLEMENTATION, ADHERENCE TO AND COMPLIANCE WITH ARMS CONTROL, NONPROLIFERATION, AND DISARMAMENT AGREEMENTS AND COMMITMENTS (2005), available at http://www.state.gov/t/vci/rls/rpt/c15720.htm (last visited Feb. 16, 2006). The report is drafted by the Department of State, Bureau of Verification, Compliance, and Implementation but by law is a Presidential report. See 22 U.S.C. § 2593a(a)(4) (requiring President to submit “a detailed assessment of the adherence of other nations to obligations undertaken on all arms control, nonproliferation, and disarmament agreements or commitments, including the Missile Technology Control Regime, to which the United States is a participating state, including information on actions taken by each nation with regard to the size, structure, and disposition of its military forces in order to comply with arms control, nonproliferation, or disarmament agreements or commitments” including “a specific identification, to the maximum extent practicable in unclassified form, of each and every question that exists with respect to compliance by other countries with arms control, nonproliferation, and disarmament agreements with the United States”). The President has delegated authority to the Secretary of State to sign the report and submit it to Congress on his behalf. See Delegation of Certain Congressional Reporting Functions, Exec. Order No.
Anyway, we do compliance assessments for a living, and I'd like to talk a little bit about what goes into them. In our diplomatic engagement with other governments on compliance-related matters, it has become apparent that many do not understand the complexity and rigor of the U.S. compliance assessment process. They sometimes seem to assume that we reach compliance findings as mere issues of policy preference—as if we just sit around a table and someone declares that "I don't like that country, so they must be guilty of noncompliance with something." In fact, I fear that is how some governments probably make such decisions. But we certainly don't.

The U.S. process, as shown in the preparation of the annual Noncompliance Report, is a long and complex one that involves the entire interagency community and detailed clearance procedures in which officials sometimes argue at length over subtle nuances of phrasing and, yes, even punctuation. The text of the report is cleared by all relevant parts of the policy community—including the Departments of State, Defense, and Energy and the National Security Council staff—as well as by the U.S. Intelligence Community. This elaborate and often difficult process is quite appropriate; the report is, by law, the President's report and it represents the findings of the U.S. Government as a whole, not just one or more components of it.

Conceptually, the process begins with trying to ensure that we have a clear understanding of the obligations in question. These obligations can come in many forms, ranging from formal treaties such as the Nuclear Nonproliferation Treaty (hereinafter "NPT"), to informal, voluntary arrangements among a group of countries such as the Missile Technology Control Regime (hereinafter "MTCR"), to United Nations resolutions such as UNSCR 1540, which commits nations to undertake efforts to stem the proliferation of WMD.

It is often imagined that compliance analysts spend most of their time arguing over facts and over interpretations of intelligence information, but interestingly, it is often the meaning of the underlying obligation that causes intense discussion and debate. This highlights the point that compliance analysis is different from intelligence analysis. To be sure, compliance analysis depends upon intelligence, which must be assessed and understood. But compliance analysis also involves legal analysis, because one needs to be able to explain what a country is required to do before one can judge whether that country has done it. Ultimately, all this requires a policy judgment as to whether the facts constitute a violation when held up against a promise or an obligation.

It's also worth noting that for compliance assessment purposes, some of the things over which intelligence analysts spend their time arguing are not...
always of primary importance. There may be different views, for instance, about when a certain country will have come into possession of a workable nuclear weapon, or how many weapons they currently have. Those are vital questions for the Intelligence Community, and for policymakers whose job it is to reduce or counter the national security threats represented by such capabilities. For a compliance analyst, however, the key may often simply be whether the country in question is trying to develop nuclear weapons at all, which, for NPT non-nuclear weapons states, is the key to identifying a potential Article II violation.3

II. NONCOMPLIANCE AND ENFORCEMENT

So that's the compliance assessment process. But for today's purposes, the most interesting discussions will likely be about the implications of noncompliance. And this is indeed where some of the most important challenges lie in our world of verification and compliance.

Dr. Fred Icklé, who went on to become head of the Arms Control and Disarmament Agency, wrote an article in 1961 for Foreign Affairs magazine which made a very important point that holds true today. The title of his article was After Detection . . . What?,4 and this title nicely summarizes his point. Verification capabilities are clearly crucial in the arms control, nonproliferation, and disarmament world. One needs to be able to detect violations in time to be able to do something about them. But that's the rub. Detection alone is of little value. Detection serves its purpose only by providing a foundation for, and warning timely enough to permit, effective action in compliance enforcement. There is no way around the need for taking action to counter the threat posed by a violation, return the violator to compliance, and deter others from following in his footsteps.

