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 INTERNATIONAL HUMAN RIGHTS

**Same-sex marriage around the world:
Overview and status of debate**.....PAGE 11

More nations have been legalizing same-sex marriage or providing same-sex couples with rights and benefits similar or identical to traditional marriage. Still, many other nations do not legally recognize such relationships or prohibit them outright. Are there certain international treaties which address this controversial topic? Do nations have a legal obligation to recognize same-sex marriage? And what is the status of the debate today?

 NATIONAL SECURITY LAW

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The United States currently keeps a list of foreign terrorists who have been marked for immediate death. This list even includes American citizens who support them. While many say that killing these targeted individuals is a matter of self-defense, others argue that killing a U.S. citizen who is not actively fighting against American forces in a non-combat zone violates domestic and international law. Where does this debate stand today?

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Can the United States kill Americans who support terrorism?

Legal experts generally agree that the United States may target and kill enemy forces on a battlefield without having to ask, say, a court for advance permission. It may also target an American citizen who decides to join enemy forces (such as a terrorist group) and then engages in actual combat against U.S. soldiers in a genuine war zone. “In a traditional war, anyone allied with the enemy, regardless of citizenship, is a legitimate target,” reported the *New York Times*.

But there is continuing and heated debate on whether the United States may place that very same citizen on a list of individuals to be targeted for death (through an aerial drone attack, for instance) if he is located in a non-combat zone and is also not engaged in active hostilities.

Some say that, domestically, the United States would never target a dangerous and wanted criminal for immediate death if—in the moments before his capture—he did not pose an imminent threat to the safety of others. In the same way, the United States should not target a suspected terrorist (including a U.S. citizen) for immediate death if he is located in a non-combat area and if he doesn’t pose an immediate threat. Instead, they argue that the United States should first try to use non-lethal means to capture him, or, alternatively, provide a suspected terrorist with due process before placing him on a targeted kill list.

But others respond that the United States may target Americans who actively support terrorism regardless of their location and regardless of whether they are engaged in active hostilities. Why would it matter, they ask, if a terrorist is planning an attack in a combat area or a non-combat area?

For those who support targeted killings of U.S. citizens outside of combat areas, what reasons do they give? How do opponents respond? Do any existing international treaties regulate or provide guidance to nations carrying out targeted killings? Have American courts considered this issue? And what is the status of the debate today?

Targeted killings in Afghanistan

After a terrorist attack destroyed the World Trade Center in New York and damaged parts of the Pentagon on September 11, 2001, the United States and several allies invaded Afghanistan and quickly toppled its Taliban government, which had harbored Al-Qaeda, the terrorist network responsible for the planning and execution of the original attacks. But to this very day, the United States continues to battle Taliban insurgents and foreign terrorists in Afghanistan. In June 2010, the conflict in that nation had become the longest war in American history, and will reach its 10-year mark in October 2011.

Experts do not consider the fighting in Afghanistan as an insurrection or some form of mass political unrest. It is a war zone, they say, where soldiers are engaged in actual combat using tanks, massive air and ground assaults, and commando raids. American forces have attacked enemy positions, killed thousands

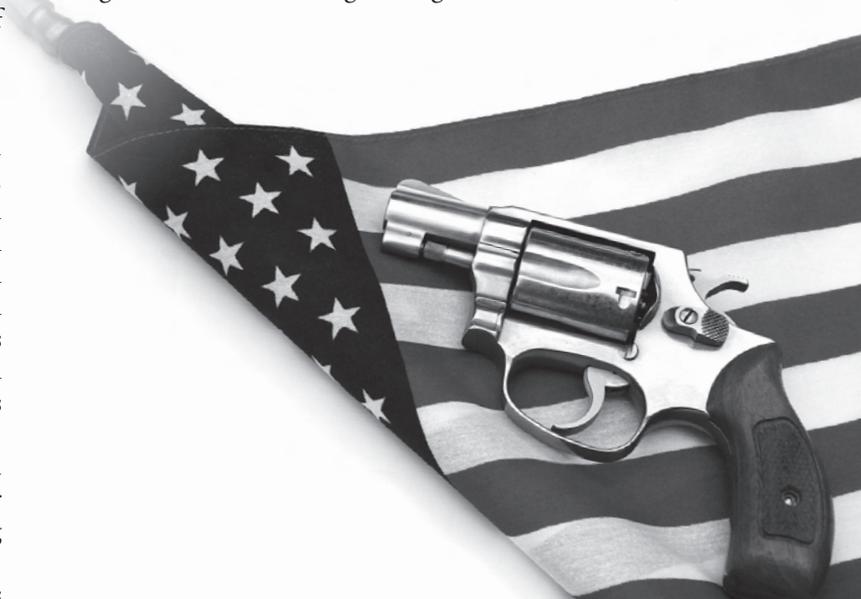
of combatants (with over 2,000 during a 14-month period from 2008-2009), and detained many as prisoners. Recent campaigns have included the Marja offensive in February 2010 involving 15,000 allied troops, and also a separate infusion of tens of thousands of U.S. troops.

The United States also uses unmanned aircrafts (often referred to as drones) in Afghanistan. Analysts at the Council on Foreign Relations, a New York-based public policy group, say that drones such as the Raven provide aerial surveillance while much larger ones, including the Reaper and Predator, can fly for nearly 24 hours and launch precise missile strikes against specific targets. (This is in contrast to, say, large aerial bombers which drop explosives over a much wider area.)

The United States presently keeps so-called “targeted kill lists” of suspected terrorists who have been marked for immediate death, say observers. After receiving the latest intelligence, the United States would send a drone to a particular location to carry out a missile strike against individuals (including American citizens) on those lists. Under current policies, analysts say that the United States does not notify individuals who are placed on targeted kill lists.

Both the Department of Defense and the Central Intelligence Agency (or CIA) operate their own drone programs, according to various sources. But, according to reporting from *U.S. News & World Report*, “intelligence officials neither admit nor deny even the existence of the CIA drone offensive,” which is operated directly from CIA headquarters in Langley, Virginia.

Because of national security concerns, the United States does not publicize information such as official statistics on drone strikes and the criteria it uses to carry them out. But according to the online *Long War Journal*, the number of drone attacks in Afghanistan and the neighboring nation of Pakistan (where



militants usually retreat) has increased in recent years. It recorded 53 drone attacks in 2009 and over 100 in 2010. The Council on Foreign Relations says that, since 2009, drones have fired at least 184 missiles and 66 laser-guided bombs at militant suspects in Afghanistan.

Observers believe that the use of drones has been successful in killing over a dozen top members of Al-Qaeda and the Taliban, including Mustafa Abu al-Yazid – a founding member of Al-Qaeda who was killed by an American drone strike in May 2010 – and also hundreds of Taliban and Al-Qaeda fighters. During a recent military briefing reported by *Dawn* (which the *New York Times* describes as “Pakistan’s leading English-language daily”), a Pakistani general said that 164 drone strikes carried out between 2007 and 2011 had killed 964 militants. In an interview in the *Washington Times*, Pakistani officials said that the drone operations have been “extremely useful in eliminating the bad guys.”

While many are touting the apparent success of drone strikes in eliminating Al-Qaeda and Taliban fighters, others note that they have also killed hundreds of bystanders in both Afghanistan and Pakistan. Citing government sources, *Dawn* claimed that drone attacks had killed over 700 civilians. As these casualties began to mount, mass protests had broken out in many part of the Arab world against the use of drones.

Supporters: Targeting foreigners and U.S. citizens in and out of combat zones

The use of drone attacks to combat international terrorism has sparked a wide debate on whether it is legal to do so. Supporters have argued that – under existing international agreements and even domestic law – it is legal to carry out such attacks in actual combat zones against both foreigners and U.S. citizens. For example:

Self-defense under the UN Charter: The United States has argued that using targeted killings is one means of self-defense in the ongoing armed conflict against Al-Qaeda and the Taliban.

Al-Qaeda had attacked the United States on September 11, 2001, and the nation had no choice but to defend itself by targeting those who had carried out the attacks in the first place. Officials point out that the *UN Charter* allows a nation to defend itself against armed attacks. “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense,” states Article 51. And, in their assessment, using targeted killings in war zones is one means of self-defense. According to a U.S. official: “Al-Qaeda had not abandoned its intent to attack the United States, and, indeed, continues to attack us.”

Officials have also argued that, under their interpretation of Article 51, the United States does not have to wait until another terrorist attack is actually underway before taking

efforts to defend itself. Under a principle generally known as “anticipatory self-defense,” they say that a nation may begin to defend itself when an attack is inevitable and imminent.

The laws of war: Proponents have also justified targeted killings within combat zones by citing various provisions from what are broadly known as the “laws of war.” Contrary to popular belief, the laws of war do not regulate when states may begin to *engage* in armed conflict. Instead, once a nation decides to engage in armed conflict, the laws of war are those treaties – close to 100 today, according to the International Committee of the Red Cross – which regulate how it and other parties carry out the *actual conduct* of warfare such as deciding what areas to target and how to treat prisoners-of-war and civilians.

In a May 2010 speech to the American Society of International Law (known as ASIL, a Washington, D.C.-based non-profit educational group), the State Department’s top legal adviser (Harold Koh) argued that U.S. drone attacks complied with the laws of war. “As a matter of international law,” he said, “the United States is in an armed conflict with Al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks . . .” Koh added: “U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.” Specifically, he argued:

- Targeted killings through the use of drones complied with the 1977 *Protocol Additional to the Geneva Conventions* (otherwise known as Protocol I). For instance, under a principle called *distinction* in Article 51 of Protocol I, parties to an armed conflict must distinguish between civilian and military targets during their attacks. The drone program followed this principle by targeting only Taliban and Al-Qaeda fighters, argued Koh. Under another principle known as *proportionality* (in Article 57), parties to an armed conflict must call off an attack if the incidental loss of life or property far exceeds any military advantage gained by the attack. Koh said that carrying out precise drone strikes can ensure that “civilian casualties are minimized.”

- The laws of war do not specifically prohibit targeted killings using drone technology to carry out attacks. “The rules that govern targeting do not turn on the type of weapon used,” said Koh. In contrast, several treaties explicitly prohibit the use of certain weapons, including biological and chemical weapons.

- Targeted killings do not violate the due process rights of targeted individuals because “a state that is engaged in an armed conflict . . . is not required to provide targets with legal process before the state may use lethal force.” As an example, Koh said that, during World War II, the United States had tracked the airplane carrying “the architect of the Japanese attack on Pearl Harbor,” and then



shot it down, all without notifying the intended target of its attack. He added that “our procedures and practices for identifying lawful targets are extremely robust,” but did not give any further details.

Authorization under domestic law: Others note that, shortly after the terrorist attacks in September 2001, the U.S. Congress passed a joint resolution called the *Authorization for Use of Military Force* (or AUMF) which gave permission to the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that

Opposition based on international law: Opponents largely agree that the United States may use targeted killings against enemies (both foreigners and American citizens) in actual combat zones as long as they complied with, say, the laws of war.

But they argue that a nation’s decision to use preemptive force to defend itself before an actual attack must satisfy other criteria set out in a letter from U.S. Secretary of State Daniel Webster in 1841 to the British ambassador concerning an incident where British forces had preemptively attacked and destroyed a private American vessel (called the *Caroline*) which they say was carrying weapons to anti-British rebels in Canada, according to historical

Many have justified the use of targeted killings (even against Americans who join enemy forces) in actual combat zones. But there is a contentious debate on whether the United States may carry out such attacks in areas which are not combat zones and where suspected terrorists may not be actively engaged in hostilities.

occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States.” This resolution, argued officials, had given very broad authority to the President to carry out military operations against Al-Qaeda and other terrorist groups, including the use of targeted attacks in combat zones.

Targeted killing outside combat zones? While many have justified the use of targeted killings in actual combat zones, policy makers and critics are contentiously debating whether the United States may carry out such attacks in areas which are not combat zones and where suspected terrorists may not be actively engaged in hostilities. Media reports say that the United States has carried out drone attacks against suspected terrorists operating in Somalia and Yemen, which are generally not considered war zones.

During his speech to ASIL, Koh implied that the United States may carry out targeted killings against terrorists outside of war zones. “Whether a particular individual will be targeted in a particular location,” he said, “will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses.” But Koh didn’t provide any further information. He also did not comment on the CIA’s secret targeted killing program.

But other proponents have broadly cited the AUMF and also Article 51 of the *UN Charter* to justify the use of targeted killings outside of combat zones. But neither source explicitly addresses whether a nation may carry out targeted attacks in non-combat zones and where suspected terrorists are not actively engaged in hostilities.

Opponents: Targeting foreigners and U.S. citizens outside of combat zones

Just as supporters have vigorously defended the use of targeted killings against both foreigners and U.S. citizens, opponents have rebutted their justifications with arguments of their own. Some include the following:

background from Professor Neta Crawford of Brown University.

For a preemptive strike to be legitimate, Webster said that British forces had to show that an attack against them was imminent (“leaving no choice of means, and no moment for deliberation”), and that all other measures were “impracticable” and “unavailing.” Even though the criteria set out in the *Caroline* incident are not formally codified in any international treaty, many nations have accepted them as a custom which they expect others to follow, say legal scholars. Without such restrictions, they argue, nations could use preemptive strikes as an excuse to attack adversaries for political reasons.

Applied in the case of targeting killings outside of war zones, critics such as the American Civil Liberties Union (or ACLU) and the Center for Constitutional Rights (or CCR, a New York-based non-profit legal organization) have argued that nations do not face imminent threats from the targeted individuals. “A policy under which individuals are added to kill lists,” said the CCR, “. . . and left on the lists for months at a time, is plainly not limited to the use of lethal force as a last resort to address imminent threats, and goes far beyond what the Constitution and international law permit,” though they don’t cite any specific treaties to support this claim. Instead, these groups have relied on the criteria set out in the *Caroline* case, arguing that the only time a nation may use lethal force outside a combat zone is to prevent imminent attacks *and* when non-lethal means are unavailable to stop them.

Civil rights organizations have also argued that the AUMF (which, again, gave permission to the President to use “all necessary and appropriate force” against those entities involved in the September 11 terrorist attacks) should be construed more narrowly. “The AUMF may be broad, but the authority it granted was not limitless, and it cannot now be construed to have silently overridden the limits prescribed by international law,” argued the ACLU, though that group also did not cite specific treaties to support its claim.

In June 2010, an independent UN human rights expert – Philip Alston (who is also a professor at NYU Law School) – presented a report (A/HRC/14/24/Add.6) which criticized the

U.S. targeted killing program. For example, in an interview with the *UN News Service*, Alston said that while targeted killings may be lawful “in armed conflict situations when used against combatants or fighters, or civilians who directly engage in combat-like activities,” his report concluded that “outside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal.” Why? The use of targeted killings

speedy trial, and then allow the individual to appeal a conviction.

In the case of a targeted killing in a non-combat zone, critics believe that – under the Fifth Amendment – the government must provide a person with due process by explaining why it had placed him on a targeted kill list and also by revealing the criteria it had used to make such a significant decision so that people will know what kind of conduct may lead to their execution.

In the case of a targeted killing in a non-combat zone, critics believe that the government must provide the targeted person with due process by explaining why it had placed him on a kill list and also by revealing the criteria it had used to make such a significant decision.

outside of combat areas, said the report, would not likely involve situations where the United States had to defend itself from an imminent threat. (Again, many U.S. officials have justified the use of targeted killings as a means of self-defense against an imminent threat.)

And allowing the United States to justify their use of targeted killings in non-combat zones as a means of self-defense would “cause chaos,” said Alston, because other nations would also invoke the U.S. rationale “in pursuit of those they deem to be terrorists and to have attacked them.” In response, a U.S. official said: “The United States has an inherent right to protect itself and will not refrain from doing so based on someone else’s exceptionally narrow – if not faulty – definition of self-defense.”

In addition, the Alston report specifically called on the United States to halt the CIA’s secret drone program because, in its assessment, that program lacked accountability. “Because this programme remains shrouded in official secrecy, the international community does not know when and where the CIA is authorized to kill, the criteria for individuals who may be killed, how it ensures killings are legal, and to what follow-up there is when civilians are illegally killed,” said Alston. (Still, one analyst noted that the report did not say that the CIA drone program was illegal.)

In contrast, he said that targeted killings carried out by the Department of Defense’s drone program are subject to some public review, noting that it had punished several officers who had coordinated a targeted killing in 2010 which had killed as many as 23 innocent bystanders in Afghanistan.

Opposition based on domestic law: Critics argue that carrying out targeted killings in non-combat areas violates several provisions in the U.S. Constitution, which they say generally protects rights of Americans outside of the United States and also places limits on what the government can do abroad against those Americans.

For example, the Fifth Amendment to the Constitution states that “no person shall be . . . deprived of life, liberty, or property without due process of law . . .” Under the concept of due process, the government must follow an established set of legal procedures (i.e., a certain process) before it takes the serious action of depriving a person of life, liberty, or property. For instance, before the government imprisons a person, it must tell that individual why he is being charged with a certain offense, carry out a fair and

(Because depriving a person of his life is irrevocable, governments must ensure that innocent people are not put to death, say legal observers.) Civil rights organizations argue that the current process in targeting an individual in a non-combat area violates due process because the government carries out that process completely in secret. The targeted individual may never learn that he had been targeted for death and, therefore, has no ability to challenge such a decision in a court.

Critics also say that carrying out targeting killings in non-combat zones violates the Fourth Amendment, which states that the government will not violate a person’s right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” And if the government wants to search or seize a person, it must get a warrant from a court based on probable cause.

Carrying out a targeted killing in a non-combat area violates the Fourth Amendment, argue some analysts, because such actions represent an unreasonable and excessive use of force in seizing a terrorist suspect (especially if he is not actively engaged in hostilities), and are carried out without a warrant issued by a court based on probable cause. Just as law enforcement officials wouldn’t fire a missile (as its first and only option) to apprehend a dangerous and wanted criminal within American borders, the U.S. government shouldn’t resort to a targeted killing as its very first option in stopping a suspected terrorist in a non-combat zone if other options are readily available to stop and capture him.

The first targeted killing of a U.S. citizen in a non-combat zone

In 2002, the United States carried out what many analysts believed to be the first targeted killing of a U.S. citizen during the war on terror in a non-combat zone. Kamal Derwish, an alleged fundamentalist Muslim born in New York state, recruited six other American citizens in the city of Lackawanna (near Buffalo) to be part of an Al-Qaeda sleeper cell in the United States, according to a profile by James Sandler, a field producer for *New York Times Television*. (Intelligence analysts say that, during the 1990s, Derwish had fought with Muslims in Bosnia, and that Saudi Arabia had deported him in 1997 for “alleged extremist activities.”)

During the spring of 2001, they traveled to Afghanistan to receive weapons training in an Al-Qaeda terrorist camp. After receiving an anonymous tip, agents from the Federal Bureau of

Investigation arrested the six recruits (but not Derwish) who all pleaded guilty in 2003 to “knowingly providing or conspiring to provide material support to a foreign terrorist organization,” and received prison sentences ranging from seven to 10 years. In November 2002, a CIA Predator drone in Yemen tracked and then fired a missile at a car carrying Derwish and suspected members of Al-Qaeda, killing everyone on board.

The targeted killing of Derwish had sparked an initial debate on whether the federal government may legally kill American citizens accused of aiding terrorists outside of the United States in non-combat areas.

At the time of his death in Yemen (which many analysts don't consider a combat zone), some observers believe that Derwish was not about to carry out a terrorist attack. They also say that the United States had never charged Derwish with a crime or asked a court for a warrant for his arrest. Some have speculated that Derwish did not even know that the U.S. government had targeted him for death. (According to several media accounts, an informant working for the United States had lured Derwish into the missile attack.)

In the wake of Derwish's killing, critics raised several objections. First, they noted that the government did not cite a specific law or a provision in the Constitution which allowed it to target American citizens in non-combat areas. Condoleezza Rice (the then-Secretary of State) described the killing of Derwish as “well within the bounds of accepted practice and the letter of [the President's] constitutional authority” in a television interview with *CBS News*. “I can assure you that no constitutional questions are raised here,” she claimed. “There are authorities that the president can give to officials.” (According to press reports from the *Washington Post*, the Bush administration had issued a secret finding in 2002 allowing the United States “to kill U.S. citizens abroad if strong evidence existed that an American was involved in organizing or carrying out terrorist actions against the United States or U.S. interests,” even if that American was located outside of a combat zone. The 2002 finding remains secret today.)

Second, legal observers said that the CIA and Pentagon did not reveal the exact process or criteria they had used to place a U.S. citizen on a targeted kill list. According to congressional testimony in February 2010 given by Dennis C. Blair, the Director of National Intelligence, officials consider “whether that

whether to place an American on a kill list nor how it evaluates such evidence. Fourth, analysts say that they are unsure whether any safeguards exist to prevent the government from mistakenly placing an innocent person on a target list.

Still, the government says that the process to place a U.S. citizen on a kill list requires additional precautions, though the exact process remains secret. “If we think that direct action [against terrorists] will involve killing an American, we get specific permission to do that,” said Dennis Blair. *Newsweek* added that “targeting an American must be first approved by a secret committee made up of senior intelligence officials and members of the president's cabinet,” and that “the president himself does not have to sign off on kill orders.”