This is a lesson unfortunately underscored by recent events. Even though the world has long since learned of Iran's flagrant noncompliance with its nuclear safeguards obligations and with Article II of the NPT, the international community is still having a difficult time making such noncompliance costly and unattractive—either to Tehran or to any country that might contemplate following Iran's path in the future. The international community is also

3. See Treaty on the Non-Proliferation of Nuclear Weapons art. II, Apr. 22, 1970, 729 U.N.T.S. 161 ("Each non-nuclear weapons State Party to the Treaty undertakes . . . not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.") [hereinafter Non-Proliferation Treaty]. See also NOTIFICATION TO INT'L ATOMIC ENERGY AGENCY (IAEA) OF TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS MAR. 5, 1970 ENTRY INTO FORCE, available at http://www.iaea.org/Publications/Documents/Infcircs/Other/infcirc140.pdf (last visited Mar. 1, 2006).

struggling to agree upon how to provide a “what” in response to North Korea’s even more obvious violations of the NPT. Dr. Icklé was, I believe, right to suggest that it can often be even harder to mount an effective response than it is to detect violations in the first place.

But what sort of response is appropriate, and when is it permitted?

A. Finding the Balance

You will probably find our Bureau second to none in advocating firm responses to compliance problems. After all, it is important that all violations—or at least all deliberate ones, anyway\(^5\)—elicit some compliance pressure aimed at making noncompliance expensive, difficult, annoying, or dangerous. The proliferators of today have learned lessons from how the international community has handled noncompliance in the past, and it seems clear that tomorrow’s would-be proliferators will learn from the choices we make in responding to today’s proliferation challenges. Not taking violations seriously, wherever they occur—thereby sending the message that compliance is not important, or is negotiable—can have grave consequences in undermining our ability to stand firm when it matters most. As a result, we believe it important for the U.S. to be a stickler for compliance rigor, and to engage in vigorous efforts to ensure compliance enforcement—a role, incidentally, which we feel to be the responsibility of all members of the international community, jointly and severally.

But it is also clear that not all failings are equally dangerous. South Korea, for instance, engaged in a few undeclared uranium enrichment and plutonium-separation experiments inconsistent with its obligations under its nuclear safeguards agreements with the International Atomic Energy Agency (hereinafter “IAEA”). In stark contrast, Iran carried on a twenty-year clandestine program to develop a full nuclear fuel cycle capable of producing, and clearly intended to produce, fissile material usable in nuclear weapons. Clearly, Iran’s activities are far more threatening to international peace and security.

Both cases represented compliance difficulties, but the dangers they present—and the responses these different efforts should therefore elicit—vary enormously. South Korea quickly cleaned up its act when the IAEA brought the problem to its attention, so no response beyond mere chastisement was

\(^5\) I do not address here the problem of a state that fails to comply with an obligation on account of error, incompetence, or forces beyond its control. In some such cases (e.g., those of simple error), mere detection of noncompliance may, alone, lead to redress. In others, remedying noncompliance may present capacity-building challenges (e.g., it may take time and money to fix things). These problems, however, are different from the challenges presented by a willful violation—with which both Dr. Icklé and I are principally concerned.
needed. Iran, however, seems intent upon retaining the fuel-cycle capabilities it secretly acquired as part of its nuclear weapons effort, while North Korea actually brags about achieving a weapons capability. Both Iran and North Korea appear to need a good deal more compliance pressure than mere admonishment.

Another interesting comparison is the case of Libya. The Libyans clearly violated Article II of the NPT by engaging in a program to manufacture nuclear weapons—which they aimed to do with the help of gas centrifuges for uranium enrichment, and even nuclear weapons designs, acquired from the A.Q. Khan proliferation network. Their program included undeclared possession of uranium hexafluoride centrifuge feedstock in noncompliance with their Comprehensive Safeguards Agreement with the IAEA, and therefore in noncompliance with Article III of the NPT. As a nuclear weapons development program, this effort constituted a very serious noncompliance problem indeed. But the context in which we learned the full details of these problems, however, was one in which it was clear that Libya was on the road to reforming its proliferating ways and eliminating its WMD programs.

So while noncompliance is always bad and should always elicit compliance pressure in response, context is critical. Decisions about appropriate responses to noncompliance can raise very complex and difficult questions, and they require all sorts of policy, and sometimes legal determinations. There is no substitute for good judgment and policy sense, and it may not be possible to set down precise recipes ahead of time for which responses will be appropriate in any particular case.

B. Counter-WMD Intervention

In extreme cases, particularly given the nature of the potential threats that can be posed by the possession of weapons of mass destruction by a rogue state—particularly one with ties to international terrorism—the repertoire of potential responses to proliferation noncompliance may include military action. Of course, any decision to take this course of action would require careful

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6. See Non-Proliferation Treaty, supra note 3, art. III ("Each non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency's safeguards system, for the exclusive purpose of verification of the fulfillments of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. Procedures for the safeguards required by this article shall be followed with respect to source or special fissionable material whether it is being produced, processed or used in any principal nuclear facility or is outside any such facility. The safeguards required by this article shall be applied to all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere.")
analysis of legal authorities and policy considerations, and would ultimately be made at the highest levels of our government.

We are often asked when such action would be consistent with the United Nations Charter and other principles of international law. It is impossible to state a general rule here because, in the end, each use of force must look for its legitimacy in the facts and circumstances that the state believes have made it necessary, and each such use of force should be judged, not against abstract concepts, but on the particular events that gave rise to it. In the case of Iraq, for instance, the U.S. had ample authority under pertinent Security Council resolutions to use force to compel compliance with WMD obligations in the face of material breaches of Iraqi obligations under relevant resolutions of the Security Council, including conditions that had been essential to the establishment of the ceasefire in 1991. This is not to say, however, that Security Council action is a *sine qua non* for the use of force in such cases, as the doctrine of self-defense may be available to justify use of force in cases where the Council has not acted. Each case must be judged on the particular facts. This is why so many attempts to define bright-line rules describing the circumstances in which the use of force is justified have come to naught.

C. Diplomacy and Counter-Proliferation

I would like to emphasize, however, that if we spend all our time debating hypothetical scenarios of military intervention we will likely miss some very important points about what can be done—and in fact is being done—to fight WMD proliferation and prevent things from ever having to come to such a pass. After all, it is now clear that skillful diplomacy can help create opportunities for compliance enforcement far short of military intervention. Let me offer you some examples:

1) This Administration’s Proliferation Security Initiative (hereinafter “PSI”) and Dangerous Materials Initiative (hereinafter “DMI”), for instance, are innovative approaches to some of these problems that rely upon coordinated applications of existing legal authorities to increase the costs and risks to proliferators and smugglers of dangerous material around the globe. We are working with like-minded friends and allies, using well-established rules regarding ascertaining the true nationality of vessels on the high seas or conducting medical, safety, and customs inspections in ports of call, and securing ship-boarding agreements with major flag states such as Panama and Liberia. The U.S. is, by such means, making it much harder for countries such as Libya to receive black market centrifuges, for countries such as North Korea to ship missiles, illegal drugs,
or counterfeit currency around the world, and for other rogue states to acquire chemical weapon precursor materials or ballistic missile components.

2) The U.S. is also now working with the Nuclear Suppliers Group (hereinafter "NSG") to halt the spread of enrichment and reprocessing technologies while we endeavor to ensure reliable alternative nuclear fuel supplies for countries that forswear such proliferation-risky capabilities. Incidentally, just this past week [October 17-18, 2005], in accordance with its recently revised guidelines, the NSG also held an extraordinary plenary meeting to consider the Iran issue in light of the IAEA Board of Governors’ resolution declaring Iran in noncompliance with its safeguards obligations (and noting that this requires a U.N. Security Council report). 7 I’m pleased to note that at the NSG plenary, the European Union announced that it would make no transfers of NSG trigger list items to Iran and would exercise special vigilance with regard to non-listed items that could nonetheless be useful in enrichment and reprocessing.

3) The U.S. also uses a range of bilateral economic and diplomatic pressures to fight WMD-related proliferation. These pressures include sanctions laws passed by the U.S. Congress, many of which are explicitly linked to specific international nonproliferation norms such as the NSG guidelines or the MTCR. Through such mechanisms, we have made it harder and more costly for would-be proliferators to do the wrong thing by making it clear that one cannot be both a WMD proliferator and a full trading partner of the world’s largest economy.

4) Finally, the example of our successful efforts, first to negotiate, and then to assist in the implementation of and ultimately to verify Libya’s elimination of its WMD programs, is also a very important illustration of the innovative approaches being taken to handle proliferation challenges. While we worked closely in Libya with both the IAEA and the Organization for the Prohibition of Chemical Weapons (hereinafter "OPCW"), it is important to note that most of our work in country was done on a cooperative trilateral basis between the U.S., our British allies, and our Libyan partners. Once Libya had made its strategic commitment to renounce WMD, for example, it was possible to work with the Libyans to eliminate their nuclear weapons program—not merely to place seals on it and monitor it

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pursuant to IAEA safeguards. As far as we’re concerned, dismantlement and removal beats mere monitoring any day.

Thanks to patient diplomatic efforts and a keen U.S. focus upon stopping WMD proliferation during 2004—coming on the heels of years of international pressure on Libya in connection with terrorism, human rights, and regional security problems—this Administration was able to achieve a tremendous success in WMD rollback on a voluntary and cooperative basis.