Taken together as a whole, groups such as the ACLU have criticized this entire process by saying that U.S. citizens and others are placed on kill lists “on the basis of a secret determination, based on secret evidence, that a person meets a secret definition of threat.”

Despite these criticisms, the American public did not engage in a fierce debate concerning the legality of targeting a U.S. citizen for death in a non-combat zone. One observer pointed out that the September 11 terrorist attacks had occurred only 14 months earlier, and that there was probably little public sympathy for anyone assisting the very terrorist group which had carried out the attacks. Also, the United States did not publicly target other U.S. citizens or even aggressively carry out its drone program yet.

A second U.S. citizen targeted for death in a non-combat zone

But the tenor of this debate quickly changed around 2007 when the United States carried out many more targeted killings in Afghanistan and Pakistan, and also suggested that it was targeting Americans in other parts of the world. According to reporting by the *Washington Post*, the Joint Special Operations Command presently maintains a list of people whom it is trying to capture or kill. That list includes at least three American citizens. One individual who is allegedly on the list – U.S.-born Muslim cleric Anwar al-Aulaqi – received significant media attention in the past few months.

Various reports and court filings say that al-Aulaqi was born in 1971 in New Mexico (where his father attended graduate school before becoming the agricultural minister of Yemen), and had lived in the United States for “much of his early life” before

The first targeted killing of a U.S. citizen during the war on terror was carried out in 2002 against Kamal Derwish whom many believe was not about to carry out a terrorist attack. They also say that the United States had never charged Derwish with a crime or asked a court for a warrant for his arrest.

American is involved in a group that is trying to attack us, [and] whether that American is a threat to other Americans,” but did not provide more details. In an interview in the *Washington Post*, a former intelligence official stated that the person has to pose “a continuing and imminent threat to U.S. persons and interests.”

Third, critics say that the government has neither provided clear information on the kinds of evidence it uses to determine

returning to Yemen with his family. He later attended Colorado State University and pursued graduate studies at San Diego State University. A dual U.S.-Yemen citizen, al-Aulaqi then returned to Yemen.

According to the U.S. Treasury Department, al-Aulaqi had been providing a group called Al-Qaeda in the Arabian Peninsula with “financial, material, or technological support for . . . terrorism”

since 2009. Officials have also accused him of helping or inspiring others to carry out terrorist attacks against the United States. For example, he had allegedly:

- Given “instructions” to Umar Farouk Abdulmutallab – the Nigerian citizen who became known as the “Underwear Bomber” – to blow up an American airliner carrying 289 people from Amsterdam to Detroit on Christmas Day 2009 by hiding explosives in his underwear.
- Exchanged around 18 e-mail messages with Nidal Malik Hasan, a U.S. Army major whom prosecutors say had shot and killed 13 people at Ford Hood, Texas, in November 2009. Several reports say that officials knew that Hasan had communicated with al-Aulaqi, but failed to take any action.
- Inspired a naturalized U.S. citizen, Faisal Shahzad, to carry out a car bombing in Times Square (New York) in May 2010. The attack was unsuccessful, and Shahzad was sentenced to life in prison.

Despite these allegations, the United States has not formally charged al-Aulaqi with any crimes or described the extent to which he was allegedly involved in these terrorist plots. (On the other hand, the government of Yemen – under pressure from Washington – announced in November 2010 that it would try al-Aulaqi in absentia for “forming an armed group to carry out criminal acts targeting foreigners.” Analysts believe that he is currently hiding in Yemen.) Al-Aulaqi has neither confirmed nor denied his alleged roles in these various plots.

To date, the United States has not publicly stated whether al-Aulaqi was on a targeted kill list. (In fact, no high-ranking official has publicly confirmed whether the U.S. government had ever approved specific orders to kill specific people, according to the *Associated Press*.) Instead, unidentified officials have told various media outlets that the federal government has targeted and continues to target al-Aulaqi. In fact, in July 2010, *National Public Radio* reported that the United States had unsuccessfully carried out “almost a dozen” drone attacks against him.

As in the case of Kamal Derwish, the United States government itself did not cite any specific regulations or statutes to justify its alleged targeting of al-Aulaqi. It also did not reveal the criteria used to place him on the list, and also did not say how it evaluated

evidence against him. (Anonymous officials generally argue that the United States had a right to defend itself against those planning or carrying out terrorist attacks.) Still, the *Associated Press* reported that the U.S. government had placed al-Aulaqi on its targeted kill list in early 2010.

Lawsuit to stop the targeted killing of Anwar al-Aulaqi

With assistance from the ACLU and CCR, Anwar al-Aulaqi’s father (Nasser al-Aulaqi) filed a lawsuit in U.S. District Court for the District of Columbia in August 2010, saying that it was illegal for the federal government to carry out the targeted killing of his son outside of a combat zone.

The plaintiff’s arguments: First, the plaintiff argued that treaty and customary international law prohibited nations from killing any individual (regardless of their citizenship) outside of combat areas without judicial process unless that person presented “a concrete, specific, and imminent threat to life or physical safety,” and also when no alternative means were available to deal with him.

Human rights groups say that treaties such as the *UN Convention Against Torture* implicitly prohibit what they call “extrajudicial killings” (which are executions carried outside of any judicial process), and that a targeted killing is one form of an extrajudicial killing. But the plaintiff did not cite that treaty (or others) in his brief.

Second, the plaintiff argued that targeted killings outside of combat zones violated both the Fourth and Fifth Amendments. Under the Fourth Amendment, using a targeted killing in a non-combat area to stop and capture Anwar al-Aulaqi would violate his right to be free from unreasonable seizures. The plaintiff claimed that his son did not present an imminent threat, and that the government could use non-lethal means to stop and capture him.

Under the Fifth Amendment, carrying out a targeted killing in a non-combat area would violate Anwar al-Aulaqi’s right not to be deprived of life without due process. Pointing out that the U.S. government has a secret process to place U.S. citizens on its kill lists, the plaintiff argued that “U.S. citizens [including al-Aulaqi] have a right to know what conduct may subject them to execution at the hands of their government.” Analysts note that the United States has not charged al-Aulaqi with any crimes, and that it did not tell him that he is presently on a kill list.

Third, the plaintiff filed suit under the Alien Tort Claims Act (also known as the Alien Tort Statute or ATS), a federal statute which allows only a foreign plaintiff – and not U.S. citizens – to sue a defendant in an American court for a tort (i.e., a wrongful act leading to an actual injury) that is widely accepted by the global community as violating international law. Some of these acts include genocide, murder, slavery, and torture. In this particular case, the plaintiff argued that international law prohibited extrajudicial killings.

On a separate matter, the plaintiff argued that he had “standing” (i.e., the legal right) to sue on behalf of his son. Legal analysts say that, in order to establish standing in a lawsuit, a person must show that he had personally suffered or will imminently suffer an actual and concrete injury which can be traced to the defendant’s alleged illegal actions. (A person cannot file a lawsuit on hypothetical injuries or cases where there are no actual controversies.)

In this case, the plaintiff did not argue that he himself would suffer an actual injury simply because the government had placed



his son on a targeted kill list. Instead, he noted that courts have allowed limited exceptions where another person (called a “next friend”) may litigate on behalf of a person who personally suffered or will suffer an injury, but cannot come to court to seek redress. But, according to various court decisions, that “next friend” must be a person with a “significant relationship with the real party” and be “truly dedicated to [his] best interests.” A “next friend” must also provide an “adequate explanation” on why the injured party cannot appear in court on his own behalf.

Applied to this case, the plaintiff pointed out that he was the actual father of the targeted individual, and argued that “taking legal action to stop the United States from killing [his] son [was] in his [son’s] best interests.” He also claimed that his son was personally unable to challenge his targeted killing in a U.S. court because the federal government had already decided to kill his son upon sight. The government, argued the plaintiff, will kill his son “without regard to whether, at the time lethal force will be

matter which the Constitution leaves to the Executive branch and not the judiciary. “Specific decisions regarding the use of force frequently must be made in the midst of crisis situations that can arise at any time, and that involve the delicate balancing of short- and long-term security, foreign policy, and intelligence equities,” argued the government. “The Judiciary is simply not equipped to manage” these various functions.

Third, the government invoked a doctrine called the “state secrets privilege” under which the government may – with the permission of a court – block access to what it believes to be secret information which, “if disclosed [say, in court proceedings] would adversely affect national security.” In this specific case, the “disclosure of whether or not lethal force has been authorized to combat a terrorist organization overseas, and, if so, the specific targets of such action and any criteria and procedures used to determine whether or not to take action” would allow terrorists to alter their plans and alert others, thus harming national security.

The father of an American citizen presently targeted for death by the U.S. government had called on a district court to prohibit the United States from killing his son and declare that the government may not carry out targeted killings outside of combat zones unless the targeted individual presents an imminent threat to life.

used, he presents a concrete, specific, and imminent threat to life, or whether there are reasonable means short of lethal force that could be used to address any such threat.”

The plaintiff called on the district court to prohibit the United States from targeting and killing his son, declare that the federal government may not carry out targeted killings outside of combat zones unless the targeted individual presents an imminent threat to life, and called on the government to release criteria to the public on how and under what circumstances it places U.S. citizens and others on targeted kill lists.

The government’s response: The government called on the court to dismiss the plaintiff’s lawsuit without resolving issues such as whether it can target Americans for death without, for example, providing them with due process. First, it argued that the court did not have jurisdiction (i.e., the legal authority) to review the case because the plaintiff did not even have the right to sue on his son’s behalf. (In other words, he lacked standing.) Contrary to claims by his father, the government argued that Anwar al-Aulaqi did have access to U.S. courts to challenge the government’s decision to target him for death. “[I]f Anwar al-Aulaqi were to surrender or otherwise present himself to the proper authorities in a peaceful and appropriate manner,” then it would not use lethal force against him, said the government.

Second, the government argued that deciding whether and when to use force (such as targeting adversaries in a foreign military campaign) was a policy issue requiring the expertise of Executive branch agencies and Congress in matters of national security and diplomacy. A concept known as the “political question doctrine” says that courts should address only issues and controversies which can be resolved through the application of the law and previous court rulings. So the decision on whether to target certain enemies for death, among other policy choices, is a

To prevent the disclosure of state secrets which could harm national security, the court must dismiss the case in its entirety, argued the government.

How did the court decide the al-Aulaqi case?

In December 2010, Judge John Bates of the district court dismissed the case without ruling on important questions such as whether the United States may legally target Americans for death in non-combat areas.

This case, said the judge, presented “stark” and “perplexing” questions. For example, he asked: “How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to defendants, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?” Other questions included: “Can the Executive order the assassination of a U.S. citizen without first affording him any form of judicial process whatsoever, based on the mere assertion that he is a dangerous member of a terrorist organization?”

Still, “no matter how interesting and no matter how important this case may be,” Judge Bates said that “the serious issues regarding the merits of the alleged authorization of the targeted killing of a U.S. citizen overseas must await another day or another (non-judicial) forum” due to the following reasons.

Failure to show standing: The judge said that the plaintiff had failed to show “next friend” standing to sue on his son’s behalf. The plaintiff did not, for instance, provide “an adequate explanation for his son’s inability to appear on his own behalf,” decided the judge. He said that there was “nothing preventing [Anwar al-Aulaqi] from peacefully presenting himself at the U.S. Embassy in Yemen,” and that the U.S. government had already made clear that it would not use lethal force if he surrendered peacefully.

“All U.S. citizens may avail themselves of the U.S. judicial system if they present themselves peacefully, and no U.S. citizen may simultaneously avail himself of the U.S. judicial system and evade U.S. law enforcement authorities,” stated the decision. “Anwar al-Aulaqi is thus faced with the same choice presented to all U.S. citizens.”

The plaintiff also failed to show that he was acting in his

federal courts could be flooded with ATS suits from persons across the globe who alleged that they were somehow placed in fear of danger as a result of contemplated government action,” wrote Judge Bates.

He also pointed out that the plaintiff cannot sue under the ATS because the plaintiff himself did not suffer any actual injuries, and that the person on whose behalf he had brought suit was an

In December 2010, a judge dismissed a case on the targeted killing of a U.S. citizen, but asked: “How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that . . . judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?”

son’s best interests, concluded the judge, who said that a “next friend” must provide (in addition to the previous criterion) “some evidence that he is acting in accordance with the *intentions or wishes* of the real party in interest.” In other words, the plaintiff had to show that al-Aulaqi did, indeed, want to defend his rights in a U.S. court, and that the plaintiff was following that wish.

But the judge pointed out that the plaintiff could not know whether Anwar al-Aulaqi truly wanted to access a U.S. court because the plaintiff had not communicated with his son since the alleged placement on a targeted kill list. Also, while the plaintiff claimed that his son couldn’t contact with him without endangering his life, the judge noted that Anwar al-Aulaqi had made numerous public statements and had posted many Internet videos which not only undermined such a claim, but also strongly suggested that he did not want to challenge his alleged placement on a targeting killing list in a U.S. court.

Al-Aulaqi had, for example, publicly called for “jihad against the West,” urged Muslims to respond to American aggression not with “pigeons and olive branches” but with “bullets and bombs,” wrote in a terrorist publication that Muslims “should not be forced to accept rulings of courts of law that are contrary to the law of Allah,” and stated that “[i]f the Americans want me, [they can] come look for me.” These and other statements, reasoned the judge, “do not reflect the views of an individual who would likely want to sue to vindicate his U.S. constitutional rights in U.S. courts,” and also “provides further evidence that [al-Aulaqi] has no intention of making himself the subject of litigation in U.S. courts.”

Failure to state a claim under the ATS: Judge Bates dismissed the claim brought under the ATS. While noting that the world community did recognize an international norm against state-sponsored extrajudicial killings which could be considered as a basis for a claim under the ATS, Judge Bates said that the no court had ever ruled that a “threatened future extrajudicial killing” could be considered a tort in violation of international law, and that doing so could lead to unintended consequences for the judicial system.

“If this Court were to conclude that alleged government threats – no matter how plausible or severe they may be – constitute international torts committed in violation of the law of nations,

American citizen. (Again, a foreigner may file a lawsuit under the ATS only for an actual injury. Also, the plaintiff in this case had filed a claim on behalf of a U.S. citizen, who are not allowed to file claims under the ATS.)

The political question doctrine: The court also dismissed the case under the political question doctrine. It agreed with the government’s argument that the plaintiff wanted the court itself to resolve policy questions – such as determining the actual threat posed by Anwar al-Aulaqi, deciding how to address that threat, and then assessing diplomatic considerations – which cannot be addressed through the application of laws and regulations.

“Viewed through these prisms,” said Judge Bates, “it becomes clear that plaintiff’s claims pose precisely the types of complex policy questions that the D.C. Circuit has historically held non-justiciable under the political question doctrine.”

State secrets privilege: After concluding that the plaintiff did not have standing to sue on his son’s behalf and that he also wanted the court to resolve policy matters best left to the Executive branch, Judge Bates decided not to address whether the government may invoke the state secrets privilege in asking the court to dismiss the case. He said: “Under the circumstances, and particularly given both the extraordinary nature of this case and the other clear grounds for resolving it, the Court will not reach defendants’ state secrets privilege claim.”

The status of targeted killings against U.S. citizens

In February 2011, the ACLU and CCR released a statement saying that they had decided not to appeal Judge Bates’ decision to dismiss Nasser al-Aulaqi’s case. The groups did not provide any particular reason, but stated that the “Executive’s claimed right to act as prosecutor, judge, and executioner dangerously undermines the rule of law and the protection of human rights here and abroad,” and that they would “continue to press the administration to be transparent about its policy of targeted killing outside of war zones, and to constrain its actions according to the Constitution and international law.”

In the meantime, political analysts note that the United States continues its targeted killing program against terrorists, and they assume that Anwar al-Aulaqi and other Americans are still targeted for death. 

Same-sex marriage around the world: Overview and status of debate

In recent years, more and more nations have been legalizing same-sex marriage. Many others which don't allow same-sex marriage have passed laws which provide same-sex couples with benefits and rights similar or identical to marriage. In the United States, several states and municipalities have legalized same-sex marriage or allow alternatives to marriage (such as civil unions) which are similar to traditional marriage. Still, most nations around the world – and a majority of jurisdictions within the United States – either prohibit same-sex marriage or don't have explicit provisions which legally recognize such a relationship.

These developments have sparked a rancorous and continuing debate on whether nations have a legal obligation to legalize same-sex marriage under domestic and even international law. While many say that prohibitions on same-sex marriage are an illegal form of discrimination which violates important principles such as equal protection of the law, others respond that marriage has been long reserved for opposite-sex couples, and that there is no consensus among nations to allow same-sex marriage.

What are some of the benefits and rights of marriage? What exactly are marriage alternatives such as civil unions? Under what basis have various states and countries legalized same-sex marriage? Are there provisions in certain international treaties which address this issue? How have global organizations such as the United Nations and international courts addressed same-sex marriage? And what is the status of the debate today?

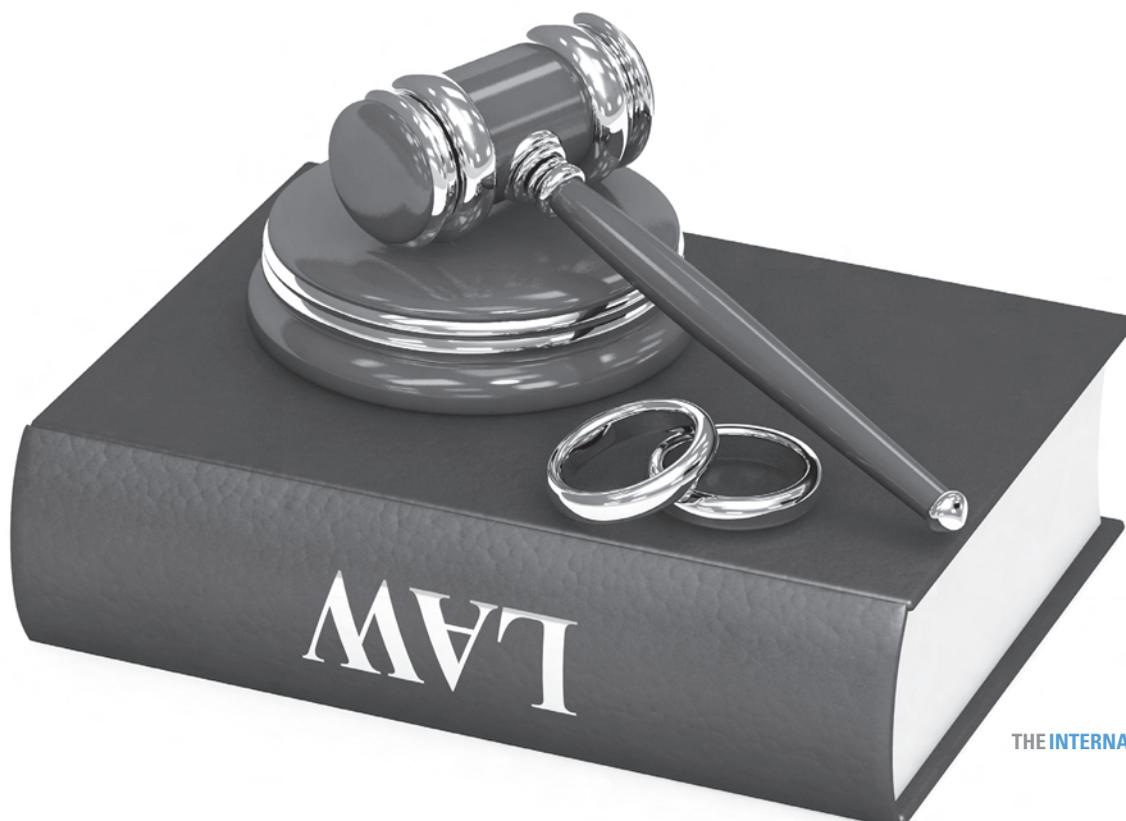
Traditional and common law marriage in the United States

Marriage is one of the longest-standing social institutions in the world where two individuals make a public commitment to live with and support one another in a usually monogamous and long-term relationship. Every country around the world has established both formal and informal legal frameworks to regulate marriage and also provide married couples with a wide range of rights, benefits, and obligations – all of which vary across different countries but share many similarities.

Many people say that the primary purpose of marriage is to encourage and provide stability to such committed relationships, and also to provide a social environment which they believe will best encourage the procreation and upbringing of children, among other purposes. Two types of marriage are prevalent in the United States.

Traditional marriage: In the United States, federal law does not broadly oversee marriage. Legal observers point out that the U.S. Constitution does not explicitly give the power to regulate marriage to the federal government. (In fact, it does not even mention the term “marriage.”) Instead, individual states regulate nearly every aspect of marriage within their respective jurisdictions in a way which they believe reflect their standards for that social institution.