I hope these examples make clear that there exist a great many tools for policymakers whose job it is to cope with the threats posed by noncompliance with arms control, nonproliferation, and disarmament agreements and commitments. The military variety of compliance enforcement constitutes only one tool in the toolbox. A finding of noncompliance should always produce compliance enforcement response, but it does not, and should not, automatically produce any particular response. Which tools will best suit the circumstances at hand is something that we need to consider anew for each problem that arises, as we tackle the policy challenges of fashioning remedies that address the wrong, and that best serve U.S. national security interests and the interests of international peace and security.

III. CONCLUSION

I hope that my discussion of the compliance assessment process and the challenges of After Detection . . . What? will help you better understand the sometimes somewhat arcane world of compliance enforcement. So while I am sorry that I offer today no bright line rules and clear recipes, I am not sure that such things exist. Nonetheless, I hope I have been able to impress upon you both the seriousness and the complexity of these challenges, and I look forward to hearing some very interesting discussions today.

Thank you.
Christopher Ford just spoke about compliance assessment and compliance enforcement, which are two concepts very inter-related and essential to non-proliferation. I will too focus my presentation today on compliance, but more specifically on its linkage with verification, another important element in non-proliferation. The Concise Oxford Dictionary describes compliance as the "action in accordance with request, command, etc." Compliance with non-proliferation obligations could then be understood as either a result of a threat of retaliation by others, or deriving from a voluntary decision to enter into such obligations.

The first type of compliance was most recently experienced in 1991 when the Security Council imposed stringent disarmament obligations on Iraq, threatening "grave consequences" in case of non-compliance (and "grave consequences" in the diplomatic lingo means "military attacks"). The inspections, therefore, implemented in Iraq from 1991 to 1998 and from November 2002 to March 2003, were extremely intrusive and unrestricted.
They inspected any place, any time, anywhere in Iraq, and they had access to any Iraqi official or scientists deemed relevant for verification purposes.

But most of the arms control, disarmament and non-proliferation obligations entered into by countries fall in the second category: voluntary agreements by which governments decide to accept certain restrictions under the expectation to benefit from joining those regimes.

In both cases, the third parties (the Security Council in the case of Iraq; the other states parties to the treaties in the case of voluntary agreements) see it as fundamental to ascertain whether the other governments are fulfilling their obligations. One important and common tool to ascertain compliance is through a “verification regime.” Thus, verification is the action to prove either compliance or non-compliance with non-proliferation agreements. The whole purpose of verification is to build confidence. In cases where proliferation concerns exist, states are demanded to be more open and transparent. Even if such measures go beyond a state’s legal obligations, they pay valuable dividends in restoring the confidence of the international community.

Verification also serves as deterrence due to the risk of detection of proscribed activities. For example, we now know that in July 1991 the Iraqi regime decided to destroy, unilaterally and in secret, its clandestine missile force to avoid being caught cheating by the United Nations Special Commission (UNSCOM).

Verification is not a rewarding activity—it goes unnoticed until something goes wrong. Verification is also not a perfect system, as its results depend on many technical, legal and most importantly, political factors. Moreover, verification is but one part of the non-proliferation regime. For the regime as a whole to function effectively, we must ensure not only effective verification but also effective export controls, effective physical protection of nuclear material and effective mechanisms for dealing with cases of non-compliance. It is imperative that these components are well integrated.

The effectiveness of a verification system depends on four elements:

a) Adequate legal authority;
b) Timely access to information;
c) Timely access to locations and people for interviews; and
d) Availability of state-of-the-art verification technology and the right to use it.

There are many versions of verification as there are many arms control, disarmament and non-proliferation agreements. The most common type of verification is the so-called “permissive regime,” such as the International Atomic Energy Agency’s (IAEA) or Organization for the Prohibition of Chemical Weapon’s (OPCW), as it is based on a voluntary acceptance by the
governments to be verified by external bodies. This type of verification in general has a limited legal scope, which reduces the actual inspection activities to certain types of materials and locations clearly defined by the agreements. Consequently, the assurances provided by this kind of verification are also limited. Still, they have proved to be an important tool for the international community. Without them, each individual state party to a multilateral disarmament or non-proliferation agreement would have to make its own assessment about the other parties' compliance with their obligations.

Over the past years, the IAEA has clearly made progress on some fronts in the verification area, but perhaps regressed on others. The IAEA's resumption of inspections in Iraq in 2002, the termination of inspections in North Korea, our investigation of clandestine nuclear programmes in Libya and Iran, the discovery of illicit nuclear procurement networks and the lack of agreement at the 2005 Nuclear Non-Proliferation Treaty (NPT) Review Conference have put the spotlight on an unprecedented array of challenges to the non-proliferation and arms control regime.

The IAEA's verification system has shown great resourcefulness and resiliency in dealing with many of these challenges. We have rapidly initiated intensive verification efforts in a number of countries and investigated the illicit procurement network. We have strengthened the verification system through enhanced use of satellite imagery, environmental sampling and a variety of new technologies—well as through the development of enhanced information analysis techniques, the introduction of integrated safeguards, and the transition towards a more qualitative, information based system. And perhaps most importantly, in dealing with these verification challenges, we have maintained our objectivity and independence, and thereby strengthened our credibility. In short, the past few years have continued to underscore the central importance of the IAEA's role in combating proliferation.

Let me now address two specific non-proliferation challenges and the verification activities conducted by the IAEA.

I. NORTH KOREA

Since 1993, the IAEA has been unable to fully implement its NPT safeguards agreement with North Korea. After an extended period of non-compliance with that agreement, in December 2002 North Korea asked IAEA inspectors to leave the country and a few weeks later declared its withdrawal from the NPT. Since that time, the IAEA has not been permitted to perform any verification activities in North Korea, and therefore, cannot provide any level of assurance about North Korea's nuclear activities.

The IAEA remains ready to work with all parties towards a comprehensive settlement that would both address the security needs of North Korea and...
provide assurance to the international community that all nuclear activities in that country are exclusively for peaceful purposes. The agreement reached in Beijing at the six-party talks—after two years of complex negotiations—on the principles that should govern a comprehensive settlement, is a significant step forward. It is particularly welcome that North Korea has expressed its commitment "to abandon all nuclear weapons and existing nuclear programs and [to return], at an early date, to the Treaty on the Non-Proliferation of Nuclear Weapons and to IAEA safeguards."\(^2\)

This past September the IAEA Board of Governors expressed the view that a successfully negotiated settlement of this longstanding issue of maintaining the essential verification role of the IAEA would be a significant accomplishment for international peace and security.

II. IRAN

For the past two and a half years, the IAEA has been investigating the nature and extent of Iran’s nuclear program, with a view to assuring ourselves that all past activities have been declared to the IAEA, and that all nuclear material and activities in the country are under safeguards. Iran has failed in a number of instances over an extended period of time to meet its obligations under its Safeguards Agreement with respect to the reporting of nuclear material, its processing and its use, as well as the declaration of facilities where such material had been processed and stored.

Since October 2003, however, Iran has made good progress in correcting its past breaches and the IAEA has been able to verify certain aspects of Iran’s nuclear program. As a result, some aspects of that program—such as those related to uranium conversion, laser enrichment, fuel fabrication and heavy water—are now being followed up as routine safeguards implementation matters.

Since last November, our verification efforts have focused primarily on two aspects of Iran’s centrifuge enrichment activities. Regarding the first aspect, the origin of uranium particle contamination found at various locations in Iran, we have made good progress, with the active cooperation of Pakistan. Regarding the second aspect, clarifying the chronology of Iran’s centrifuge activities, we still have a number of unanswered questions and we have made repeated requests to Iran for additional information and access.

As our latest report in September made clear, Iran continues to fulfill its obligations under the safeguards agreement and additional protocol by providing timely access to nuclear material, facilities and other locations. This,

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however, is a special verification case that requires additional transparency measures as a prerequisite for the IAEA to be able to reconstruct the history and nature of all aspects of Iran’s past nuclear activities, and to compensate for the confidence deficit created. By promptly responding to these IAEA requests, Iran would well serve both its interests and those of the international community. The more thoroughly we are able to clarify all of Iran’s past nuclear activities, the more we will be in a position to understand and confirm the nature of the program.

As a confidence building measure, the Board has also, in a number of resolutions beginning in December 2003, urged Iran to maintain a voluntary suspension of all its enrichment related and reprocessing activities and has asked the IAEA to continue to monitor Iran’s application of this suspension. Since August 8, Iran has been conducting conversion activities at the Isfahan Uranium Conversion Facility under IAEA verification. Other aspects of Iran’s suspension remain intact.

The IAEA Board of Governors has continued to devote considerable attention to the implementation of Iran’s NPT safeguards agreement. Last month the Board adopted a resolution that, inter alia, found Iran to be in noncompliance with its safeguards agreement and urged Iran to implement the transparency measures necessary for the IAEA to be able to clarify outstanding issues. The IAEA will continue to call on Iran to do its utmost to work with the IAEA and the international community, to provide assurance that its nuclear program is exclusively for peaceful purposes.