Individual states have, for example, established specific eligibility requirements for people who want to get married. They include the following requirements:



- In most states, “18 is the age for marriage without parental consent,” according to legal analyst Jeanine Elbaz, author of *Marriage & Its Alternatives*, published by TriBeCa Square Press at New York Law School.
- All states generally prohibit people from marrying other close family members and relatives such as parents marrying their children or uncles marrying their nieces, though some allow first cousins to marry.
- Every state requires that prospective spouses make a conscious decision to get married, and that their decision to do so is deliberate and unimpaired. Some states won’t allow, for example, people who are drunk or high on drugs to get married.
- All states prohibit bigamy where a lawfully-married person deliberately marries another person. In most states, the act of bigamy is a felony.
- Every state – with the exception of Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, and the District of Columbia – allows only individuals who are of the opposite sex to get married. A majority of states (39 out of 50) has, in fact, passed laws which ban same-sex marriage. So same-sex couples who are in committed relationships and reside in these 37 states cannot get married and, accordingly, cannot receive the rights and benefits of a traditional marriage.

Individual states and the federal government have also passed laws which create extensive rights and grant enormous benefits to people based on their marital status (meaning whether a person is currently married, not married, or had been married). For example:

- A 2004 report issued by the U.S. General Accountability Office (or GAO) “identified a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits,



rights, and privileges.” Married couples may, for instance, take larger tax deductions, and widows of armed service members killed in the line of duty receive monthly benefits. On the other hand, unmarried people are not entitled to these federal benefits.

- If an incapacitated spouse is unable to make a medical decision (he may, for instance, be in a coma), state laws generally give legal authority to the other spouse to make decisions on his behalf. Unmarried partners usually can’t make such decisions.
- In many states, a spouse may sue another party for the wrongful death of a deceased spouse. In contrast, many states don’t allow non-spouses to file such suits.
- State and federal rules of evidence generally recognize the right of a spouse to invoke “spousal testimonial privilege” in refusing to testify against a defendant spouse.

Common-law marriage: In addition to traditional marriages, some states recognize what is called “common-law marriage.” In this arrangement, a couple may not have followed a particular state’s requirements in getting married such as getting a license. But a state still views these individuals as married because of their “conduct,” according to the National Conference of State Legislatures – they live with each other, present themselves as spouses, and would have been eligible for a traditional marriage under that state’s marriage laws. Common-law marriages are, in fact, “legally valid only if each person is eligible to marry under the marital state’s marriage laws,” according to Jeanine Elbaz.

Observers say that the federal government and states bestow the same rights and benefits of traditional marriages onto common law marriages, though there are restrictions involving estate issues and spousal support, among other matters, which vary across states. Also, while only nine states and the District of Columbia allow common-law marriages, legal experts say that – under the “Full Faith and Credit Clause” of the U.S. Constitution – even those states which do not allow common-law marriages must legally recognize those which are valid in other states. (This clause, located in Article IV, Section 1, calls on all states to recognize “the public acts, records, and judicial proceedings of every other state.”)

Legal experts say that same-sex couples cannot pursue common-law marriage as an alternative to traditional marriage. Nearly all of the states which allow common-law marriage have banned same-sex marriage, they point out. Also, Jeanine Elbaz notes that the Full Faith and Credit Clause “protects common-law marriages of opposite-sex couples only.”

Alternatives to marriage in the United States

While millions of people in the United States get married every year, many other couples (for various reasons) cannot or choose not to marry, but are still committed to living with and supporting one other in a long-term monogamous relationship. Many states and various municipalities have created what have been described broadly as “marriage alternatives” which grant limited legal benefits and protections to these couples. For instance:

Domestic partnerships: As of June 2011, nine states (California, Hawaii, Maine, Maryland, Nevada, New Jersey, Oregon, Wisconsin, and Washington) and the District of Columbia offer

what is called a “domestic partnership,” which generally provides registered couples with certain tax and inheritance benefits, but limits the ability to make medical decisions for an incapacitated partner, among other restrictions. On the other hand, jurisdictions such as California and Oregon offer domestic partners the same benefits and rights of married couples.

Legal observers also point out that while most states do not offer domestic partnerships, individual cities and municipalities within some of these states do. For example, while the New York State government has not established domestic partnerships, the city of New York has done so for its residents. And some jurisdictions which have created domestic partnerships offer them to both opposite-sex and same-sex couples. Also, certain states (such as Nevada and New Jersey) may have banned sex-sex marriage, but they offer domestic partnerships to same-sex couples.

The federal government presently does not recognize domestic partnerships and, accordingly, does not grant federal benefits to couples in that particular relationship, according to the National Conference of State Legislatures and various legal observers.

Civil unions: In response to complaints from human rights groups along with growing societal acceptance of gays and lesbians in the United States, several states had passed laws which allowed same-sex couples to form what are called “civil unions,” a legal arrangement which provides them with the same benefits and legal protections given to opposite-sex married couples by those states. According to Jeanine Elbaz, “the civil union was created [by these states] to provide same-sex couples a legally recognized union parallel to marriage.” In fact, “the only difference between ‘civil union’ and ‘marriage’ on a state level is the name,” she said.

Civil unions are available only to same-sex and not heterosexual couples. Regulations also require that an authorized individual (such as a member of the clergy or government official) preside over a ceremony or legal act to make the civil union official and binding on the same-sex couple.

Connecticut, New Hampshire, and Vermont had once offered civil unions to same-sex couples, but later legalized same-sex marriage within their respective jurisdictions. (They then converted existing civil unions into marriages.) As of June 2011, Illinois and New Jersey are currently the only states which offer civil unions to same-sex couples. Neither state allows same-sex marriage.

Cohabitation: Individuals may simply decide to cohabit (i.e., live) with each other outside of any established legal framework. In this arrangement, two people simply move in with each other and don’t need any legal authorization to do so. If a couple later decides to end the relationship, they simply part ways.

According to the U.S. Bureau of the Census’ *Annual Social and Economic Supplement*, approximately 5.37 million unmarried adult couples of the opposite sex cohabited with each other in 2006. Experts also say that many same-sex couples cohabit with each other simply because most states prohibit same-sex marriage.

Legal analysts point out that cohabitation does not provide any of the benefits of traditional marriage, domestic partnerships, or civil unions. So individuals in a cohabitating relationship cannot, for instance, automatically inherit certain property if the other person dies. In fact, according to *Marriage & Its Alternatives*, “no state has enacted any legislation to specifically govern the rights and obligations of cohabitation.”

Same-sex marriage in the United States

As of June 2011, five states and the District of Columbia allow same-sex couples to get married (i.e., they issue marriage licenses) within their respective jurisdictions and grant them the same benefits, rights, and responsibilities given to heterosexual married couples. The courts of most of these states had ruled that prohibitions on same-sex marriage violated a doctrine called “equal protection of the law.”

According to this doctrine, when a government administers and enforces its laws on people in similar situations or circumstances, it must treat everyone alike. A government violates equal protection when it gives some individuals the right to engage in a certain activity while denying that same right to others based on factors such as a gender and race – unless there is a compelling public interest to do so, according to the Legal Information Institute at Cornell Law School.

In the case of same-sex marriage, many states had argued that their laws allowed heterosexual couples to get married (while excluding same-sex couples) because doing so furthered what they believed were important public policy goals. But, in their opinions, the courts ultimately decided there was no rational relationship between the same-sex marriage bans and the professed public policy interests of these states.

Vermont: In December 1999, the Vermont Supreme Court unanimously ruled (in *Baker v. Vermont*) that the state had violated its constitution when local town clerks denied marriage licenses to several same-sex couples.

Specifically, the court decided that Vermont had violated the constitution’s “Common Benefits Clause” (similar to an equal protection clause) because that state had failed to provide an “overriding public interest” in forbidding marriage for same-sex couples. It rejected, for instance, the state’s argument that limiting



marriage to opposite-sex couples would serve the government's interest in "furthering the link between procreation and child rearing," noting that many opposite-sex couples never intend or cannot have children, but that the law still "[extended] the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal."

same-sex marriage would advance its stated goal of preserving "the traditional definition of marriage as a union one man and one woman." While acknowledging that many people morally disapproved of homosexuality and held strong beliefs that marriage was reserved for heterosexual couples, the court held that "tradition alone never can provide sufficient cause" for

In the United States, five states and the District of Columbia allow same-sex couples to get married within their respective jurisdictions and grant them the same benefits, rights, and responsibilities given to heterosexual married couples.

After the court concluded that the plaintiffs were entitled to "obtain the same benefits and protections afforded by Vermont law to opposite-sex married couples," the Vermont legislature passed a law in April 2009 which legalized same-sex marriage and, subsequently, granted the benefits and rights of marriage to same-sex couples.

Massachusetts: In November 2003, the Massachusetts Supreme Judicial Court ruled (in *Goodridge v. Mass. Department of Public Health*) that the state had violated the equal protection rights of the plaintiffs (a lesbian couple who wanted to get – but were denied – a marriage license) by failing to show how a ban on same-sex marriage served legitimate public purposes. Among several arguments, the state claimed that restricting marriage to heterosexual couples advanced what it believed to be the primary purpose of marriage – to provide a "favorable setting for procreation."

But in its 4-3 decision, the court described this "marriage is procreation" argument as "incorrect," pointing out that the state's laws contained "no requirement that the applicants for a marriage license attest to their ability or intention to conceive children." Instead, the majority said that the essential element of marriage is "the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children." (Still, the majority did not say that same-sex marriage is a fundamental right.)

The law in Massachusetts now says that "the same laws and procedures that govern traditional marriage also apply to same-sex marriages," and that "there are no special procedures for a same-sex marriage."

Connecticut: In October 2008, the Connecticut Supreme Court (in *Kerrigan v. Commissioner of Public Health*) ruled in a 4-3 decision that Connecticut's ban on same-sex marriage violated the state constitution's guarantee of equal protection, and that gay people had a right under that state's constitution "to marry the otherwise qualified same sex partner of their choice."

During court proceedings, the state did not argue that the ban on same-sex marriage promoted heterosexual procreation or provided an optimal setting to raise children. Instead, the ban furthered the government's interest in maintaining uniformity with the marriage laws of most other states which prohibited same-sex marriage.

But the court said that the state "offered no reason" why this was an important goal, and that such a goal was not "sufficiently compelling to justify the discriminatory effect" on same-sex couples. It also rejected the state's argument that prohibiting

discrimination in violation of equal protection grounds, and that moral disapproval is "an inadequate reason for discriminating against a disfavored minority."

Ultimately, the court concluded that same-sex couples were "entitled to marry the otherwise qualified same sex partner of their choice." The court also ruled that allowing civil unions for same-sex couples in Connecticut while reserving marriage to heterosexual couples continued to violate the equal protection rights of the plaintiffs. "Although marriage and civil unions do embody the same legal rights under our law, they are by no means equal," said the court. "There is no doubt that civil unions enjoy a lesser status in our society than marriage."

In April 2009, Connecticut reformed its marriage laws to allow same-sex marriage and which also converted existing civil unions in Connecticut into marriages.

Iowa: In April 2009, the Iowa Supreme Court unanimously decided (in *Varnum v. Brien*) that a law which limited marriage to a man and a woman violated the equal protection clause of the state's constitution. In its ruling, the court said that it was "firmly convinced [that] the exclusion of gay and lesbian people from the institution of civil marriage [did] not substantially further any important governmental objectives."

It decided, for instance, that limiting marriage to opposite-sex couples did not substantially contribute to the government objective of creating an optimal environment to raise children. (The court noted that if Iowa truly wanted to create such a setting, it would have excluded other groups of potential parents from marriage, including child abusers and violent felons, and not just gay people.) The court also said that limiting marriage to opposite-sex couples did not promote the government's objective of promoting stability in opposite-sex relationships. In fact, "there was no evidence to support that excluding gay and lesbian people from civil marriage makes opposite-sex marriage more stable," said the court.

It called on Iowa to remove any language from its laws which limits marriage to a man and woman, and also to interpret and apply its laws "in a manner allowing gay and lesbian people full access to the institution of civil marriage." The court also implied that it would view alternative arrangements similar to marriage (such as civil unions) for gay people as "equally suspect and difficult to square with the fundamental principles of equal protection."

New Hampshire: In June 2009, the New Hampshire legislature passed a law which allows same-sex couples to marry in that state. Analysts note that, unlike other state legislatures, the legislature in

New Hampshire did not pass its law in response to a court ruling.

District of Columbia: In December 2009, the city council of the District of Columbia passed a bill legalizing same-sex marriage. As in the case of New Hampshire, it did not pass the bill in response to a court decision.

Defense of Marriage Act (or DOMA) in the United States

In the early 1990s, opponents of same-sex marriage worried that the Full Faith and Credit Clause of the U.S. Constitution would require every state to recognize a valid same-sex marriage carried out in jurisdictions which allow such unions. In response, Congress passed and the president signed DOMA into law in 1996.

DOMA does not prohibit same-sex marriage across the United States. Rather, under DOMA, no state or territory within the United States is required to recognize and grant benefits to same-sex marriages which had been carried out in other states and territories. (Still, a state retains the option to recognize a same-sex union if it chooses to do so.) Legal observers also say that, under DOMA, states don't have to recognize valid same-sex marriages which took place in those nations which allow them.

In addition, under DOMA, when the federal government determines the meaning of any federal statute, regulation, or administrative ruling which involve marriage, it must define that term as a "legal union between one man and one woman as husband and wife." This particular definition applies only to the federal government. It does not require the states to use the federal definition of marriage when interpreting their own laws and regulations. But at least 30 states have passed their own version of DOMA where they also defined marriage as the legal union between one man and one woman as husband and wife.

What are some of the implications of DOMA? Legal observers say that same-sex married couples cannot receive *federal* benefits (such as Social Security, tax, and veterans benefits) which are given to heterosexual married couples. Also, states don't have to recognize rulings (such as those concerning child custody and financial support) made in other states, territories, and countries involving same-sex marriages.

Because every state and even the federal government have their own laws concerning marriage and marriage alternatives, which, in turn, are "regulated and evaluated at all levels and across various institutions (legislative, judicial, and administrative)," law professor Sonia Bychkov Green of John Marshall Law School said, "the current status of same-sex marriage is one of the most confusing situations in United States law."

Same-sex marriage and marriage alternatives across the world

How are other nations addressing the issue of same-sex marriage? Do they legally recognize same-sex relationships? Under what basis are they doing so? Do other nations allow civil unions, domestic partnerships, and other marriage alternatives which provide benefits and rights similar to those found in marriage?

Just as the status of same-sex marriage and marriage alternatives vary across the United States, they vary widely around the world. Presently, 10 nations allow same-sex marriage within their respective jurisdictions. But, viewed as a whole, these nations neither grant the same exact benefits nor do they give same-sex couples the same exact rights as those given to opposite-sex married couples. The chart below gives a broad overview of the 10 nations which allow same-sex marriage.

Nations which allow same-sex marriage within their entire jurisdictions

Nation (Year legalized)	Route to legalization of same-sex marriage
<p>Netherlands (2000)</p>	<ul style="list-style-type: none"> • In December 2000, the Netherlands became the first nation in the world to legalize same-sex marriage when the Dutch Parliament passed a law (<i>Act Opening the Institute of Civil Marriage</i>) amending its marriage regulation, which now says that "two people of different or the same sex can contract a marriage." • Supporters said that allowing same-sex marriage was a matter of equal rights for gay couples. "If we are equal human beings, we must be given the same legal civil status as heterosexuals [who marry]," said the editor of <i>Gay Krant</i>, a newspaper for the gay community in the Netherlands, in an interview. • Analysts say that same-sex and opposite-sex couples presently have the same marital rights and protections concerning inheritance, tax, and property issues. • Same-sex couples may also adopt children. But under Dutch regulations, one member of a same-sex couple does not automatically become a legal parent to a child already belonging to the other member. To be viewed as a parent, the non-biological person must formally adopt that child. • To get married in the Netherlands, at least one person must be a Dutch citizen or resident.
<p>Belgium (2003)</p>	<ul style="list-style-type: none"> • In January 2003, Belgium became the second nation in the world to legalize same-sex marriage when its parliament amended the <i>Belgian Civil Code</i>, which now reads: "Two persons of the same sex may contract marriage." • Supporters framed the issue as a matter of equal rights. "There is a continuous trend in the law of many countries to recognize same-sex love as equal to different-sex love," claimed legal analyst and same-sex marriage supporter Kees Waaldijk. "And there is no reason why some of the core institutions of family law should be excluded." • Same-sex couples have the same marital rights and protections as opposite-sex couples, including the right to adopt children, say many analysts. • If a same-sex couple wants to marry in Belgium, at least one member of that couple must have lived in Belgium for at least three months.

Nation (Year legalized)	Route to legalization of same-sex marriage
Spain (2005)	<ul style="list-style-type: none"> • In July 2005, Spain’s parliament legalized same-sex marriage. The <i>Spanish Civil Code</i> now states that “marriage will have the same requirements and results when the two people entering into the contract are of the same sex or of different sexes.” • In his remarks to lawmakers, Prime Minister José Luis Rodríguez Zapatero said: “Spanish society is responding to a group of people who have been humiliated, whose rights have been ignored, their dignity offended, their identity denied, and their freedom restricted.” In an interview with the <i>New York Times</i>, the secretary general of the International Lesbian and Gay Association said: “Spain is talking about total equality.” • Yet while Spain gives the same marital rights and protections to same-sex and opposite-sex couples, it does not allow a same-sex couple to adopt children. But it does allow a single person (whether they are homosexual or heterosexual) to adopt children, according to a legal commentator. • If a same-sex couple wants to marry in Spain, at least one member of that couple must be a Spanish citizen.
Canada (2005)	<ul style="list-style-type: none"> • A series of court decisions in different provinces opened the way for the legalization of same-sex marriage. A 2003 decision by the Federal Court of Appeal in Ontario, for example, said that restricting marriage to same-sex couples violated the equal protection provisions of the <i>Charter of Rights and Freedoms</i> (which legal observers describe as Canada’s bill of rights). • After other courts across Canada separately ruled that restricting marriage to opposite-sex couples violated the Charter, several provinces began to issue marriage licenses to same-sex couples. • In July 2005, Canada became the first nation in North America to legalize same-sex marriage when its parliament passed the <i>Civil Marriage Act</i>, which says that “marriage, for civil purposes, is the lawful union of two persons to the exclusion of others.” • Both opposite-sex and same-sex couples share the same marital rights, and every province allows same-sex couples to adopt children. • Same-sex couples don’t have to be Canadian citizens or residents if they want to marry in Canada.
South Africa (2006)	<ul style="list-style-type: none"> • In 2005, the Constitutional Court of South Africa ruled unanimously that prohibiting same-sex marriage violated the equal protection clause of its constitution and also a clause which prohibits the government from discriminating against people solely on the basis of their sexual orientation. • In November 2006, the South African parliament legalized same-sex marriage (the first in Africa) by passing a <i>Civil Union Bill</i>, which removed references to the gender of a couple. • Same-sex and opposite-sex couples share the same marital rights and protections, including the right to adopt children. (In 2002, the Constitutional Court of South Africa ruled that a law banning same-sex couples from adopting children violated the constitution’s provisions on equality.) • Current regulations don’t require same-sex couples to be either citizens or residents of South Africa to get married.
Norway (2009)	<ul style="list-style-type: none"> • In January 2009, lawmakers passed a law amending “the definition of civil marriage to make it gender-neutral.” • Anniken Huitfeldt, a lawmaker who introduced the legislation to legalize same-sex marriage, said that doing so represented “an historic step towards equality.” • Married same-sex couples presently have the same rights and protections as heterosexual married couples, including the right to adopt children, say legal analysts. • The law does not require same-sex couples to be citizens or residents of Norway to get married.
Sweden (2009)	<ul style="list-style-type: none"> • In April 2009, the Swedish parliament adopted a law which made the definition of marriage gender-neutral. • During the debate on whether Sweden should allow same-sex marriage, Soeren Andersson of the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights said: “In changing the law, everybody could be equal in the eyes of the law.” • Same-sex and opposite-sex couples have the same marital rights and protections. In 2002, Sweden allowed same-sex couples to adopt children. • Sweden does not require same-sex couples to be Swedish citizens or residents to get married.