III. NUCLEAR FUEL CYCLE

Countries with nuclear industries have set up elaborate accounting and protection measures to ensure strong national oversight of their nuclear material. The IAEA inspects regularly to verify the accuracy of what countries report. Export controls restrict the transfer of sensitive technologies that could be misused for nuclear-weapons production.

However, controlling access to nuclear-weapons technology has grown increasingly difficult. The technical barriers to designing weapons and to mastering the processing steps have eroded with time. Much of the hardware in question is “dual-use;” for example, it is hard to justify restrictions on exporting “hot cell” technology that could be used for plutonium separation when the same equipment is vital for producing radioisotopes used in modern medicine. Changes in political fortunes or economic downturns have at times found nuclear scientists without jobs and reportedly willing to offer their knowledge and services elsewhere. And with the passage of time, the sheer diversity of technology has made it harder to control both procurement and sales. In pre-1991 Iraq, for example, scientists were simultaneously pursuing
no fewer than six different technologies to enrich uranium for eventual weapons use, shopping for essential equipment and specialized materials in more than ten countries.

Uranium enrichment is sophisticated and expensive, but it is not proscribed under the NPT. Most designs for civilian nuclear-power reactors require fuel that has been "low-enriched," and many research reactors operate with "high-enriched" uranium. It is not uncommon, therefore, for non-nuclear-weapon states with developed nuclear infrastructures to seek enrichment capabilities and to possess sizeable amounts of uranium that could, if desired, be enriched to weapons-grade.

While high-enriched uranium is easier to use in nuclear weapons, most advanced nuclear arsenals favor plutonium, which can be tailored for use in smaller, lighter weapons more suited for missile warheads. Plutonium is a by-product of nuclear-reactor operation and separation technology ("reprocessing"), also not proscribed under the NPT, can be applied to extract the plutonium from spent fuel for re-use in electricity production.

Under the current NPT regime, therefore, there is nothing illicit in a non-nuclear-weapon state having enrichment or reprocessing technology, or possessing weapon-grade nuclear material. And certain types of bomb-making expertise, unfortunately, are readily available in the open literature. Should a state with a fully developed fuel-cycle capability decide, for whatever reason, to break away from its non-proliferation commitments, most experts believe it could produce a nuclear weapon within a matter of months.

In 1970, it was assumed that relatively few countries knew how to acquire nuclear weapons. Now, with thirty five to forty countries in the know by some estimates, the margin of security under the current non-proliferation regime is becoming too slim for comfort. We need a new approach.

Several proposals have been floated in the past two years, including one by President Bush, to restrict the spread of enrichment and reprocessing facilities and technologies. However, countries with the potential to develop such technologies, in particular developing countries, are opposed to any further restriction. It is in that context that the Director General has presented his proposal for a Multinational Approach to the nuclear fuel cycle.

In 2004, the Director General established a group of senior experts to explore options for multilateral control of fuel cycle facilities. In February 2005, the expert group issued its report, and the Director General has been encouraged by the range of supporting initiatives that have followed. The uranium industry and the World Nuclear Association have set up a working group to explore the concept of fuel assurances. The United States has been developing a proposal on providing "reliable access to nuclear fuel," working with principal suppliers, for states that agree to forego independent enrichment
and reprocessing facilities. And the Nuclear Threat Initiative is working on a strategy that would help the IAEA set up an actual fuel bank.

In addition, with spent nuclear fuel stored in temporary sites in more than fifty countries, many without the proper geology for underground disposal, multilateral approaches to spent fuel management and disposal could be a solution for the future. In July in Moscow, at an international conference organized by the Federal Atomic Energy Agency (ROSATOM) in cooperation with the IAEA, considerable discussion took place on possibilities related to multilateral fuel storage and disposal, as well as fuel leasing or even full service nuclear leasing.

We should be clear that there is no incompatibility between tightening controls over the nuclear fuel cycle and expanding the use of peaceful nuclear technologies. In fact, by reducing the risks of proliferation we could pave the way for more widespread use of peaceful nuclear applications.

IV. NUCLEAR TERRORISM

The security of nuclear and other radioactive material and associated technologies has taken on heightened significance in recent years. The IAEA has been active in the field of nuclear security for many years, but the events of September 2001 propelled the rapid and dramatic re-evaluation of the risks of terrorism in all its forms—whether related to the security of urban centers, oil refineries, air and rail travel, or activities involving nuclear and radiological material. Terrorist attacks since that time have continued to keep these concerns in the forefront of our collective consciousness. It has become obvious that our work to strengthen nuclear security is both vital and urgent and that we must not wait for a "watershed" nuclear security event to provide the needed security upgrades.

Effective and credible approaches to nuclear security are essential not only for detecting and responding to illicit trafficking, but also for the protection of nuclear power plants, research reactors and the array of nuclear and other radioactive materials that support these and other nuclear applications. To optimize the effectiveness of these efforts, it is important to prioritize—to focus on those facilities and activities where the risk is greatest—and to maintain a balance between security needs and the many benefits of peaceful applications of nuclear technology.

International cooperation has become the hallmark of these security efforts. While nuclear security is and should remain a national responsibility, some countries still lack the programmes and the resources to respond properly to the threat of nuclear and radiological terrorism. For these countries, international cooperation is essential to help them strengthen their national
capacities. International cooperation is also essential to our efforts to build regional and global networks for combating transnational threats.

In that context, the IAEA has established a nuclear security plan to help states to improve their national capacities to guard against thefts of nuclear and other radioactive material and to protect related facilities against malicious acts. Important progress has been achieved in the last few years in increasing the governments' awareness of the potential risk of nuclear terrorism. But much remains to be implemented. International cooperation in this fight is essential, as the system is as strong as its weakest link. Loose controls in one country could mean safe passage or ground for a terrorist organization to acquire, plan and launch a nuclear or radiological attack to another country. And the consequences to the population and the environment in such an attack would not only be suffered by the country under attack, but also by its neighbors. After all, we are all on the same side in this fight.
THE IMPORTANCE OF CUSTOMARY INTERNATIONAL LAW DURING ARMED CONFLICT

Jordan J. Paust

Customary international law is universal in its reach. It is not subject to control by a few actors in the international legal process, and it binds all participants in international and non-international armed conflicts to the extent that it is applicable to such conflicts.

For example, insurgents operating during an armed conflict not of an international character who are nationals of a state that has not ratified the 1949 Geneva Conventions (a rare state, such as Taiwan) are bound by relevant customary humanitarian law reflected, for example, in common Article 3 of the Conventions. Thus, they are subject to prosecution for violations of common Article 3's prohibitions—technically, not as violations of treaty law as such, but as violations of the customary law reflected in common Article 3. Further, it is widely recognized that common Article 3 reflects customary international law, as a new study of the International Committee of the Red Cross (ICRC) demonstrates.

That treaties can later reflect customary law and bind nonsignatory nationals was recognized, for example, by the International Military Tribunal at Nuremberg with respect to German nationals despite the refusal of Germany to ratify the 1907 Hague Convention No. IV prior to the outbreak of World

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4. See, e.g., id. at 816.
5. Id. at 816–17 n.19.
War II. Moreover, a general participation clause that limited the treaty's reach to conflicts between signatory states became irrelevant once the rules mirrored in the treaty became customary international law, which is universal in its reach. The same reach can occur regarding other customary laws of war despite attempted limitations concerning treaties through use of unilateral reservations or understandings, since the effect of such treaty-based limitations are obviated once the rights, duties and protections become customary international law.

Further, it did not matter that Germany objected, was a major participant in war-making, and was otherwise a specially affected state. Customary international law is based in general and dynamic patterns of opinio juris and practice, but when a customary norm comes into existence it is universally applicable.

With respect to Geneva law, it is important to note that common Article 1 of the Conventions, which reflects customary law, requires that signatories and their nationals "respect and . . . ensure respect" for the Conventions "in all circumstances." Thus, customary and treaty-based Geneva obligations flow erga omnes—that is, not merely to enemies, but also to all other signatories and, as customary obligatio erga omnes, to all of humankind and without putative excuses based on alleged necessity, reciprocity, or reprisals.

Customary international law also provides relevant rights for all participants in international or non-international armed conflicts whether or not they are nationals of a state, nation, or belligerent that has ratified a treaty reflecting the same rights. With respect to treaty-based rights, it is worth emphasizing that the nationals of a state that has ratified the 1949 Geneva Conventions are bound by and have numerous express and implied rights under such treaties. It does not matter that such nationals are also members of an entity that is not a state, nation, belligerent, or insurgent—such as a private security corporation operating in Iraq, a lawyers' bar association, or al Qaeda. Nationals of signatories to the Geneva Conventions, such as Saudi and Afghan nationals, have duties and rights under Geneva law applicable to the wars in Afghanistan and Iraq.

Customary international law, which is universal in its reach, also provides states various competencies mirrored, for example, in Hague and Geneva law,
whether or not persons under control or enemies in battle are nationals of signatories to such treaties. Thus, for example, the customary competence to detain certain persons under definite suspicion of activity hostile to the security of a state when reasonably necessary for security purposes that is reflected in Articles 5, 42–43, and 78 of the Geneva Civilian Convention can be exercised also with respect to nonsignatory nationals. Detention of non-prisoners of war, of course, is subject to required review of the propriety of detention. Customary state competencies to detain prisoners of war that are reflected in the Geneva Prisoner of War Convention also apply with respect to nonsignatory nationals.