Nation (Year legalized)	Route to legalization of same-sex marriage
Portugal (2010)	<ul style="list-style-type: none"> • A 2009 decision issued by the Constitutional Court of Portugal ruled that the nation's constitution did not require the state to recognize same-sex marriage. At the same time, it also said that the constitution did not prohibit recognition of same-sex marriage. • In May 2010, the president of Portugal signed a law passed by the parliament to allow same-sex marriage. (It removed references to opposite-sex couples in the civil code, and now states that marriage "is a contract between two people wishing to form families through full communion of life.") • In his remarks to parliament, Prime Minister José Sócrates said that legalizing same-sex marriage would represent "a small change in the law, but a very important and symbolic step to fully realize values that are pillars of open, tolerant, and democratic societies – freedom, equality, and non-discrimination." • While same-sex couples presently share many of the same marital rights of opposite-sex couples, they may not jointly adopt children. • Same-sex couples do not have to be citizens or residents of Portugal to get married.
Iceland (2010)	<ul style="list-style-type: none"> • In June 2010, Iceland's parliament unanimously legalized same-sex marriage by passing a law making the definition of marriage gender-neutral. • During that same month, the prime minister of Iceland, Johanna Sigurdardottir (whom media analysts say was the "world's first openly gay head of government"), married her long-time partner, which made her "the world's first head of government to enter a gay marriage," said the <i>Associated Press</i>. • The Nordic Gender Institute reported that the Minister of Justice had described the passage of the law as "necessary to increase equality and equal rights." • Married same-sex couples have the same rights and protections as opposite-sex married couples, including the right to adopt children. • Same-sex couples do not have to be citizens or residents of Iceland to get married.
Argentina (2010)	<ul style="list-style-type: none"> • In July 2010, Argentina became the first nation in Latin America to legalize same-sex marriage when the Argentine National Congress amended the marriage provisions of the Argentine Civil Code to remove a reference to "man and woman," and, instead, replaced it with "couple." • One lawmaker said that the amendment would address "a situation of injustice and discrimination toward sectors of the Argentine society who really do not have the guarantee of equal rights as our constitution establishes." • Under current law, married same-sex couples have the exact same rights as heterosexual married couples, including the right to adopt and the right of inheritance, among others, said media analysts. • Unlike other jurisdictions which don't require citizenship or residency, same-sex couples must be citizens or residents of Argentina to get married in Argentina.

Sources: "Gay marriage around the world," *Pew Forum on Religion and Public Life*, July 9, 2009; "The World After Proposition 8 – A Global Survey of the Right to Marry," by S. Elizabeth Foster, *The California International Law Journal*, Vol. 18, No. 1, 2010; www.religioustolerance.org

While 10 nations allow same-sex marriage, the overwhelming majority of countries (the remaining 182, or 95 percent) limits marriage to opposite-sex couples or don't make explicit provisions to recognize same-sex marriage. But rather than allowing same-sex marriage, many nations have either created or are in the process of creating marriage alternatives for same-sex couples which offer rights and benefits similar to or exactly the same as those given to opposite-sex married couples. For example, 18 nations allow civil unions and domestic partnerships for same-sex couples. But the level and extent of benefits bestowed on same-sex couples in these legal arrangements differ from one jurisdiction to the next. Also, each nation has its own legal definition for terms such as civil union and domestic partnerships. (International law does not provide official definitions, said one analyst.)

European Union (or EU): Six member states allow same-sex marriage. On the other hand, 14 allow civil unions and domestic partnerships for same-sex couples (but not same-sex marriage), according to the *International Law Prof Blog*. For instance:

- In 1989, Denmark became the first nation in the world to create a registered partnership giving same-sex couples the same rights as opposite-sex married couples, including the right to adopt children.
- France in 1999 passed a law to allow civil unions, which grants rights similar to those of marriage. But unlike comparable laws in other European nations, France's law also allows heterosexual couples to enter into civil unions. By 2009, heterosexual couples made up 95 percent of all civil unions in that year, according to official statistics. In January 2011, France's highest court – the Constitutional Council – ruled that laws which restricted marriage to a man and woman did not violate the nation's constitution, and that Parliament would not have to make any changes to such laws.
- Finland passed a domestic partnership law in 2002 which granted same-sex couples with rights and responsibilities similar to those given to heterosexual married couples.

- The United Kingdom passed a *Civil Partnership Act* in 2004 which granted same-sex couples the same benefits as married couples such as those concerning inheritance, taxes, and pensions.
- In 2009, Hungary implemented a registered partnership law which would give same-sex couples the same rights as opposite-sex married couples, but which doesn't allow adoption.

Other nations around the world, while not allowing same-sex marriage, have also created marriage alternatives for same-sex couples or are in the process of considering same-sex marriage. For instance:

- **Australia:** While Australia bans same-sex marriage, several states and territories currently allow same-sex couples to enter into civil and domestic partnerships which provide some benefits similar to those found in marriage.
- **In Latin America:**
 - Uruguay in 2008 allowed same- and opposite-sex couples to enter into civil unions which provide rights and benefits

laws in other nations before it moves forward on any legislation of its own.

- **In the Middle East:** The Israeli supreme court ruled in 2006 that Israel had to register the same-sex marriages of Israeli citizens performed in other nations, which (in turn) entitled them to receive tax benefits and adoption rights granted to heterosexual married couples. In 1994, Israel allowed same-sex couples to enter into what it called “unregistered cohabitation” where they would receive some rights given to opposite-sex married couples.

Criminalizing same-sex marriage

While many nations don't have legal provisions which specifically address same-sex marriage, they have long-standing laws which broadly criminalize homosexuality. Same-sex marriage, therefore, would also be illegal in those nations. For example, at least 24 nations across Asia have laws criminalizing homosexuality, according to a 2010 survey (called “State-Sponsored Homophobia”) carried out by the International

Supporters say that prohibitions on same-sex marriage are an illegal form of discrimination which violates important principles such as equal protection of the law. But opponents respond that marriage has been long reserved for opposite-sex couples.

similar to those of marriage. The law also allows same-sex couples to adopt children.

- In 2004, one state in Brazil began to allow same-sex couples to enter into civil unions, granting them many of the rights and benefits given to opposite-sex married couples. In May 2011, the supreme court in Brazil ruled that same-sex couples should have nearly the same rights and benefits as opposite-sex couples, though it did not say that such couples have the right to marry.
- In 2009, the Mexico City legislature legalized same-sex marriage by amending its civil code to define marriage as “the free uniting of two people.” (The law applies only to that city, and grants same-sex couples the same rights and benefits as opposite-sex married couples.) In August 2005, the supreme court upheld Mexico City's same-sex marriage law, and said that the 31 other states in Mexico had to recognize same-sex marriages performed in that city. (But it did not require them to perform same-sex marriages within their respective jurisdictions.) In a later decision, the supreme court ruled that a same-sex couple had a right to adopt children.
- **In Asia:**
 - Media sources reported that Japan in 2009 began to allow its citizens to marry same-sex foreign partners in nations which allow same-sex marriage, but no further information is available from that government.
 - In November 2008, the highest court in Nepal ruled that the government must grant full rights to gays and lesbians, including the right to marry, and also repeal laws which discriminate against them. Analysts say that lawmakers in Nepal are in the process of studying same-sex marriage

Lesbian, Gay, Bisexual, Trans, and Intersex Association. In Africa, 36 (out of approximately 53) nations have laws which criminalize homosexuality, and which punish offenders with penalties ranging from jail sentences to the death penalty. Overall, says the 2010 survey, 76 countries around the world criminalize homosexuality.

The survey also noted that “more than 50% of African governments have taken action and steps to formally criminalize same-sex union.” In 2009, for instance, lawmakers in Nigeria (which already criminalizes homosexuality) considered a law which would specifically punish “the coming together of persons of the same sex with the purpose of leaving together as husband and wife or for other purposes of same sexual relationship,” according to Amnesty International. In 2005, the Ugandan parliament amended the nation's constitution to limit marriage to a man and a woman. It also states that “it is unlawful for same-sex couples to marry.”

Last year, the African nation of Malawi made headlines around the world when a court sentenced a gay couple to 14 years of hard labor in prison for holding what some news articles described as that nation's first same-sex engagement ceremony. During court proceedings, the judge said that the couple had broken laws banning “unnatural acts” and also for committing “gross indecency.” The UN High Commissioner for Human Rights responded by saying that “laws criminalizing people based on their sexual orientation are discriminatory by nature and violate several international treaties,” according to the *UN News Service*. “The protection of individuals against discrimination is pervasive in international human rights law. Why should it be suspended for this one group of human beings?”

After continuing criticism, the president of Malawi pardoned the convicted couple, but added: “I have done this on humanitarian grounds, but this does not mean that I support this.”

International treaties and same-sex marriage

How do international treaties and other instruments address same-sex marriage? Many call on their signatory nations to recognize and respect people’s “right to marry.” But they don’t explicitly address whether such a right includes an individual’s decision to marry a person of the same sex. While many analysts point out that several of these instruments address the right to marry in the context of men and women, others point out that they also contain provisions calling on signatory nations to protect various rights without taking into account various factors, including a person’s race, gender, political views, religion, or sexual orientation.

The Universal Declaration of Human Rights: Adopted by the UN General Assembly in 1948, this political statement calls on nations to recognize and respect a wide variety of human rights for “all peoples,” including the right to life and liberty, and freedom from slavery, discrimination, arbitrary arrest, and detention, among many others. In the area of marriage, Article 15 of the Universal Declaration says, in part, that “men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family . . .”

Opponents of same-sex marriage argue that Article 15 does not require nations to recognize same-sex marriages, pointing out that it doesn’t even mention the term “same-sex marriage.” Also, it seems to imply that only “men and women” have the right to marry, they argue.

On the other hand, supporters of same-sex marriage respond that Article 15 broadly says that men and women have a right to marry, but does not explicitly require them to pick someone of the opposite sex. Also, it does not prohibit same-sex marriage outright. Furthermore, they argue that when signatory nations

recognize and respect the rights of people within their respective jurisdictions (including the right to marry), they must do so – under Article 2 – without making distinctions “of any kind,” including those based on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.” Distinctions “of any kind,” say supporters of same-sex marriage, would logically include sexual orientation.

They also point out that when nations apply their laws and protect the rights of people within their respective jurisdictions, they must do so on an equal basis. Under Article 7 of the Universal Declaration, nations must recognize that “all [people] are equal before the law and are entitled without any discrimination to equal protection of the law.” So passing and implementing a law which prohibits same-sex marriage while allowing opposite-sex marriage would violate the equal protection rights of gay people, they claim.

Despite these arguments, legal analysts point out that, as a general matter, declarations issued by the United Nations (such as the Universal Declaration) are mostly aspirational statements on how nations should address a certain issue which is not specifically covered by a formal international treaty or agreement, and that they don’t have the force of law. In fact, many legal experts do not view the Universal Declaration as an international treaty.

The International Covenant on Civil and Political Rights (or ICCPR): This 1966 treaty calls on its more than 140 signatory nations to recognize and protect fundamental civil and political rights, including the right to life, freedom of association, and the right to a fair trial, among many others. (Unlike the Universal Declaration, the ICCPR is an enforceable international treaty.) In the area of marriage, Article 23 of the ICCPR states that “the right of men and women of marriageable age to marry and to found a family shall be recognized.”

The UN Human Rights Committee (comprised of independent experts) monitors the implementation of the ICCPR by its signatory nations, and also issues authoritative interpretations (called “general comments”) of specific treaty provisions. It also accepts and adjudicates complaints from individuals who allege that a certain signatory nation had violated particular provisions of the ICCPR.

Proponents of same-sex marriage point out that Article 2 of the ICCPR calls on signatory nations to recognize and ensure various



rights, including the right to marry, without making distinctions among people of “any kind” such as those based on color, gender, political beliefs, race, religion, or other status. Although Article 2 does not explicitly mention sexual orientation, proponents say that the phrase “any kind” would logically include sexual orientation, and that prohibiting same-sex marriage for that reason alone would violate Article 2.

In addition, proponents point out that another provision (Article 26) says that everyone is “entitled without any discrimination to the equal protection of the law,” and that signatory nations “shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, . . . or other status.” So, under this line of reasoning, nations must equally protect the rights of both opposite-sex and same-sex couples to get married, and disregard their status, including sexual orientation.

But there is a continuing debate on the extent to which nations must, under Article 26 of the ICCPR, treat everyone alike under the law, and also the extent to which they must prohibit discrimination based on a person’s sexual orientation. In two noteworthy developments, the UN Human Rights Committee had addressed these two issues by (1) issuing a general comment and (2) adjudicating a dispute between an individual and his home state. But it did directly address same-sex marriage.

General Comment No. 18: In November 1989, the Human Rights Committee issued General Comment No. 18 where it provided further explanations of the term “nondiscrimination” in the ICCPR. Under its interpretation, Article 26 “prohibits discrimination in law or in fact in any field regulated and protected by public authorities.” It further stated that “when legislation is adopted by a State party, it must comply with the requirement of Article 26 that its content should not be discriminatory.” Still, General Comment No. 18 does not explicitly address sexual orientation or the issue of same-sex marriage.

But proponents of same-sex marriage can argue that while General Comment No. 18 does not directly address these controversies, it does prohibit discrimination in “any field regulated and protected by public authorities,” which can be interpreted to include marriage, and that any legislation adopted by a state (such as laws which restrict marriage based on sexual orientation) must not be discriminatory.

But opponents can point out that General Comment No. 18 also states that “the enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance.” The UN Human Rights Committee notes, for instance, that nations punish offenders by placing them in jail, but that authorities usually try to segregate juvenile from adult offenders. In the area of marriage, one commentator noted that many nations have passed laws which set minimum age requirements and also prohibit close relatives from getting married. So, in the same way, a nation may prohibit same-sex couples from getting married, though it can provide a close alternative such as civil unions, for example.

This debate – concerning the extent to which Article 26 calls on nations to treat everyone alike and also the extent to which it must prohibit discrimination based on a person’s sexual orientation – continues today.

Toonen v. Australia: In March 1994, the UN Human Rights Committee (which, again, monitors the implementation of and disputes arising under the ICCPR) issued what many legal analysts described as a significant decision (*Toonen v. Australia*, Communication No. 488/1992) addressing whether Article 26 of the ICCPR required nations to prohibit discrimination based on a person’s sexual orientation under the term “other status.”

Nicholas Toonen – a gay rights activist and resident of Tasmania, which is part of Australia – complained that Tasmanian laws criminalizing sodomy violated the ICCPR. Specifically, they violated Article 17 (which prohibits arbitrary and unlawful interference with a person’s privacy) and also Article 26 (which prohibits discrimination on any grounds – such as sexual orientation, in Toonen’s views – in violation of equal protection of the law).

The Committee ruled specifically that Tasmanian laws criminalizing sodomy were unreasonable and interfered with Toonen’s privacy in an arbitrary manner (in violation of Article 17). It rejected Tasmania’s justifications for its anti-sodomy laws, including claims that these laws prevented the spread of HIV/AIDS, and that they also protected morality. The Committee noted that, in the context of curbing the spread of HIV/AIDS, these laws may actually have had the opposite effect. Also, Australia had conceded that “a complete prohibition on sexual activity between men is unnecessary to sustain the moral fabric of Australian society,” and that Australia had generally accepted that “no individual should be disadvantaged on the basis of his or her sexual orientation.” In fact, several Australian states had already prohibited discrimination based on a person’s sexual orientation.

On the other hand, the Committee avoided addressing the issue of whether Tasmania’s anti-sodomy laws had violated Article 26 of the ICCPR by discriminating against a person based on his sexual orientation. For the first time, the Committee said that the phrase “other status” (in Article 26) did include sexual orientation. But it did not provide further details or guidelines. Instead, the Committee decided that it was not necessary “to consider whether there [had] also been a violation of Article 26” because it had already determined that the anti-sodomy laws had violated Toonen’s rights under Article 17.

Why didn’t the Committee decide outright that Tasmania’s anti-sodomy laws had violated Article 26 by illegally discriminating against a person based on his sexual orientation? One political analyst speculated that it wanted to avoid a ruling whose reasoning could have been interpreted beyond the facts of the *Toonen* case, which concerned only anti-sodomy laws in Tasmania. (Again, *Toonen* did not address whether marriage laws – and various other laws – discriminating against people based on their sexual orientation violated Article 26.) Another analyst said that the Committee would have garnered controversy if it had issued a wide-ranging ruling where it went beyond Tasmania’s anti-sodomy laws and had struck down *all* laws (including those regulating marriage) which discriminated against a person based on his or her sexual orientation.

The International Covenant on Economic, Social, and Cultural Rights (or ICESCR): This treaty, also passed in 1966, calls on nations to ensure basic economic, social, and cultural rights of individuals within their respective jurisdictions. These rights, among others, include the right to work, the right to free primary education, and the right to favorable and safe work

conditions, an adequate standard of living, limitation on work hours, and social security.

In the area of marriage, Article 10 of the ICESCR states that signatory nations must recognize that “the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children,” and that “marriage must be entered into with the free consent of the intending spouses.”

Proponents of same-sex marriage point out that Article 2 of the ICESCR calls on signatory nations to recognize and ensure these rights “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Although Article 2 does not explicitly mention sexual orientation, proponents say that the phrase “other status” would logically include sexual orientation, and that prohibiting same-sex marriage for that reason alone would violate Article 2.

In 2009, the UN Human Rights Committee – which also monitors the ICESCR’s implementation – issued an official interpretation (called General Comment No. 20) which defined the term “other status.” The Committee said that the term specifically included “sexual orientation,” and that nations “should ensure that a person’s sexual orientation is not a barrier

discrimination,” including those based on color, economic status, race, and religion. (The Convention does not explicitly include discrimination based on sexual orientation.) Among many other rights, a state must (under Article 17) recognize “the right of men and women of marriageable age to marry . . . if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.”

Protocol to the African Charter on Human and People’s Rights: Adopted in 2003 as an legal attachment to the African Charter (which itself was passed by African nations in 1981 where they agreed to uphold various human rights for people within their respective jurisdictions), this protocol requires nations, under Article 6, to ensure that “women and men enjoy equal rights and are regarded as equal partners in marriage.” Analysts also note that, under Article 2 of the 1981 African Charter, nations must guarantee these rights and freedoms without taking into account distinctions “of any kind” (such as a person’s race, language, or religion, though it does not explicitly mention sexual orientation), and to ensure “equal protection of the law” for every individual.

The European Convention on Human Rights (1950): Article 12 of this convention states that “men and women of marriageable age have the right to marry and to found a family, according to

How do international treaties and other instruments address same-sex marriage? Many call on their signatory nations to recognize and respect people’s “right to marry.” But they don’t explicitly address whether such a right includes an individual’s decision to marry a person of the same sex.

to realizing Covenant rights . . .” Although some can argue that barring same-sex couples from getting married (because of their sexual orientation) would seem to violate Article 2, others point out that General Comment No. 20 does not explicitly mention same-sex marriage.

Still, one legal analyst noted that, presently, two major international treaties (the ICCPR and the ICESCR) called on signatory nations to protect certain rights without discrimination or distinctions based on a person’s sexual orientation. Some believe that these developments could further the cause of same-sex marriage.

Many other international treaties call on nations to recognize a wide variety of human rights, including a right to marry. But as in the cases of the ICCPR and the ICESCR, these other treaties don’t explicitly mention a right to same-sex marriage. But all of them do say that signatory nations must recognize and enforce the respective rights given to all people under their jurisdictions on an equal basis without discrimination.

The American Convention on Human Rights: Passed in 1969, this treaty calls on nations (primarily those in the Western Hemisphere) to recognize and respect a wide range of human rights. It also states that “all persons are equal before the law” and that signatory nations must ensure that all people under their jurisdiction exercise their rights “without any

the national laws governing the exercise of this right.” (It calls on its member states – all of them in Europe – to protect and enforce a wide variety of individual rights, including the right to association, expression, privacy, religion, and a fair trial, among others.)

The Charter of Fundamental Rights of the European Union (2000): Under the Charter, which is comparable to a bill of rights for Europe, all EU member nations must (under Article 9) guarantee “the right to marry and the right to found a family . . . in accordance with the national laws governing the exercise of these rights.” Notably, Article 9 does not make any reference to “men” or “women.” The Charter also states, under Article 20, that “everyone is equal before the law.” Furthermore, Article 21 prohibits discrimination under any grounds, and specifically mentions sexual orientation. (In a significant decision issued in June 2010, an international court in Europe had ruled on the question of whether there was a right to same-sex marriage under the European Convention and the Charter. Please see the later section *International courts and same-sex marriage*.)

Some analysts point out that some of these treaties (such as the *American Convention on Human Rights* and the EU’s *Charter of Fundamental Rights*) don’t give people an absolute right to marry. Rather, they allow nations to pass laws imposing certain conditions (such as minimum age requirements) on the right to

marry, which can be used to justify bans same-sex marriage. At the same time, these treaties say that these conditions must not affect “the principle of nondiscrimination.”

International organizations and same-sex marriage

Just as nations and treaties address marriage in different ways, so do various international organizations. Some of these organizations include:

European Parliament: Since the 1990s, the European Parliament has passed several resolutions concerning the treatment of gays and lesbians in Europe. (Citizens of EU member states directly elect delegates to represent them in that body, making it a very rough equivalent of the U.S. House of Representatives, though it doesn't have the same legislative authority as its American counterpart.)

For example, in a February 1994 resolution (known as the *Resolution on equal rights for homosexuals and lesbians in the EC – A3-0028/94*), the European Parliament called on EU member nations to treat all of their citizens equally (“irrespective of their sexual orientation”), abolish laws criminalizing sexual activities between people of the same sex, and initiate campaigns to stop acts of violence against gays and lesbians, among other measures. That same resolution also called on lawmakers to pass laws which would, for instance, “seek to end the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework, and should guarantee the full rights and benefits of marriage, allowing the registration of partnerships.” But analysts note that the resolutions were not legally binding.