Customary international law also provides a necessary background as an interpretive aid. As recognized internationally in Article 31 of the Vienna Convention on the Law of Treaties and domestically by various decisions of the U.S. Supreme Court, customary international law is a relevant and necessary background for interpretive purposes, resolving ambiguities, and filling in gaps. Such a role of customary law is all the more important with respect to norms jus cogens or peremptory norms that preempt other norms with respect to rights and duties. An example is the customary and jus cogens prohibition of torture as well as cruel, inhuman, or degrading treatment, such as the stripping of persons naked for interrogation purposes, the use of dogs for interrogation and even terror purposes, and hooding for interrogation purposes—each of which is a patently illegal tactic that was authorized and ordered in memos by Secretary Rumsfeld and others as part of a common plan for use in Guantanamo and even in Iraq. These were clearly illegal tactics under customary laws of war and nonderogable human rights law, and their authorization and use can lead to criminal and civil responsibility for

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17. See, e.g., id. at 507–10 (judicial review under human rights law), 514 (review under the Geneva Civilian Convention).
21. Id. art. 31(3)(c); See, e.g., PAUST, supra note 1, at 12–13, 370, 388 n.64, 435–37 (concerning such a use of customary international law in U.S.).
perpetrators, conspirators, complicitors, and those guilty of the separate offense of dereliction of duty.\textsuperscript{25}

Brigadier General Janis Karpinski has stated in an August 3, 2005 interview with Professor Marjorie Cohn that she saw a Rumsfeld authorization on a pole outside at Abu Ghraib: "It was a memorandum signed by Secretary of Defense Rumsfeld, authorizing a short list, maybe 6 or 8 techniques: use of dogs; stress positions; loud music; deprivation of food," and so forth, adding "and then a handwritten message over to the side that appeared to be the same handwriting as the signature . . . said 'Make sure this happens' with two exclamation points."\textsuperscript{26} On Frontline on October 18, 2005, she also stated that Major General Miller came to Iraq to GTMOize interrogation tactics.\textsuperscript{27}

Another example of the use of custom involves the incorporation of customary human rights to due process into common Article 3 of the Geneva Conventions. This occurs expressly through the phrase "all the judicial guarantees recognized by civilized nations."\textsuperscript{28} Today, these include the minimum human rights to due process reflected in Article 14 of the International Covenant on Civil and Political Rights,\textsuperscript{29} which in turn are mirrored in the Rules or Statutes of the ICTY,\textsuperscript{30} the ICTR,\textsuperscript{31} and the ICC\textsuperscript{32}—but which are seriously lacking in present rules for the military commissions at Guantanamo.\textsuperscript{33}

Customary international law can also shift limitations in the Geneva Conventions or override them. An example is the recognized applicability of rights and duties set forth in common Article 3, not merely during insurgencies, but also during belligerencies and wars among nations and/or states such as the wars in Afghanistan and Iraq. Perhaps more appropriately, the rights and duties reflected in common Article 3 are now a minimum set of customary rights and

\textsuperscript{25} See, e.g., id. at 852–55, 862 n.198.
\textsuperscript{28} See, e.g., Paust, supra note 16, at 511 n.27, 514.
duties that are also applicable in international armed conflicts. Moreover, customary and universally applicable human rights apply during war and provide at least the same or similar rights and restraints.

Another area of customary law is worth highlighting—the immunity of combatants from prosecution for conduct that is lawful under the customary laws of war. Interrelated is the customary definition of "combatant," which hinges on membership in the armed forces of a belligerent, nation, or state during an armed conflict. Attempts to change that test can be dangerous for U.S. and other military personnel. Of course, mere insurgents have no combatant status or combatant immunity under customary law.

Customary international law can also have effects domestically. For example, when a treaty is not directly incorporable but the customary laws of war can be, customary laws of war can produce direct effects in a domestic legal process. In the United States, the customary laws of war are binding on the President and all persons within the Executive branch. There have also been recognitions of the primacy of the laws of war over federal statutes.

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34. See, e.g., Paust, supra note 3, at 816–17 n.19.
35. See, e.g., id. at 820–22. Under the U.N. Charter, human rights would also prevail over inconsistent law of war treaties. See U.N. Charter arts. 55(c), 56, 103. Human rights jus cogens would also prevail over more ordinary international law.
37. Id. at 328–330.
38. See, e.g., id. at 332–35.
39. Id. at 327–29.
40. See, e.g., PAUST, supra note 1, at 7–16.
42. See, e.g., Paust, supra note 3, at 856, 858–61.
43. See, e.g., PAUST, supra note 1, at 106–07.