The European Parliament passed subsequent resolutions where it criticized particular EU member states for discriminating against people based on their sexual orientation. In a resolution called *Homophobia in Europe* (P6_TA(2006)0018) passed in January 2006, the European Parliament noted that same-sex partners in some EU nations still did not “enjoy all of the rights and protections enjoyed by opposite-sex married couples, and, consequently, [suffered] discrimination and disadvantage.” It urged them to “enact legislation to end discrimination faced by same-sex partners in the areas of inheritance, property arrangements, tenancies, pensions, tax, social security, etc.” Still, same-sex couples still face discrimination across Europe, say human rights groups.

MERCOSUR: At the conclusion of an August 2007 meeting, a body called the MERCOSUR High-Level Human Rights Authorities issued a statement urging member nations of MERCOSUR (which is the Spanish acronym for the common market and trading bloc created by Argentina, Brazil, Paraguay, and Uruguay) to “generate laws which guarantee LGBT [lesbian, gay, bisexual, and transgender] people and their families the same rights and protection States recognize for heterosexual families, by creating legal institutions such as common-law marriage, cohabitation, civil unions, or equal access to marriage for same-sex couples,” according to a rough translation provided by the International Lesbian, Gay, Bisexual, Trans, and Intersex Association. But experts point out that the statement was not legally binding. Still, countries such as Argentina and Uruguay have provided same-sex couples with rights similar to those given to opposite-sex couples.

United Nations: Neither the UN General Assembly nor the

Security Council had ever passed a declaration or resolution which directly addressed same-sex marriage. But in December 2008, the General Assembly, for the first time in its history, passed a non-binding declaration concerning gay rights called the *Statement on Human Rights, Sexual Orientation, and Gender Identity*.

This declaration called on UN member nations “to ensure that sexual orientation or gender identity may, under no circumstances, be the basis for criminal penalties.” It also said that human rights – such as those specifically listed in the Universal Declaration, the ICCPR, and the ICESCR – should apply to all people “regardless of sexual orientation or gender identity.” Although the declaration did not explicitly address same-sex marriage, proponents of same-sex marriage point out that the right to marry is a human right, and that – under the December 2008 statement – such a right should apply to all people regardless of sexual orientation.

As of June 2011, 68 of the UN's 192 member nations (or 35 percent) had signed the 2008 declaration.

International courts and same-sex marriage: *Schalk and Kopf v. Austria* (2010)

The European Court of Human Rights – in the case of *Schalk and Kopf v. Austria* (Application no. 30141/04) – became one of the first international courts to address same-sex marriage. Specifically, it determined, for the first time in its jurisprudence, “whether two persons who are of the same-sex can claim to have a right to marry.”

In June 2010, it ruled that certain international treaties did not require Austria (the defendant party in the case) to extend the right of marriage to same-sex couples. It also decided that, by preventing same-sex couples from getting married or by not providing them with marriage alternatives, Austria did not illegally discriminate against them in violation of international law.

Legal analysts say that the decision applies only to Austria (and, by inference, to the other EU member nations) and not to other countries around the world. Also, while courts in other nations – such as the United States, for instance – could cite the reasoning in this particular decision in litigation concerning same-sex marriage, they are not bound to follow it or use it as a fundamental basis of their jurisprudence.

Was Austria legally obligated under international law to extend the right to marry to same-sex couples? A same-sex couple (Horst Schalk and Johan Kopf, known as the “applicants”)



living in Vienna argued that Austria's domestic law restricting marriage to opposite-sex couples had violated Article 12 of the 1950 *European Convention on Human Rights* (or ECHR), which states that "men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

Specifically, they argued that the wording of Article 12 did not "necessarily have to be read in the sense that men and women only had the right to marry a person of the opposite sex." The court, they said, should view the ECHR as a "living document which is to be interpreted in present-day conditions" where more and more EU nations (during the past decade) had been granting the right of marriage to same-sex couples or providing other legal alternatives similar to marriage. Viewed in this particular context, "there was no longer any reason to refuse same-sex couples access to marriage," claimed Messrs. Schalk and Kopf.

In addition, they pointed to the 2000 *Charter of Fundamental Rights of the European Union* (or Charter) which says in Article 9 that "the right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights." (The Charter is, again, comparable to a bill of rights for the EU, and is, in some ways, an updated version of the ECHR.) In contrast to Article 12 of the ECHR, Article 9 of the Charter does not make any reference to "men or women." As a result, nations should not block same-sex marriage, said the applicants.

In response, the government of Austria argued that, in its view, the wording of Article 12 (which contains the phrase "men and women") reserved marriage to opposite-sex couples only. It also acknowledged that while the institution of marriage had seen "major social changes" in Europe since the adoption of the ECHR, there was no clear consensus among EU states on whether they had a legal obligation to grant the right to marry to same-sex couples.

In its decision, the court (which resolves disputes concerning the ECHR) ruled unanimously that Austria's marriage law did not violate Article 12 of the ECHR because that treaty did not require EU member nations to grant the right to marry to same-sex couples. How did the court reach its decision?

First, it determined that Article 12 had, indeed, reserved marriage for opposite-sex couples, noting that the ECHR's drafters had deliberately chosen the phrase "men and women." And during the time in which European nations had adopted the ECHR (in 1950), "marriage was clearly understood in the traditional sense of being a union between partners of different sex," added the court.

Second, it rejected the applicants' arguments that Article 12 should be read in the context of present-day conditions. It said that there was "no European consensus regarding same-sex marriage," pointing out that only six EU nations (out of 27) allowed same-sex marriage. (By June 2011, 10 nations worldwide allowed such a union.)

Third, while it is true that Article 9 of the Charter does not make any mention of "men and women" concerning the right to marry, that fact alone does not infer that nations must automatically grant the right to marry to same-sex couples. Instead, the court noted that "by referring to national law, Article 9 of the Charter leaves the decision whether or not to allow same-sex marriage to the [EU] states," and that the court itself "must not rush to substitute its own judgment in place of that of the national authorities, who

are best placed to assess and respond to the needs of society."

It also pointed out that the drafters of the Charter had provided an explanation of Article 9 (in a document called "Explanation relating to the Charter of Fundamental Rights of the European Union") where they stated "this Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex." The court further cited other expert commentary which said that there was "no explicit requirement [in Article 9] that domestic laws should facilitate [same-sex marriages]," and that "international courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples . . ."

Did Austria illegally discriminate against same-sex couples under international law in regards to marriage? The applicants also claimed that Austria had illegally discriminated against them in violation of the ECHR.

First, they argued that the right to respect for family life (under Article 8 of the ECHR) inherently contained the right to marry. Article 8 says, in part, that everyone has a right to respect for his family life, and that public authorities had to justify any interference in family life – for example, by passing laws to prevent same-sex couples from getting married and, thus, being viewed as a family, asserted the applicants – with reasonable justifications such as those dealing with national security, public safety, the prevention of disorder or crime, and the protection of health or morals, among others.

As in the case of opposite-sex couples, Messrs. Schalk and Kopf wanted to get married to show their long-term commitment to one another and also to be viewed as a "family" in the eyes of society (even if they did not have children). But by restricting marriage to opposite-sex couples, Austria had violated what the applicants believed to be their right to respect for family life, and that Austria had treated them differently (compared to opposite-sex couples who wanted to get married) solely on the basis of their sexual orientation and without any compelling justification for doing so.

They further noted that, under Article 14 of the ECHR, EU governments had to protect everyone's rights and freedoms (such as a right to respect for family life) without discriminating against them on any grounds, including sex, race, color, language, religion, or other status.

Second, Messrs. Schalk and Kopf pointed out that, during proceedings in their case, Austria had passed a *Registered Partnership Act* which provided benefits similar (though not identical) to marriage for same-sex couples in committed relationships. But the applicants claimed that Austria had a legal obligation under the ECHR to create a legal arrangement for committed same-sex couples earlier than it did so. And not only was Austria obligated to create such a legal arrangement, it had to create one whose benefits and protections were identical to those found in marriage.

Because the benefits of marriage and registered partnerships were not identical, Austria continued to discriminate against them illegally on the basis of their sexual orientation, argued the applicants. (They noted, for example, that registered partnerships did not provide the same parental rights for same-sex couples as those given to opposite-sex couples.)

In a 4-3 decision, the court concluded that Austria did not illegally discriminate against the applicants. First, it said that the right to marry cannot be derived from Article 8. The ECHR,

stated the court, “is to be read as a whole and its Articles should, therefore, be construed in harmony with one another.” Because it had ruled earlier that Article 12 of the ECHR did not require EU member nations to grant the right to marry to same-sex couples, then Article 8 “cannot be interpreted as imposing such an obligation, either.”

Second, the court said that Austria did not have an obligation under the ECHR to provide a same-sex couple with a legal arrangement recognizing their long-term commitment to each other earlier than it had. While the court noted “an emerging European consensus toward legal recognition of same-sex couples,” it pointed out that “there is not yet a majority of States providing for legal recognition of same-sex couples.” As a result, the question of whether EU states have an obligation under the ECHR to provide legal recognition to same-sex couples must “still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing and introduction of legislative changes,” said the court. It added: “The Austrian legislator cannot be reproached for

marry, the court said that it would “no longer consider that the right to marry enshrined in Article 12 of the ECHR must, in all circumstances, be limited to marriage between two persons of the opposite sex.”

Second, the court noted (in several instances) what it described as a “rapid evolution of social attitudes towards same-sex couples” where more and more EU nations were starting to recognize same-sex couples and where certain EU laws now included same-sex couples in the concept of “family.” Given these changes in attitudes, the court said it would now begin to view a “cohabitating same-sex couple living in a stable de facto partnership” as a “family” under Article 8 of the ECHR.

Third, the court determined that “same-sex couples are just as capable as different-sex couples of entering into stable committed relationships.” As a result, it concluded that same-sex couples “are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship.” Analysts say that this viewpoint is important because future applicants in a discrimination case regarding same-

In June 2010, the European Court of Human Rights became one of the first international courts to address same-sex marriage, ruling that international treaties did not require a nation to extend marriage to same-sex couples. But it also clarified many issues which could eventually lead to a right to marry for same-sex couples.

not having introduced the *Registered Partnership Act* any earlier.”

Third, the court ruled that Austria did not illegally discriminate against Messrs. Schalk and Kopf by denying them legal recognition corresponding to marriage “in each and every respect.” Just as many EU nations did and did not legally recognize same-sex couples, the court pointed out that those EU nations which did grant legal recognition to same-sex couples also provided varying levels of benefits compared to those given to opposite-sex married couples. Because of these continuing differences, the court declared that “States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition.”

Even though the majority decided that Austria did not discriminate illegally against the applicants, it still noted in the decision that treating people in similar situations differently is “discriminatory if it has no objective and reasonable justification.” It also said “the court has held repeatedly that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification.” But the court immediately followed these remarks by saying that “a wide margin is usually allowed to the State under the [ECHR] when it comes to general measures of economic or social strategy.”

Laying the groundwork for a right to same-sex marriage? While opponents of same-sex marriage say that they had won a major victory in the Austria case, other legal analysts point out that the court had clarified several issues which some believe could eventually lead to a right to marry for same-sex couples.

First, because Article 9 of the 2000 Charter (which, again, is considered an update of the 1950 Convention) did not make any explicit reference to “men and women” concerning the right to

sex marriage would be able to argue that they were being treated differently from a similarly situated opposite-sex couple who wanted to get married.

Taken as a whole, Clive Baldwin (a senior legal advisor at Human Rights Watch) wrote in an article for *The Guardian* that “in recognizing that the right to family life and the right to marry are applicable to same-sex relationships, the court has effectively said it will declare it a duty for states to recognize such rights, once enough states have done so.”

In the same vein, the dissenting opinion in *Schalk and Kopf v. Austria* pushed the reasoning of the majority decision a step further by concluding that Austria had illegally discriminated against Messrs. Schalk and Kopf in violation of Article 8 and 14 of the ECHR. It noted that the majority itself had determined that the applicants’ relationship fell within the notion of family life; that they were in a “relevantly similar situation to a different-sex couple” who wanted legal recognition of their relationship; and that discrimination based on sexual orientation required serious justification. It also noted that Austria did not justify the different way it treated same- and opposite-sex couples who wanted to get married.

Because Austria had failed to provide any justification for treating the applicants differently from an opposite-sex couple who wanted to get married, the majority should have inferred that Austria had illegally discriminated against them, argued the dissent. It said: “In the absence of any cogent reasons offered by the respondent Government to justify difference of treatment, there should be no room to apply the margin of appreciation.” 

Prosecuting and punishing pirates: A work in progress

It may be hard to believe that, in modern times, pirate ships are roving the seas to attack and plunder other vessels. But incidents of piracy have actually exploded in recent years and seem to be getting worse in some parts of the world, say officials. While piracy has existed since times of antiquity, this recent development has caught individual nations and their legal systems off-guard as they try to determine whether and how to prosecute and punish pirates. Some nations have put pirates on trial in their domestic courts. But others have quickly released them soon after their capture.

Are there international treaties which provide guidance to nations addressing piracy? Have they been effective? How are the United Nations and other organizations dealing with piracy? How are individual nations prosecuting suspected pirates in their custody, and have they faced problems in doing so? Are there more effective approaches in fighting piracy?

Piracy: An ancient problem persisting in modern times

According to the International Maritime Bureau (or IMB), pirates in 2010 had seized more vessels (53) and have held more hostages (1,181) than at any other time since it began keeping records in 1991. Various groups such as London-based think tank Chatham House and the International Chamber of Commerce reported 445 worldwide pirate attacks last year, compared to 406 attacks in 2009, and 293 attacks in 2008.

While pirate attacks occur all over the world, analysts say they are concentrated around the Gulf of Aden (which is located between Somalia and the southern portion of the Arabian peninsula), the Horn of Africa (around the eastern coast of Somalia), areas of the Indian Ocean, and the Malacca Strait, a body of water between the Indonesian island of Sumatra and the nation of Malaysia. But an analysis carried out by IMB showed that pirates from Somalia held around 85 percent of all hostages and nearly 60 percent of all captured vessels in 2010.

Pirates – who are usually armed with automatic weapons and travel in fast-moving skiffs – have attacked a wide range of vessels, including fishing boats, private yachts, large container vessels, and even supertankers carrying millions of gallons of oil. In 2008, pirates had even captured a Ukrainian cargo ship loaded with Russian tanks and other weapons bound for a port in Kenya. Pirates have also dramatically extended the reach of their attacks in recent years – as far as 1,500 miles from the coast of Somalia, according to the IMB – by using so-called “mother ships,” which are large vessels (usually stolen) carrying the smaller skiffs. Once pirates capture a vessel, they hold the passengers and crews hostage until they receive a ransom (which could cost millions or tens of millions of dollars in cash) from the ship’s owners, shipping companies, and even foreign governments. Some recent examples include:

- A \$3 million ransom for the *Sirius Star*, a Saudi-registered oil tanker;
- A \$3.5 million ransom for the Ukrainian ship *MV Faina* carrying Russian tanks;
- A reported \$9.5 million ransom for the *Sambo Dream*, a South Korean oil tanker; and
- A reported \$7 million ransom for the *MV Golden Blessing*, a Singaporean ship.

These piracy attacks have imposed a large financial burden on the commercial shipping sector, costing between \$7 billion to \$12 billion a year, according to Colorado-based non-governmental organization One Earth Future, which include “ransoms, insurance premiums, re-routing ships, security equipment, and naval forces.” It estimated that, in 2010, pirates had received total payments of around \$238 million.

Others such as analyst Michael Baker of the Council on Foreign Relations, a New York-based think tank, said that the higher cost of shipping could increase prices for goods in East Africa. And according to Joe Angelo, the managing director of



Intertanko (a group representing oil tanker owners), recent pirate attacks against tankers in the Indian Ocean – which he described as “spinning out of control” – could impede “crucial shipping lanes with the potential to severely disrupt oil flows to the United States and to the rest of the world.”

Some analysts say that the lack of opportunities in failed states such as Somalia has pushed people to become pirates. “Although piracy manifests itself at sea, the roots of the problem are to be found ashore,” said UN Secretary-General Ban Ki-moon. “In essence, piracy is a criminal offense that is driven by economic hardship, and that flourishes in the absence of effective law enforcement.” Others say that the overfishing of Somali coastal waters – the longest in Africa – over the past two decades by foreign fishing fleets has affected the thousands of people in Somalia who depend on the fishing industry for their livelihood, reported *TIME* magazine. And humanitarian workers say that other nations must provide much more technical assistance to rebuild the Somali economy so that it will provide more opportunities for people.

Still others believe that many people have become pirates to earn vast sums of money very quickly simply by demanding ransoms. “As long as piracy is so lucrative, with ransom payments adding up to tens if not millions of dollars, and other economic options so bleak, the incentives are obvious,” said the *UN News Service*. The *Washington Post* reported that some Somali pirates were driving Land Rovers, buying drugs, and living in lavish houses.

Others, such as Donna Hopkins – the coordinator for counter piracy and maritime security at the U.S. State Department – believe that only 15 percent of all ransoms go to the pirates themselves and that the rest fall into the hands of “transnational criminal networks.” She also speculated that some individuals working in international maritime organizations had passed on information to pirates on “the most lucrative [shipping] targets.”

“territorial sea,” which, under UNCLOS, extends 12 nautical miles (or 13.81 miles) from its coastline. So a State could, for instance, pursue a foreign ship within its territorial waters “when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State,” according to Article 111.

On the other hand, no country may claim jurisdiction over any areas of the “high seas,” which Article 86 defines as “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea, or in the internal waters of a State . . .” Legal experts also say that a state generally cannot claim jurisdiction over foreign vessels operating on the high seas, and, as a result, cannot board such vessels.

There are, however, a few exceptions. Article 110 states that personnel from only a warship (or other ship “clearly marked and identifiable as being on government service”) may board a foreign vessel on the high seas when they have reasonable grounds for suspecting that the foreign vessel is improperly flagged, or is engaged in the slave trade, unauthorized broadcasting, or piracy.

Because piracy has been long viewed with scorn throughout the world, UNCLOS has specific provisions to address piracy, which it defines as any illegal acts of violence, detention, or depredation committed for private ends by the crew or passengers of a private ship and directed against another ship on the *high seas* only. Article 105, for example, authorizes any State to seize a pirate ship or any ship under the control of pirates and arrest the persons on board. It also says that “the courts of the State which carried out the seizure may decide upon the penalties to be imposed.”

But experts point out a major shortcoming. Under UNCLOS, piracy is limited to those acts committed on the high seas. Why? In deference to state sovereignty, UNCLOS is silent on how piracy should be defined and combated in a particular nation’s territorial seas. (It assumes that most nations will pass laws within their respective jurisdictions to prohibit piracy.) But modern-

According to the International Maritime Bureau, pirates in 2010 had seized more vessels (53) and have held more hostages (1,181) than at any other time since it began keeping records in 1991. These numbers are probably higher because many maritime companies do not report piracy incidents.

Addressing piracy: International treaties

The world community is currently using several approaches to address piracy. But their success has been mixed. Many have, for instance, tried to rely on existing international treaties. But several shortcomings have made them ineffective in fighting modern-day piracy. Some of these treaties include:

The United Nations Convention on the Law of the Sea (or UNCLOS): Signed in 1982, UNCLOS is the most comprehensive international agreement regulating the use of the world’s oceans. It sets guidelines on the use of natural resources, establishes certain navigational rights for all nations, and calls for measures to control and prevent pollution, among many other duties.

Under Articles 2 and 3, a coastal State may exercise its sovereignty (i.e., it may enforce its laws and regulations) over its

day piracy has been taking place in the *territorial seas* of failed states (such as Somalia) which don’t have effectively functioning governments to stop such activities, say analysts.

And while the number of piracy incidents on the high seas has also grown dramatically, observers point out that official naval vessels pursuing pirate skiffs must turn back once the pirates enter a nation’s territorial seas. Under Article 111(3) of UNCLOS, “the right of hot pursuit ceases as soon as the ships pursued enters the territorial sea . . . of a third state.” (Again, this is to respect a state’s sovereignty over its territorial seas.)

Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (or SUA): Many nations and UN officials have called on the world community to use SUA as another tool to fight piracy. Adopted in 1988,

the main purpose of SUA is to “ensure that appropriate action is taken against persons committing unlawful acts against ships,” according to the International Maritime Organization. For instance, under Article 3, nations must pass laws which make it

international peace and security, analysts say that piracy – in and of itself – does not threaten international peace and security. So to establish a legal basis under which it can address piracy, the Security Council had passed a resolution stating that piracy had

Pirates have attacked a wide range of vessels, including fishing boats, private yachts, large container vessels, and even supertankers carrying millions of gallons of oil. In 2008, pirates had even captured a Ukrainian cargo ship loaded with Russian tanks and other weapons.

a crime to seize a ship by force, carry out acts of violence against ship personnel if such action threatens the safe navigation of the ship, cause damage to a ship when then threatens its navigation, or injure or kill a person while carrying out these various acts.

Under Article 7 and 10, if the alleged offender is found in the territory of a SUA signatory nation, that nation must take him into custody and then – “without any exception whatsoever and whether or not the offense was committed in its territory” – submit the case to prosecutors for investigation. If a nation does not want to prosecute an alleged offender for whatever reason, Article 11 calls on nations to make violations of Article 3 “extraditable offenses.” And under Article 4, SUA applies to acts which had taken place on the high seas and also in a state’s territorial waters. (In contrast, UNCLOS applies only to piracy incidents taking place on the high seas.) These articles, say observers, makes it less likely for an alleged offender to find safe havens.

Analysts, however, point out a few shortcomings. First, SUA does not mention the term “piracy” at all. So some analysts have questioned its applicability to piracy. In fact, they point out that nations had passed SUA in response to a number of terrorist incidents dealing with maritime vessels, including the hijacking of an Italian cruise ship called the *Achille Lauro* in 1985 where terrorists killed an American passenger and then threw his body overboard. In the wake of the killing, the terrorists left the ship and then tried to escape to Tunisia when U.S. fighter jets intercepted their aircraft and guided them to an airbase in Italy. Analysts said that the Italian government had refused to extradite some of the terrorists, and allowed some of them to leave Italy.

Even so, others point out that the convention does not explicitly prevent its use to stop piracy. Others also argue that SUA is applicable to piracy because it criminalizes acts which pirates usually carry out such as seizing ships and attacking crew members.

In a second shortcoming, a signatory nation may enforce the terms of SUA only within its respective jurisdiction. As in the case of UNCLOS, a nation cannot – on its own – enforce SUA’s provisions in the territorial seas of another state even if that state (such as Somalia) does not have the ability to do so.

Addressing piracy: The United Nations

Given these various shortcomings in existing international treaties, the world community has also taken action through the United Nations. Specifically, the Security Council, beginning in 2008, passed several resolutions addressing piracy. (While the *UN Charter* explicitly calls on the Security Council to maintain

“exacerbated” the deteriorating security situation in Somalia which itself threatened international peace and security. Experts point out that infighting among different Somali factions was spreading to neighboring countries, causing instability in the region.)

- **Resolution 1816** (2008): authorizes nations to “enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea,” and to “[u]se...all necessary means to repress acts of piracy and armed robbery.” (The phrase “all necessary measures” commonly refers to the use of force.) While nations are highly protective of their sovereignty, the Somali Transitional Federal Government had given nations explicit permission to stop piracy in its territorial waters.
- **Resolution 1838** (2008): calls on UN member states with “naval vessels and military aircraft operating in the area to use – on the high seas and airspace off the coast of Somalia – the necessary means to repress acts of piracy in a manner consistent with the 1982 United Nations Convention on the Law of the Sea.”
- **Resolution 1846** (2008): explicitly allows nations to stop pirates operating in Somali territorial waters “by deploying naval vessels and military aircraft, and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery off the coast of Somalia.” (In contrast, previous resolutions did not say exactly how to stop pirates.) It also urged nations to use the SUA convention “to create criminal offences, establish jurisdiction, and accept delivery of persons” involved in piracy. (One legal observer speculated that the UN wanted to end the debate on whether nations may use SUA to address piracy.)
- **Resolution 1851** (2008): says that nations may undertake all necessary measures “in Somalia” (meaning on Somali land) to stop piracy as long as they gave “advance notification” to Somali authorities. In a press release, the UN Department of Public Information said that the resolution “[authorized] states to use land-based operations in Somalia as part of [the] fight against piracy.” (In early April 2011, FBI agents working with Somali authorities captured an alleged pirate negotiator on Somali territory, who was later taken to the United States to stand trial.)
- **Resolution 1918** (2010): calls on UN member nations to pass domestic laws criminalizing piracy, and also to prosecute and then imprison convicted pirates. It also called on the

UN Secretary-General to present a report describing various options to prosecute pirates such as the use of regional and international tribunals.

In addition to passing resolutions, the UN established a Counter Piracy Programme within the UN Office on Drugs and Crime (UNODC) in May 2009 to help the governments of Kenya, Seychelles, and Somalia in setting up adequate courts and jails to detain and put pirates on trial. UNODC is also in talks with other states in the region to find other approaches in fighting piracy.

Addressing piracy: Are naval patrols effective?

In accordance with UN resolutions, many nations have been patrolling Somali waters and outlying areas since 2008 to prevent pirate attacks and also to protect commercial shipping and other vessels. Some of these operations are being carried out by:

The European Union (or EU): Under what it calls Operation ATALANTA, the EU Naval Force Somalia has been protecting vessels of the World Food Programme (which is supplying food to Somalia), and has also been stopping acts of piracy off the coast of Somalia. As of March 2010, these patrols had caught and disarmed 275 pirates. But it released 235 pirates because of complications with evidence and other potential problems concerning prosecution, according to an EU naval officer in an interview with the *Washington Post*. Some have described this approach as “catch and release.”

United States: The United States is also carrying out naval patrols in Somali waters and in surrounding areas. While these patrols have largely been focused on anti-terrorism operations – some say terrorists are trying to establish a beachhead in the Horn of Africa – they did catch at least 39 pirates last year, but soon released 18 of them. In an interview with *ABC News*, a senior U.S. official said: “Catch and release is always the last resort, but on occasion, we have resorted to the last resort,” explaining that if a pirate did not pose a national security threat to the United States, and if a neighboring country such as Kenya refused to prosecute him, then U.S. naval forces would let the pirate go.

Even with these naval patrols, officials such as Donna Hopkins of the U.S. State Department said that “there aren’t enough ships on the planet to patrol [for example] the entire Indian Ocean. The *Maritime Reporter* estimates that the Gulf of Aden combined with the coasts of Kenya and Somalia – areas where pirates usually carry out their operations – take up approximately 1.1 million square miles (an area four times larger than Texas). Given this vast expanse which navies must patrol, observer Roger Middleton at think tank Chatham House suggested: “If you’re going to have a force to fight piracy, it’s more sensible to do it on land than at sea.”

Combined Maritime Forces (CMF): Composed of a multinational force of naval vessels from nations such as South Korea, Singapore, Turkey, and the United States, CMF patrols Somali waters to prevent piracy.

Addressing piracy: Prosecution in domestic courts

Treaties such as UNCLOS call on nations to apprehend suspected pirates and allow their courts to impose penalties (though it is not a strict requirement for the courts to do so). But many countries have discovered that their domestic legal systems are not adequately equipped to prosecute pirates. For instance, while some nations don’t have laws which deal specifically with

piracy, others had passed such laws centuries ago but did not amend them to address modern-day piracy. The United States, for example, enacted its piracy statute in 1819. Dutch analysts say that their nation wrote its anti-piracy law during the 1600s and referred to acts of piracy as “sea robbery.” Other states also have similar problems.

In addition, some nations are having difficulty gathering evidence to prosecute pirates. Some evidence such as skiffs and weapons are lost during scuffles with pirates. Others cite the expensive costs of transporting pirate ships and weapons to faraway countries where trials are taking place. Furthermore, some nations are unable to call witnesses – many of whom are active duty crew members presently traveling on naval vessels and merchant ships around the world – to testify against alleged pirates. One analyst said: “[Kenyan] law is cumbersome, requiring witnesses to testify on three separate occasions, a tough order logistically for merchant sailors.”

Moreover, many nations hesitate to bring alleged pirates within their respective jurisdiction, worrying that once the pirates serve their sentences, they could apply for asylum. Some pirates have argued that their ringleaders will persecute or even kill them in the belief that they had cooperated with prosecutors. How are some nations currently prosecuting pirates and what particular problems have they faced?

Germany: In April 2010, Germany began a piracy trial (its first since 1624) against 10 suspected pirates who attacked a German merchant ship (the *MV Taipan*) in the Gulf of Aden. Dutch marines had boarded the ship, arrested the pirates, and found machine guns and missile launchers in their possession. The Netherlands later extradited the men to Germany where their trial is still underway.

Kenya: Many nations are depending on Kenya (which shares a long border with Somalia) to help fight piracy, pointing out that its somewhat stable democracy and functioning legal system – all within the vicinity of pirate-infested waters – make it an ideal place to prosecute pirates.

In 2008 and 2009, Kenya concluded separate agreements – officially called “memorandas of understanding” (or MOUs) – with Canada, China, Denmark, the European Union, the United Kingdom, and the United States where it would take custody of and prosecute alleged pirates captured by the naval forces of these nations in return for financial assistance and other incentives in doing so. The costs of piracy trials – including expenses for transporting evidence, providing defendants with lawyers and translators, and then incarcerating what could be hundreds of people for several years – would be expensive, said Kenyan officials.

Observers say that Kenya has tried and convicted more than 43 pirates, and that around 100 more are still awaiting trial.

In recent months, though, the prosecution of pirates in Kenya suffered several setbacks. First, Kenya terminated all of its MOUs at the end of September 2010, arguing that its partner nations did not provide enough financial assistance. In an interview with a Kenyan newspaper, a security analyst, Simiyu Werunga, claimed that “Kenya gave these countries access to our jails and our courtrooms with the expectation that they would build or rehabilitate the same all over the country and build the capacity of our naval forces in return, which unfortunately has not happened.” A Kenyan parliamentary committee report also claimed that the prosecution of pirates had increased the backlog of court cases.

Still, a representative for the Foreign Affairs Ministry said that Kenya would continue to hold pirates already in its custody and continue trying them.

Second, in an important ruling which has further undermined Kenya's role in prosecuting pirates, Judge Mohammed Ibrahim of the High Court of Kenya issued a ruling in November 2010 which said that, under current laws, Kenya did not have jurisdiction (i.e., the legal authority) to prosecute nine individuals accused of piracy which had specifically taken place on the high seas. In March 2009, the German navy captured these individuals after they had attacked a vessel called the *MV Courier* in the Gulf of Aden (which is considered as part of the high seas), and then transported them to Kenya for prosecution.

Kenya charged the alleged pirates for violating Section 69(1) of its Penal Code which states that "any person who in territorial waters or upon the high seas commits any act of piracy . . . is guilty of the offence of Piracy." Separately, Section 5 of the Penal Code says that Kenyan courts have jurisdiction to try criminal cases which had taken place in "every place within Kenya, including territorial waters." Lawyers for the alleged pirates argued that Kenya did not have the jurisdiction to prosecute them because Section 5 did not specifically mention the high seas. Prosecutors argued otherwise, pointing out that Section 69(1) mentioned the high seas, which is where the alleged acts had occurred.

Ultimately, Judge Ibrahim ruled in favor of the defendants. He wrote that, under Section 5, "the Kenyan Courts have no jurisdiction in criminal cases . . . where the alleged incident or offence took place outside the geographical area" of Kenya. Concerning the charge of piracy, the judge said that because Section 5 did not mention the high seas, Kenya did not have jurisdiction to prosecute the defendants. But he noted that Section 69(1) did mention the high seas, yet did not define that term.

To resolve the inconsistency between Section 5 and Section 69(1) – where one section mentions the high seas and the other does not – the judge decided that "Section 5 is juridically paramount to and overrides Section 69(1)." Why? Section 5 "is the defining provision with regard to jurisdiction of the Kenyan Courts," he said. He then ordered the immediate release of the defendants and also called on Kenyan authorities to "ensure [their] safe passage" to their countries of origin.

While some say that this decision was a blow to piracy prosecutions in Kenya, others note out that the judge, in his decision, suggested that Parliament could amend Section 5 to cover acts of piracy carried out on the high seas. Others point out that Kenya can still prosecute acts of piracy taking place in Kenyan territorial waters.

Netherlands: In 2009, five Somali pirates attacked a Dutch-Antilles flagged ship (the *MV Samanyolu*) in the Gulf of Aden using automatic weapons and even a rocket-propelled grenade launcher. A Danish naval vessel captured and handed them over to Dutch prosecutors. In June 2010, a court in the Netherlands convicted all five men under the 17th century law of "sea robbery" and ordered them jailed for five years instead of the maximum sentence of 12 years. In handing down the lighter sentence, the judge in the case cited the poor conditions in Somalia which he believed pushed the men to engage in piracy.

But since the conviction, officials have expressed their concerns in prosecuting pirates. One of the men, for example, said that "he

wants to stay in the Netherlands after he is released and hopes to bring his family over."

Seychelles: Officials say that island nation of Seychelles (located 1,200 miles east of Somalia in the Indian Ocean) will take a leading role in prosecuting pirates when they announced the creation of a UN-funded center for detaining and prosecuting suspected pirates. Seychelles said it had already amended its piracy laws to allow convictions even if suspects were not carrying out robbery when they were captured. (Some analysts have argued that attempted robbery – where pirates fail to rob their victim because their plan had been foiled by naval patrols, for instance – should not be considered piracy per se since nothing was stolen.)

South Korea: In February 2011, South Korea began its prosecution of five Somali pirates for maritime robbery and attempted murder after they were captured by commandos who boarded the *Samho Jewelry*, a South Korean chemical carrier. One of the pirates had shot the captain of the vessel during the rescue, reported the *Yonhap News Agency*. During an interview with the *Miami Herald*, a coast guard officer said that "South Korea's criminal code stipulates that local authorities can punish foreigners who commit crimes against South Koreans even outside its territory."

Yemen: After trying 12 Somali pirates for seizing a Yemeni oil tanker and killing two crew members, a court in Yemen in May 2010 sentenced six of them to death. It sentenced all of the other individuals to 10 years in prison after finding them guilty of hijacking the ship. (Yemen did not charge them with piracy.) On the other hand, a Yemen court in November 2010 sentenced 10 men to five years in prison for "acts of piracy against Yemeni fishing boats." It released three other men for lack of evidence.

United States: During the past year, federal courts have tried and convicted several pirates, though not without debate. While one court convicted some defendants of piracy, another did not. Also, prosecutors had appealed a decision where a judge said that piracy strictly included only robbery. Yet a different judge had reached the opposite conclusion. Some recent cases include:

MV Maersk Alabama: In April 2010, four Somali pirates boarded the *MV Maersk Alabama* (a privately-owned container vessel) which was traveling in the Indian Ocean. After unsuccessfully trying to take control of the vessel, the pirates seized its captain



and escaped in a lifeboat. During a stand-off in the glare of media attention, U.S. Navy SEALs killed three of the pirates. Authorities detained a fourth pirate, Abduwali Abdukhadir Muse, who was already aboard a navy vessel to conduct ransom negotiations.

Officials brought Muse to New York to stand trial in a U.S. district court. In May 2010, he pled guilty to several felony counts of hijacking maritime vessels, kidnapping, and hostage taking. (There was no trial, and legal observers note that the government did not file any piracy charges against him.) He also agreed to cooperate with the government in further investigations. In February 2011, the court sentenced him to nearly 34 years in prison.

USS Ashland: In April 2010, Somali pirates in the Gulf of Aden attacked what they thought was a merchant vessel but was actually an American warship (the *USS Ashland*), which fired back and destroyed their skiff. Analysts note that the pirates never boarded the *USS Ashland* or succeeded in taking anything from that ship. The *USS Ashland* apprehended the pirates and took them to Norfolk,

Judge Raymond's decision to throw out the piracy charges.

USS Nicholas: In April 2010, five Somali pirates in the Indian Ocean attacked an American warship (the *USS Nicholas*), which they thought was a merchant vessel. The *USS Nicholas* returned fire and captured the pirates. Authorities transferred the men to Norfolk, Virginia (the home port of the warship), to stand trial at a U.S. district court for piracy (in violation of 18 USC §1651) and other crimes, including "attack to plunder a vessel, act of violence against persons on a vessel, assault with a dangerous weapon, [and] assault with a dangerous weapon on federal officers and employees," among others.

As in the case of the *USS Ashland*, the defendants during this trial (*U.S. v. Hasan*) called on the court to dismiss the charge of piracy, saying that they did not carry out such an act under the 1819 federal statute on piracy. Among other arguments, the defendants said that they did not board the ship or rob anyone.

In an initial decision issued in October 2010, the judge in the

Many countries have discovered that their domestic legal systems are not adequately equipped to prosecute pirates. For instance, while some nations don't have laws which deal specifically with piracy, others had passed such laws centuries ago but did not amend them to address modern-day piracy.

Virginia, to stand trial at a U.S. district court. (The warship is based in nearby Little Creek, Virginia.) In *U.S. v. Said*, prosecutors charged the men with piracy (such as engaging in illegal acts of violence committed for private ends, as described by UNCLOS) and other crimes listed in the U.S. Code, including "attacking to plunder a vessel, engaging in an act of violence against persons on a vessel, and using a firearm during a crime of violence."

The 1819 federal law on piracy (in 18 USC §1651) states at that "whoever, on the high seas, commits the crime of piracy as defined by the law of nations [also called international law], and is afterwards brought into and found in the United States, shall be imprisoned for life." The statute itself does not specifically define the phrase "piracy as defined by the law of nations." But in 1820, the U.S. Supreme Court (in *U.S. v. Smith*) examined the 1819 law and explicitly defined piracy as "robbery upon the sea."

In early August 2010, one of the defendants (Jama Idle Ibrahim) pled guilty to all of the charges except piracy. A judge imposed a prison sentence of 30 years. But in a press release, prosecutors described the sentencing as "the first . . . in Norfolk for acts of piracy in more than 150 years."

Later that month, Judge Raymond Jackson dismissed only the piracy charges against the remaining defendants. Using the Supreme Court's definition of piracy, he ruled that prosecutors could not charge the defendants with piracy because they did not actually carry out robbery when attacking the *USS Ashland*.

He also ruled that the government "failed to establish that any unauthorized acts of violence or aggression committed on the high seas [also constituted] piracy." (During court proceedings reported by the *Wall Street Journal*, when the judge asked whether firing a bow-and-arrow, a slingshot, or a rock at a ship constituted piracy, the prosecutor nodded his head.) The government said that it would continue its case against the defendants, but appealed

case (Mark S. Davis) refused to drop the charge of piracy, ruling that "the offense of piracy set forth in 18 U.S.C. §1651 must be defined according to contemporary customary international law" (which the federal statute calls the "law of nations"). Specifically, he said that "both the language of 18 U.S.C. §1651 and Supreme Court precedent [in *Smith*] indicate that the 'law of nations' connotes a changing body of law, and that the definition of piracy . . . must therefore be assessed according to the international consensus definition at the time of the alleged offense."

So under this reasoning, said Judge Davis, the definition of piracy under 18 U.S.C. §1651 in the year 2010 would include acts mentioned in contemporary treaties such as UNCLOS, which he noted was signed by a consensus of an "overwhelming majority of the world" (or around 161 nations). Again, UNCLOS defines piracy as any illegal acts of violence, detention, or depredation committed for private ends by the crew or passengers of a private ship and directed against another ship on the *high seas*. In the opinion of Judge Davis, this definition would seem to include attempted piracy carried out by acts of violence. (Judge Davis had reached the opposite conclusion than the one reached by Judge Jackson on whether to drop piracy charges against the defendants.)

After the resumption of the trial, the defense said that poverty and a lack of food had pushed the accused defendants (who claimed to be fisherman) into piracy. Prosecutors, on the other hand, argued that the men confessed to the attack on the *USS Nicholas*, and even said that they hoped to receive a ransom between \$10,000 and \$40,000.

In November 2010, the jury convicted the five men of piracy and the other offenses, "marking what is believed to be the first piracy trial conviction in the United States since 1820," according to a press release from the U.S. Department of Justice. Judge Davis sentenced them to life in prison in March 2011.

Addressing piracy: Prosecution in the International Criminal Court and UN ad hoc courts?

In addition to domestic courts, policy makers are debating whether to use the International Criminal Court (or ICC) to prosecute pirates. The ICC is the world's only permanent international criminal tribunal and has jurisdiction to prosecute individuals for crimes of aggression, crimes against humanity, genocide, and war crimes, but only when a nation where these crimes had occurred is unable or unwilling to try the alleged wrongdoers. (Analysts sometimes refer to the ICC as the "court of last resort.") A 1998 treaty called the *Rome Statute of the International Criminal Court* created the ICC, which presently has 114 States parties.

In a 2010 workshop report called "Suppressing Maritime Piracy: Exploring the Options in International Law," the American Society of International Law (a Washington, DC-based non-profit group) said using the ICC to prosecute pirates would avoid complications in domestic criminal prosecution by providing an international tribunal with its own uniform set of rules and procedures. The report also indicated that using the ICC would serve as a deterrent against piracy because it would be able to charge ringleaders and not just individual pirates.

But the report also described significant obstacles. For example, the ICC presently does not have the jurisdiction to prosecute piracy. Some say that the States parties can vote to amend the *Rome Statute* itself or add an additional section to the statute (called a protocol) to give authority to the ICC to prosecute pirates, but others believe that such a process will be very difficult.

Several workshop participants added that expanding the ICC's jurisdiction to include piracy may end up trivializing the purpose of the court, which is to try the most serious crimes such as genocide and war crimes – all carried out on a large scale. Others also believe that ICC will be unable to carry out what could be hundreds of piracy trials given its limited financial and personnel resources. Moreover, some say that using the ICC to prosecute pirates would not address the possibility that many pirates could request asylum once their prison sentences ended.

In contrast to permanent tribunals such as the ICC, the report examined the possible use of ad hoc (i.e., temporary) tribunals created by the Security Council specifically to address piracy. It noted that the UN had used such tribunals to prosecute serious abuses of human rights carried out during the 1990s in Rwanda and the former Yugoslavia. Some workshop participants believed that the costs of administering an ad hoc tribunal would not exceed those for domestic courts, and that the very existence of such tribunals could deter acts of piracy.

But others said that past ad hoc tribunals were lengthy, expensive, and did not fulfill their goals of successfully prosecuting those responsible for committing atrocities. (Several trials continue even today.) Some add that an ad hoc piracy tribunal would encounter the same problems faced by domestic courts, including complications with evidence and the possibility that convicted pirates would apply for asylum. Furthermore, others argued that the Security Council would not have the authority to set up ad hoc tribunals because piracy – outside of Somali territorial waters – did not present a threat to international peace and security. (Again, under the *UN Charter*, the Security Council generally addresses threats to international peace and security.)

The next steps in addressing piracy: The UN Secretary-General's report

In accordance with Security Council Resolution 1918, the UN Secretary-General issued a report (S/2010/394) in July 2010 which outlined options for prosecuting and imprisoning individuals who had engaged in piracy specifically off the coast of Somalia. Some of the options include:

- Calling on the UN to continue its assistance to regional nations in prosecuting Somali pirates. This would allow them to continue building upon and strengthening their progress against piracy, though it would require UN funding and greater efforts to improve and build more local jails.
- Creating a Somali court on the territory of a third-party state, which would allow Somalia to increase its involvement in anti-piracy efforts and also enhance its judicial system. But difficulties include finding third-party states willing to host a Somali court on its territory. Also, Somalia's laws and judicial system would require time-consuming revisions.
- Creating a special UN chamber (with UN judges) in the existing legal system of another nation in the region. But this option could require changes in the laws of the hosting nation.
- Creating a UN-assisted regional tribunal and facilities through a multilateral agreement. The report said that this option would allow countries to gain expertise in prosecuting piracy while detaining them within the region. But creating such a new and separate tribunal could be time-consuming and costly.
- Creating a new UN international tribunal (complete with UN judges, prosecutors, and staff) with the legal authority to require cooperation from all nations in combating piracy. But, as in other cases, setting up such a court will be time-consuming and expensive.

In April 2011, the Security Council passed a resolution (1976) where it decided to "consider the establishment of specialized Somali courts to try suspected pirates both in Somalia and in the region, including an extraterritorial Somali specialized anti-piracy court." The Security Council then called on the Secretary-General to report back by June 2011 on how to implement such a plan of action.

While the United Nations continues to debate how to address piracy, the media reported that the Somali parliament in January 2011 began to debate the passage of a domestic anti-piracy law (drafted by a Justice Committee) which would criminalize piracy and impose penalties ranging from fines in the tens of thousands of dollars (in a nation where the per capita GDP was \$600 in 2010) to long prison terms. But during debate, many opposed the law, arguing that some Somalis accused of being pirates were actually protecting Somali territorial waters from foreign fishing vessels, according to *Agence France-Presse*. Lawmakers then sent the bill back to the Justice Committee for further amendments.

In the meantime, observers point out that piracy still remains a significant problem off the coast of Somalia and surrounding waters. In February 2011, for instance, Somali pirates had (for the first time) deliberately killed their hostages (several American aboard a private yacht). Experts say that such an occurrence is rare because killing hostages would end any ransom payments to pirates. 

Criminal disenfranchisement at home and abroad

Experts say that the importance of voting in free elections cannot be understated. The ability to vote allows people to hold their elected officials accountable for their actions and performance in office. Voting can also alter the course of a nation's priorities when entrenched political parties lose their mandate and see their policies overturned by newly elected representatives. Around the world in recent decades, voting in many nations has even resulted in historic change. Recently, people living in the southern half of Sudan voted by an overwhelming majority to secede from that nation and form their own sovereign state.

While the ability to vote is a powerful tool, every country places certain restrictions on who may actually vote. Many impose, for example, certain residency requirements. Others, unfortunately, prevent minority groups from voting. Nations even disenfranchise (i.e., take away the voting rights of) individuals for specific reasons. Presently, many countries are debating whether and to what extent they can disenfranchise an individual after a criminal conviction.

What is U.S. policy concerning criminal disenfranchisement? Do other nations take away a person's ability to vote after a criminal conviction? Are there international treaties which provide guidance in the area of voting and criminal disenfranchisement? And are more nations pursuing criminal disenfranchisement policies today?

Criminal disenfranchisement in the United States

Many people argue that the ability to vote is a privilege which must be earned and maintained, and that governments should disenfranchise individuals convicted of felonies, which are crimes that are so serious that society imprisons violators for more than a year in jail. In the views of Roger Clegg, president of the Center for Equal Opportunity (a conservative advocacy group), voting requires a certain level of competence. In his opinion, ex-felons lack "good judgment" to vote. "We have certain minimum standards of trustworthiness before we let people participate in the serious business of self-government," he said, "and people who commit serious crimes don't meet those standards."

Other supporters of criminal disenfranchisement argue that specific crimes carried out by felons – such as rape where victims must undergo years of counseling and also encounter significant intimacy problems in their relationships – had caused and continues to cause so much harm that they should continue being punished with measures such as disenfranchisement.

Many also note that the ability to vote is not an absolute right, and that every nation imposes certain restrictions on the ability to vote. "Not everyone in the United States may vote," says Clegg, pointing out that various laws in the United States prevent certain groups of people from voting, including the mentally ill, those who do not meet citizenship requirements, and children. Disenfranchising felons, they say, would be another restriction among many others.

Opponents of criminal disenfranchisement, on the other hand, say that voting is an inherent right of all citizens born in a democratic nation. In support of this belief, they cite the Fifteenth Amendment, which bans discrimination against voters based on their race, and also the 24th Amendment, which prohibits poll taxes in federal elections. Other voting rights proponents cite the *Voting Rights Act of 1965*, which outlawed literacy tests and other discriminatory practices in voting registration. In a 1995 case called *McLaughlin v. City of Canton*, a federal judge claimed that "disenfranchisement is the harshest civil sanction imposed by a democratic society," and that because "the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship," society should not impose such a measure lightly.

Opponents also argue that criminal disenfranchisement is simply an unfair practice. Former convicts who complete their prison sentences have fully paid their debt and should be reintegrated into society along with all of their rights, they argue. Others, such as Reynolds Holding, a columnist for *TIME* magazine, warn that disenfranchising people could create more problems for society. "Penalizing [former felons] further by taking away their right to vote is not just unfair to them, it's bad for us," he argued. Excluding their participation in the democratic process could alienate former criminals and make them less



prone to obey the law. Others such as Clegg have described this rationale as “ridiculous,” dismissing arguments that some people commit crimes because they can’t vote.

Does the U.S. Constitution allow states to disenfranchise people after a criminal conviction? In 1974, the Supreme Court ruled in a landmark decision that the Constitution allows a state to do so. In *Richardson v. Ramirez*, three people challenged California’s criminal disenfranchisement laws, arguing that disenfranchising convicted felons violated the Equal Protection Clause of the Fourteenth Amendment, which says that “no state shall . . . deny to any person within its jurisdiction equal protection of the laws.”

The plaintiffs said that while the state of California afforded its residents with the right to vote, it denied that very same right to former convicts (now re-integrated into society) even after they had served their prison sentences, hence denying former convicts equal treatment. Among other reasons, the Supreme Court ruled that California did not violate the Fourteenth Amendment

Many people argue that the ability to vote is a privilege which must be earned and maintained, and that governments should disenfranchise individuals convicted of felonies, which are crimes that are so serious that society imprisons violators for more than a year in jail.

because Section 2 of that amendment allows governments to deny the right to vote for people who had participated in a rebellion, “or other crime.”

Still, the Court did not say that all criminal disenfranchisement laws were automatically legal under the Constitution. In the 1985 case *Hunter v. Underwood*, it struck down an Alabama statute that disenfranchised people convicted of “any crime involving moral turpitude.” The Court determined that the main reason Alabama had passed its law (back in 1901) was to disenfranchise African-Americans. Because Alabama had engaged in “purposeful racial discrimination,” the Court struck down the law, saying that it had violated the Equal Protection Clause of the Fourteenth Amendment.

In addition to challenging criminal disenfranchisement laws under the Fourteenth Amendment, others have argued that such laws violate the Eighth Amendment, which says that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Opponents argue that, in many cases, criminal disenfranchisement laws impose a disproportionate punishment, thus making them cruel and unusual.

But in a 1974 decision called *Theiss v. State Administrative Board of Elections*, the Supreme Court disagreed. In determining whether a certain punishment was cruel and unusual under the Eighth Amendment, the Court said that it had to examine “the evolving standards of decency that mark the progress of a maturing society.”

It noted that Congress had ratified the Eighth Amendment in 1791, and then pointed out that the Fourteenth Amendment (ratified much later in 1868) specifically allows criminal disenfranchisement. “The penalty of disenfranchisement is one specifically recognized by the Fourteenth Amendment, an

amendment enacted [after] the Eighth,” said the Court. As a result, the Court said that the ideals and prohibitions set forth in the newer amendment (i.e., the Fourteenth) were more reflective of modern society’s standards than those set forth in the Eighth Amendment. Therefore, criminal disenfranchisement laws did not constitute cruel and unusual punishment.

Presently, each state decides whether or not to implement a criminal disenfranchisement policy. While many states disenfranchise felons for the remainder of their lives, others restore a felon’s right to vote a few years after his release from prison. And still other states actually allow felons to vote during their incarceration. Some examples from around the nation include:

- Maine and Vermont: People with felony convictions can vote, even while incarcerated.
- Mississippi: *Mississippi Voting Code §23-15-19* bars people convicted of certain crimes (including murder, rape, bribery, theft, and perjury) from voting. A two-thirds vote in both

houses of the state legislature restores the ability to vote.

- New York: Under *New York Voting Code §5-106*, people with felony convictions may register to vote either after their maximum sentence of imprisonment has expired or after completing parole. The governor may also restore voting rights by issuing a pardon.
- Texas: Under *Texas Election Code, Title 2, §11.002*, incarcerated felons cannot vote, but may do so upon completion of parole, probation, or by receiving a pardon.
- Nebraska: Under *§29-2264 of Nebraska Voting Code*, ex-felons can register to vote two years after completing their prison sentences.

No single federal law regulates criminal disenfranchisement policies in the United States. Though federal laws such as the 1965 *Voting Rights Act* and the 1993 *Voter Registration Act* prohibit states from enacting certain discriminatory practices in voting, experts say that state governments largely regulate who may vote in both local and national elections. Accordingly, states regulate whether people may vote after serving a criminal sentence.

Still, the use of criminal disenfranchisement remains controversial. As more people enter prison (the *Washington Post* reported in 2008 that “with more than 2.3 million people behind bars, the United States leads the world in both the number and percentage of residents it incarcerates”), people are debating the implications of a growing class of disenfranchised people.

Criminal disenfranchisement: The shifting debate in other nations

As in the case of the United States, other nations also restrict the voting rights of former convicts. But, according to scholars at the University of Minnesota and Northwestern University, “most automatically restore voting rights after a waiting period that commences upon release from prison.” (They say that only

Belgium – which permanently bars people imprisoned for five years or more from ever voting again – has disenfranchisement policies similar to those found in the United States.)

In fact, in a broad overview of major democracies in the developed and developing world, the debate concerning disenfranchisement is no longer focused on whether governments should restore the voting rights of former prisoners. Instead, it has shifted to a discussion on which prisoners (i.e., those who are currently incarcerated) should vote. A legal analyst in the area of criminal disenfranchisement, Erika Wood of the Brennan Center for Justice at NYU Law School, said: “The debate in Europe [for instance] is over which [incarcerated] prisoners should be barred from voting. In almost all cases, the debate stops at the prison walls. While researchers differ over how to categorize certain laws, in most European nations, some or all prisoners are entitled to vote.”

In 2003, the International Foundation for Election Systems carried out a survey (“Incarceration and Enfranchisement: International Practices, Impact and Recommendations for Reform”) which provides an overview of this trend. Examples include:

- Australia: Prisoners may vote in any election if they have a sentence of 12 months or less. Prisoners with a sentence of five years or less can vote in federal elections. Australia even reminds prisoners about upcoming elections. It also does not restrict the voting rights of convicted criminals once they are released from prison.
- Canada: Even if a person is convicted of a felony, Canada does not restrict inmate voting. It also does not place restrictions on the voting rights of prisoners upon their release.
- China: Prisoners may vote with specific restrictions. But those on death row may not vote.
- Germany: While prisoners may vote (and, as in the case of Australia, receive reminders from the government about upcoming elections), individuals convicted of treason, electoral fraud, espionage, or belonging to an illegal organization may not vote.
- Israel: Prisoners may vote while incarcerated.
- Zimbabwe: Prisoners serving a sentence of less than six months may vote.

Observers say that other democracies tend to treat voting as a right and not as a privilege. South Africa’s constitution, for instance, states that “every adult citizen has the right to vote in elections for any legislative body established in the terms of this Constitution.” The *Basic Law of Hong Kong* says: “Permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with law.”

In some cases, people must vote, according to the Electoral Reform Society, a voting rights organization. Australia, Belgium,

and Brazil, for example, have a compulsory voting system, and failing to vote is a crime punishable by fines or, in extreme cases, imprisonment. In Belgium, failure to vote in at least four elections within 15 years can lead to permanent disenfranchisement. Australia imposes a fine on non-voters, and failure to pay the fine can lead to imprisonment. In Brazil, voting is mandatory for literate residents between the ages of 18 and 70.

International law and criminal disenfranchisement

Analysts say that there is no treaty whose sole purpose is to address comprehensively whether or how countries must carry out criminal disenfranchisement policies. (As previously shown, most nations have simply passed their own domestic regulations overseeing that practice.) Instead, some treaties, in part, provide general guidelines for nations to follow in the area of voting rights and criminal disenfranchisement. Supporters and opponents of criminal disenfranchisement have used provisions from these treaties to advance their particular viewpoints.

The International Covenant on Civil and Political Rights (or ICCPR): Adopted by the United Nations General Assembly in 1966, this treaty calls on nations to recognize and protect

Opponents of criminal disenfranchisement say that voting is an inherent right of all citizens born in a democratic nation. One U.S. judge claimed that “disenfranchisement is the harshest civil sanction imposed by a democratic society.”

fundamental civil and political rights such as the right to equality before the law, freedom of association, the right to a fair trial, and the right to assemble peacefully, among many others. The United Nations Human Rights Committee – whose members are independent experts – monitors the implementation of the ICCPR by its signatory nations. It also issues official interpretations and guidelines (called “general comments”) for specific treaty provisions.

People who oppose criminal disenfranchisement usually cite Article 25 of the ICCPR, which says that “every citizen shall have the right and opportunity . . . to vote.” They argue that the term “every citizen” doesn’t include any conditions or qualifications, and, therefore, should implicitly include convicted criminals who finish serving their sentences. In addition, opponents cite Article 10(3), which states that “[t]he penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation.” They believe that Article 10(3) undercuts the argument that former felons lack the requisite “good judgment” to participate in elections since one of the goals of sending felons to prison is to rehabilitate and then integrate them back into society.

Furthermore, opponents point to Article 2 which requires signatory governments to protect the rights listed in the ICCPR (including the right to vote) for all individuals within their respective jurisdictions without taking into account a person’s “race, colour, sex, language, religion . . . or other status,” among other distinctions. In the context of criminal disenfranchisement, prohibiting a person from voting because of his status as a convicted criminal would violate Article 2, say opponents.

Moreover, other opponents of criminal disenfranchisement cite Article 26, which says that nations must equally protect the rights of individuals within their respective jurisdictions from those who may discriminate against them because of their “race, colour, sex, language, religion, . . . or other status,” among other factors. So governments which enact criminal disenfranchisement laws simply as a cover to prevent, say, racial minorities or former convicts from voting would violate Article 26.

In the same way, proponents of criminal disenfranchisement use the ICCPR to advance their viewpoints. They note that the Human Rights Committee, in 1996, issued General Comment No. 25, which, in part, provides guidance to nations that disenfranchise former criminals. For example:

- They say that Paragraph 4 – which states that “any conditions which apply to the exercise of rights protected by Article 25 [such as the right to vote] should be based on objective and reasonable criteria” – does not outright prohibit criminal disenfranchisement, but, instead, seems to imply that nations should establish objective criteria if it decides to restrict voting rights based on a person’s criminal record.
- In the same way, Paragraph 10 – which says that “the right to vote at elections and referenda must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote” – also seems to allow nations to set voting restrictions (such as criminal disenfranchisement) as long as they are reasonable. Proponents of criminal disenfranchisement can argue that it is reasonable to disenfranchise people for committing serious criminal offenses.
- Proponents of criminal disenfranchisement point especially to Paragraph 14 which says that “if conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence.” They argue that this paragraph clearly allows criminal disenfranchisement, and even sets forth the parameters which states must follow when excluding convicted criminals from the electoral process.

But in response, opponents of criminal disenfranchisement point out that these paragraphs from General Comment 25 does not explicitly endorse the use of criminal disenfranchisement or say that nations must disenfranchise former criminals. It simply seems to acknowledge that many nations disenfranchise former criminals, but provides them with guidelines to ensure that voting restrictions are reasonable, based on objective criteria, and are proportionate to certain offenses.

In the midst of this debate, the Human Rights Committee in July 2006 issued a report (called “concluding observations”) which broadly reviewed a wide range of domestic U.S. human rights practices. In the area of voting, the report concluded that

U.S. criminal disenfranchisement policies did not comply with various provisions in the ICCPR, and said that the United States “should adopt appropriate measures to ensure that states restore voting rights to citizens who have fully served their sentences and those who have been released on parole.”

Specifically, the Committee determined that U.S. criminal disenfranchisement policies did not comply with Article 25 of the ICCPR which again says that all citizens have the right and opportunity to vote. It said that the United States should “review regulations relating to deprivation of votes for felony conviction to ensure that they always meet the reasonableness test of Article 25,” but did not provide any further details. (This reasonableness test is found in General Comment 25, Paragraph 14, which again says that suspending the right to vote should be proportionate to the offense and the sentence.) One observer speculates that the Committee was indirectly criticizing the fact that many jurisdictions in the United States have widely differing criminal disenfranchisement policies where one offense could result in a lifetime voting ban in one state but not another.

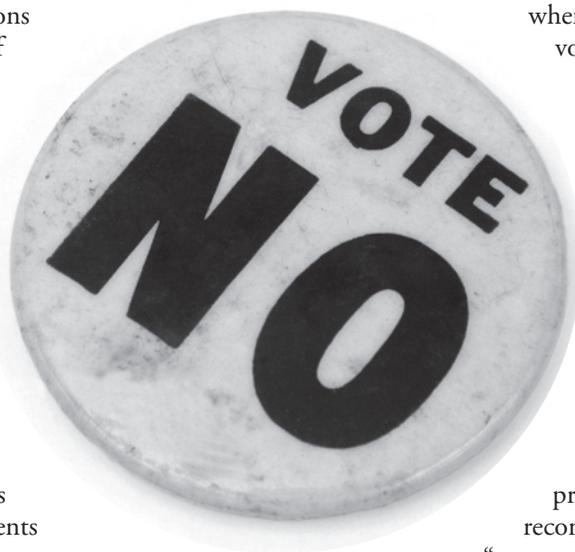
The Committee also concluded that U.S. criminal disenfranchisement policies did not comply with Article 26, which again calls on nations to equally protect the rights of individuals from those who may discriminate against them on account of their race, for instance. But it did not explicitly explain how it reached this conclusion. Rather, the Committee simply said that American policies had “significant racial implications” (though it didn’t provide any specific examples), and recommended that United States should “assess the extent to which such regulations disproportionately impact on the rights of minority groups.” (Experts say that criminal disenfranchisement laws in the United States affect racial minorities more than any other group.)

It also said that U.S. criminal disenfranchisement policies did not serve “the rehabilitation goals of Article 10(3),” but again did not provide any further explanations. Some legal observers believe that the Committee was indirectly questioning why many states saw a need to continue punishing former criminals (through disenfranchisement) if they had supposedly been rehabilitated in prison.

The United States did not change its criminal disenfranchisement policies because the report was not legally binding.

The African Charter on Human and Peoples’ Rights: Adopted in 1981, the African Charter is a regional treaty which calls on its signatory nations to recognize and protect a wide variety of civil, economic, political, and social rights, including the right to a fair trial, freedom of association, the right to work, and the right to education, among many others.

In the area of voting, Article 13 of the Charter says: “Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives



in accordance with the provisions of the law.” Though the Charter does not explicitly address criminal disenfranchisement, one legal analyst said that the Charter implicitly allows for such punishment as long as a nation carries it out “in accordance with the provisions of the law,” and also if the law and its criteria are not arbitrary or unreasonable.

Many nations take away the voting rights of individuals for specific reasons. Presently, they are debating whether and to what extent they can disenfranchise an individual after a criminal conviction.

But opponents respond that the first clause of the article (which says that every citizen shall participate in the democratic process) seems to implicitly ban criminal disenfranchisement. Denying criminals – who are also still citizens – the right to vote would violate a clearly stated right to participate in the governance of a nation, they say.

The American Convention on Human Rights: Similar to the African Charter, the American Convention (adopted in 1969) is another regional treaty calling on its member nations to protect a broad range of human rights. In the area of voting, Article 23(1)(b), states: “Every citizen shall enjoy the following rights and opportunities . . . to vote and be elected in genuine periodic elections.” As in the case of other treaties, opponents of criminal disenfranchisement can say that, under their interpretation, this provision implicitly bans such a punishment because it would prevent the right to vote.



On the other hand, supporters say that the American Convention seems to allow explicitly for criminal disenfranchisement, pointing out that Article 23(2) says: “The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph [such as the right to vote] only on the basis of age, nationality, residence, language, education, civil and mental capacity, or

sentencing by a competent court in criminal proceedings.” So if a nation chooses to curtail a person’s voting rights as part of sentencing during criminal proceedings, it may do so.

But one legal analyst notes that, in the specific case of the United States (which signed but did not ratify the American Convention), disenfranchisement is not always part of sentencing during criminal proceedings, and that regulations concerning such punishment are found in civil statutes. Because the United States usually strips a criminal of his voting rights *after* being released from prison, opponents say that such punishment falls outside of the parameters of the American Convention (which says that such punishments should be meted out during criminal sentencing), and, therefore, may be invalid.

The European Convention on Human Rights (or ECHR): Adopted in 1950, the ECHR calls on its member states to protect and enforce a wide variety of individual rights, including the right to association, expression, privacy, religion, and a fair trial, among many others. It also established the European Court of Human Rights to adjudicate disputes involving that treaty. In the area of voting rights, Article 3 of Protocol No. 1 of the ECHR says: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” (A protocol is an attachment to an existing treaty.)

While Article 3 does not explicitly mention or directly regulate the issue of criminal disenfranchisement, the European Court of Human Rights had issued a major decision – *Hirst v. The United Kingdom* (No. 2) (Application No. 74025/01) – addressing this issue.

After killing his landlady, John Hirst pleaded guilty to manslaughter in 1980 and began to serve time in prison. Under a 1983 British law, *all* convicted prisoners automatically lose their right to vote until their release. Hirst claimed that the law violated Article 3. By indiscriminately imposing a blanket voting restriction on all convicted prisoners without taking into account the nature of their crimes and the lengths of their sentences, the law undermined the free expression of the opinion of the people, argued Hirst.

In 2004, the European Court of Human Rights ruled unanimously that an absolute voting ban on all convicted prisoners in the UK did violate Article 3. In its decision, the court cited a 1987 case (called *Mathieu-Mohin and Clerfayt v. Belgium*) where it said that the right to vote was not absolute, and that EU nations had a “wide margin of appreciation” to set certain limits

and conditions on the voting rights of prisoners. At the same time, the court said it had a duty to determine “that the conditions [did] not curtail the rights in question to such an extent as to impair their very essence and deprive of them of their effectiveness,” and also to determine whether particular voting restrictions were necessary and proportionate in pursuit of a legitimate aim.

The court then determined that “there was no evidence that the United Kingdom legislature had ever sought to weigh the competing interests or to assess the proportionality of the ban as it affected convicted prisoners.” Instead, it simply prohibited all convicted prisoners from voting. Such an indiscriminate approach, ruled the court, fell outside the “acceptable margin of appreciation” in setting voting restrictions, and thus violated Article 3. The court pointed out that the UK already had policies in place which allowed certain prisoners to vote (such as those who had appealed their convictions and also those imprisoned for failing to pay their debts), and that it could do the same for other convicts.

Legal analysts say that this decision did not call on the United Kingdom to give the right to vote automatically to all convicted prisoners without any conditions. Instead, they say that the decision inferred that the government should review its laws and determine whether an outright voting ban on all convicted prisoners served a legitimate purpose.

In November 2010, news sources said that the United Kingdom was in the process of implementing the court’s decision, and

United States: Reforming criminal disenfranchisement laws?

Analysts note that, in recent years, many jurisdictions in the United States have been reforming or repealing their criminal disenfranchisement laws. Several states still have disenfranchisement laws which impose a lifetime ban on all ex-felons. But others have lightened their voting restrictions, limiting them to only a few years after completion of a criminal sentence. In a 2010 publication (called “Expanding the Vote: State Felony Disenfranchisement Reform”), an advocacy group called The Sentencing Project (which calls for reform of the criminal justice system) gives an overview of some major changes in state disenfranchisement policies. For example:

- In 1997, Texas repealed its lifetime voting ban on all individuals convicted of a felony. It later eliminated a two-year waiting period, and now automatically restores the voting rights of all felons once they complete their prison sentences.
- In 2001, Connecticut ended its voting ban for people on probation, which, in turn, extended the right to vote to more than 33,000 ex-felons.
- In 2001, New Mexico repealed its lifetime disenfranchisement law. Presently, people convicted of a felony may vote once they complete their sentences. Analysts say that these reforms had restored the right to vote to more than 69,000 convicted felons.
- In 2005, Nebraska repealed a law which imposed a lifetime

No treaty comprehensively addresses whether or how countries must carry out criminal disenfranchisement policies. Instead, some treaties, in part, provide general guidelines for nations to follow in the area of voting rights and criminal disenfranchisement.

would soon decide which convicted prisoners would be able to vote. In the debate concerning criminal disenfranchisement, this development seems to confirm the trend where more and more nations are debating which *prisoners* should be allowed to vote and not whether they should be allowed to vote upon their release, say analysts.

Also, while this decision applied only to the UK and to the particular facts of this case, other commentators say that it effectively sent a notice to other European Union (or EU) nations which completely disenfranchised criminal convicts. According to the British Broadcasting Corporation, approximately 13 nations in the EU currently prevent their prisoners from voting, including Armenia, Bulgaria, the Czech Republic, Estonia, Hungary, Luxembourg, Romania, and Russia.

Charter of Fundamental Rights of the European Union: Others point out that the Charter of Fundamental Rights of the European Union says, in part, in Articles 39 and 40 that “every citizen of the [European] Union has the right to vote.” (Analysts say that the Charter is comparable to a bill of rights for the EU.) But it does not explicitly address criminal disenfranchisement.

ban on convicted felons. Instead, after a two-year waiting period, Nebraska will automatically allow former prisoners to vote.

- In 2006, Rhode Island repealed a law which disenfranchised people on probation and parole.
- In 2007, Maryland’s repealed its lifetime voting prohibition for people who have completed their sentences. This restored the voting rights of more than 52,000 ex-felons, say analysts.

In another development, members of Congress in 2009 introduced the *Democracy Restoration Act* (H.R. 3335), which (if passed) would be the first piece of federal legislation to allow people who complete their prison sentences for felony convictions to vote in federal elections only. (It does not apply to state or local elections.) Analysts at the Sentencing Project say that the proposed law could restore voting rights for nearly 4 million ex-felons. While a subcommittee in the House of Representatives held a hearing in March 2010, the law did not advance any further in the legislative process. One analyst said that the present Congressional leadership will unlikely take up the measure. 

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International Law News Roundup

COMPARATIVE LAW

Oklahoma: Sharia, international law banned in courts?

Courts may not use Sharia law or international law when deciding cases, according to a state constitutional amendment approved by Oklahoma voters late last year. While supporters say that the amendment will ensure that state courts base their decisions on federal and state laws, opponents argue that the measure is both unnecessary and unconstitutional. What does the amendment say exactly? What is its current status? Do other nations, including the United States, allow the use of religious laws in their legal systems?

In November 2010, voters in Oklahoma approved an amendment to the state's constitution (by a margin of 70 to 30 percent) which would require courts to "rely on federal and state law when deciding cases," and also forbids them from "considering or using" both Sharia law and international law. Also known as the *Save Our State Amendment*, the measure defined Sharia law as Islamic law "based on two principle sources, the Koran and the teaching of Mohammed." It defined international law as "the law of nations" which "deals with the conduct of international organizations and independent nations," and that its sources included "international agreements, as well as treaties."

The amendment, say analysts, specifically applies to courts and not to individuals. It does not, for instance, explicitly prohibit Muslims in Oklahoma from practicing their faith or using Sharia law to guide their own personal lives, though critics believe otherwise.

Sharia – which means "the clear, well-trodden path to water" – is not merely a strict listing of Islamic rules and regulations embodied, for instance, in a single reference book, say experts. Rather, Sharia is comprised of the principles and rules governing the life of a devout Muslim, and is drawn from various sources, including the Koran, the teachings of the prophet Mohammed, the ideas of Islamic scholars, and the consensus of a particular Muslim community.

Supporters say that the amendment preempts Oklahoma courts from basing their decisions on Sharia law or international law. "I see this in the future somewhere in America," said state Rep. Rex Duncan, one of the amendment's primary supporters, in an interview. "It's not an imminent threat in Oklahoma yet, but it's a storm on the horizon in other states." Do other states and nations use Sharia law in their legal systems?

In 2008, observers note that the United Kingdom began to allow private citizens to use what are broadly called Sharia courts where experts in Islam convene a tribunal to adjudicate certain civil matters such as property and labor disputes, marriage and divorce, and inheritance issues, and only when the private parties voluntarily agree to do so, according to reporting from the *New York Times*. In a 2008 speech in a mosque reported by the *Daily Mail*, the president of the Supreme Court of the United Kingdom, Nicholas Phillips, said: "There is no reason why principles of

Sharia law or any other religious code should not be the basis for mediation or other forms of dispute resolution."

Sharia tribunals in the United Kingdom neither decide criminal cases nor do they replace the British legal system. Rather, they supplement the existing system, as long as "they do not come into conflict with English law," said the then-justice minister Jack Straw. The *New York Times* also reported that "the Church of England has its own ecclesiastical courts," and that "British Jews have had their own 'beth din' courts for more than a century."

Many other nations also use a secular legal system along with Sharia law, according to Toni Johnson, an analyst at the Council on Foreign Relations, a New York-based foreign policy think tank. Saudi Arabia, for instance, interprets Sharia guidelines to prevent women from driving and calls on them to be completely covered in public. Some regions within Nigeria have adopted harsh Sharia punishments in their penal codes, including amputations for theft, and death in cases of adultery or sodomy, according to the *BBC*. And in Egypt, the *BBC* says that Sharia law applies only in areas such as marriage, divorce, inheritance, and custody of children. "Otherwise the legal system is entirely a secular one," it reported.

The United States also allows its residents to use Sharia and other religious laws in limited cases, say observers. Under the *Federal Arbitration Act* (or FAA), for example, people may voluntarily decide to use private arbitration panels – whose decisions can be enforced by state and federal courts – in settling private contract disputes, says legal analyst John Richards of *LegalMatch.com*. Though not expressly stated in the statute, one analyst wrote in the *Economist* that laws such as the FAA permits the use of Christian, Jewish, and Muslim arbitration panels to settle private disputes.

Still, supporters such as Oklahoma Rep. Duncan said: "It should not matter what France might do, what Great Britain might do, or what the Kingdom of Saudi Arabia might do. Court decisions [in Oklahoma] ought to be based on federal or state law."

Supporters of the Oklahoma amendment have pointed to a controversial case in 2010 where a woman in New Jersey asked a court to issue a restraining order against her husband whom she claimed had continually assaulted her sexually. The court (in *S.D. v. M.J.R.*) said it was not necessary to do so, arguing that the couple had divorced and were no longer living together. It also said that the husband did not act with criminal intent when he forced his wife to have sex, accepting the claim that his Muslim beliefs allowed him to have sex with her on demand. An appeals court later overturned the decision, and said that the lower court should not have considered the husband's religious beliefs when considering an order of protection for the wife.

"The fact that Sharia law was even considered anywhere in the U.S. is enough for me," said Rep. Anthony Sykes, another Oklahoma lawmaker and supporter of the amendment. "It should scare anyone that any judge in America would consider using that as precedent."

But critics say that no Oklahoma court had ever used Sharia law (or international law) as the primary basis for its decision.

(Others point out that the 15,000 Muslims in the state make up 0.41 percent of its total population of 3.7 million residents.) They also say that U.S. courts may only use what is called “controlling authority” – such as the U.S. Constitution and federal and state laws – as the primary basis of their decisions. The Oklahoma law, critics believe, is unnecessary.

As in the case of using Sharia law, legal analysts also say that U.S. courts must not base their decisions primarily on international law (which are embodied in treaties and opinions of international judicial bodies, among other sources), though they do point out that, under Article 6 of the Constitution, “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”

Voters in Oklahoma decided that courts may not consider Sharia or international law when ruling on cases, but opponents argue that the measure violates several important provisions of the U.S. Constitution.

To bolster their arguments, both supporters and opponents of the Oklahoma amendment have cited a 1990 Supreme Court decision (*Employment Division, Dept. of Human Resources of Oregon v. Smith*) which ruled that Oregon may deny unemployment compensation to religious observers when their dismissals result from the use of the drug “peyote,” which some Native Americans use as part of a religious ritual, but is illegal in that state. Allowing people to disobey the law because of their religious beliefs would make “the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself,” said the majority decision. In the same way, supporters of the *Save Our State Amendment* say that considering Sharia law in court decisions would permit selective adherence to certain laws depending on a person’s faith.

But opponents argue that, under *Smith*, the court had established that state laws supersede those of any organized religion. So it is unnecessary to pass the *Save Our State Amendment*, they say.

Other states soon began to propose their own constitutional amendments and laws to prohibit their courts from using Sharia law and international law when deciding cases. For example:

- Under SB 88 in Alaska, “a court, arbitrator, mediator, administrative agency, or enforcement agency may not apply a foreign law if application of the foreign law would violate an individual’s right guaranteed by the Constitution of the State of Alaska or the United States Constitution.”
- HJ0008 in Wyoming says that “the courts shall not consider the legal precepts of other nations or cultures including, without limitation, international law and Sharia law.”
- Texas proposed HJR 57, which says that “a court of this state may not enforce, consider, or apply any religious or cultural law.”

In response, Muneer Awad – the executive director of the Oklahoma branch of the Council on American-Islamic Relations (a civil rights and anti-defamation group) and also an Oklahoma City resident – asked the U.S. District Court for the Western District of Oklahoma to issue a temporary restraining order to stop state officials from certifying the results of the *Save Our State*

Amendment. Allowing the amendment to come into effect, he argued, would violate the U.S. Constitution.

First, the Oklahoma amendment would violate the Establishment Clause of the First Amendment, which states that the government shall “make no law respecting the establishment of religion.” Legal analysts say that this clause not only forbids the United States from establishing an official or national religion, but also prohibits it from giving preference to one religion over another or from passing laws with religious purposes.

According to Awad, the Oklahoma amendment violates the Establishment Clause in several ways. For example, it does not have any secular purpose. In justifying the amendment, Awad pointed out that supporters such as Oklahoma Rep. Duncan said that the United States was in a “cultural war, a social war, a war for the survival of our country.” In addition, by singling out only Islam and Sharia law, the amendment favored other religions while inhibiting his own. Furthermore, because “there is no single religious text that all Muslims accept as the exclusive source” for Sharia law, the amendment would require Oklahoma courts to determine “what is and what is not Sharia law.” Doing so, said Awad, would force the government to “become excessively entangled in Plaintiff’s faith,” which, in turn, violates the Establishment Clause.

Second, the Oklahoma amendment would violate the Free Exercise Clause of the First Amendment, which says that the government shall not pass any laws “prohibiting the free exercise” of religion unless it serves a compelling government interest and is “narrowly tailored to advance that interest.” Awad said that the Oklahoma amendment will prevent him from exercising his right to use Sharia law when making personal decisions which can be enforced by the courts and other judicial bodies. For instance, “Plaintiff [will be] unable to rely on a court to incorporate the religious documents [of Islam] that express his faith into his will” since the Oklahoma amendment would prohibit the court from doing so, argued Awad, who added that the amendment did not serve any compelling government interest.

In late-November 2010, Judge Vicki Miles-LaGrange issued a preliminary order which blocked state officials from certifying the results of the amendment. “While defendants contend that the amendment is merely a choice-of-law provision that bans state courts from applying the law of other nations or cultures – regardless of what faith they may be based on, if any – the actual language of the amendment reasonably, and perhaps more reasonably, may be viewed as specifically singling out Sharia law, conveying a message of disapproval of plaintiff’s faith,” she wrote. In response, Rep. Mike Reynolds of the Oklahoma legislature introduced a resolution (HR 1004) in January 2011 calling on the U.S. House of Representatives to impeach Judge Miles-LaGrange for what he called “abuse of authority.”

While the court’s decision solely addressed Sharia law, the Council on American-Islamic Relations said that the amendment would also prevent Oklahoma courts from honoring international arbitrations, adhering to international human rights treaties, and recognizing marriages and divorces from other countries.

In March 2011, Oklahoma lawmaker Sally Kern introduced a bill (HB 1552) which she claimed would address some of the problems in the original Oklahoma amendment. First, the proposed bill says that “the Legislature fully recognizes the right

to contract freely under the laws of this state.” Second, it states that “any court, arbitration, tribunal, or administrative agency ruling or decision shall . . . be void and unenforceable” if these bodies base their “rulings or decisions in the matter at issue in whole or in part on any law, rule, legal code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges granted under the United States and Oklahoma Constitutions.”

The Oklahoma House of Representatives passed the bill in a 76-3 vote. The state Senate will consider the bill in the coming months. Legal analysts are currently examining the proposed law to see whether it complies with the First Amendment of the Constitution. 

COMPARATIVE LAW

Switzerland: New law to recover stolen public funds from abroad

Many corrupt public officials often choose to deposit their stolen or illegally acquired funds in nations such as Switzerland which have strict bank secrecy laws. But recently, Switzerland has made it harder for them to shield these unlawfully obtained assets from scrutiny, and also easier for the fleeced governments to reclaim them. In a recent public spectacle which had many people shaking their heads in disbelief, an exiled dictator returned to his homeland and risked arrest – all in an attempt to gain access to alleged stolen funds before the new Swiss law came into effect.

On January 16, 2011, Jean-Claude Duvalier, the former leader of Haiti, returned to the capital city of Port-au-Prince after living in exile in France for nearly 25 years. During his rule, critics say that Duvalier had ordered his security forces to carry out large-scale human rights abuses against political opponents. In 1986, in the midst of a popular uprising, he fled Haiti and, according to observers, stole at least \$300 million in public funds.

Duvalier claimed that he had returned to help Haiti recover from an earthquake which had destroyed large swaths of that country a year earlier. (The earthquake, according to the U.S. Geological Survey, was one of the largest in that nation’s history.) “Haiti is in my blood,” said Duvalier upon his return. “I cannot be indifferent to its suffering.”

But many critics believe that Duvalier was low on cash (having “squandered [his money] on a lavish lifestyle of jewelry, chateaus, fancy cars, and a very expensive divorce from his ex-wife,” according to the *New York Times*), and had returned to Haiti in a plan to gain access to a frozen Swiss bank account containing \$6 million before Switzerland implemented a new domestic law to help nations claim stolen assets.

Analysts believe that corrupt officials from around the world have taken their unlawfully acquired or stolen assets and then deposited them in Switzerland and other jurisdictions with strong bank secrecy laws, which generally prohibit the exchange of information concerning a particular account (such as the identities of its shareholders and documentation of financial activities) with other jurisdictions seeking such information. As a result, it is extremely difficult for outside authorities, creditors, and litigants to claim assets in these accounts.

Still, nations such as Switzerland have cooperated with foreign investigators to recover unlawfully acquired or stolen funds through “mutual legal assistance” (or MLA) treaties under which nations formally agree to exchange evidence and information concerning specific criminal matters. So a nation making claims on what it says are stolen public funds would have to follow a process specified in an MLA signed with Switzerland such as showing that it had started a criminal investigation or that the public official had been convicted of a criminal offense.

After obtaining such information from the origin country, Swiss officials would then have the burden of proving to a Swiss court that the funds in question were obtained illegally. (On the other hand, the account holder would not have to show that he had acquired the funds legally.) After examining the evidence, a court can order a bank to freeze and later return the funds to its rightful owners.

But critics point out that many impoverished nations neither have the resources to launch such criminal investigations nor the capacity to trace and locate stolen funds. They also note that the judicial system in many of these nations is ineffective and in disrepair, and simply don’t have the ability to fulfill their obligations under an MLA.

Corrupt foreign officials will find it much harder to claim alleged stolen funds deposited into Swiss bank accounts while fleeced governments will have an easier time recovering them under a new Swiss law.

To address these concerns, the Swiss Parliament in October 2010 passed a law – called the *Federal Act on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means* (also known as the *Return of Illicit Assets Act* or RIAA) – setting out new procedures to seize and return unlawfully acquired assets.

Under Article 2 of the RIAA, the Swiss government may freeze what are believed to be stolen assets in a Swiss bank account when an origin country cannot comply with the terms of an MLA because: (1) its judicial system is in “total or substantial collapse,” and (2) when the account is controlled by “individuals who exercise or have exercised a high public office abroad (politically exposed persons),” which include heads of state, high-ranking politicians, and high-ranking members of the administration, and also people who are “closely associated” with politically exposed persons.

Article 6 says that the assets in dispute would be viewed automatically as unlawful in origin if the account holder is a politically exposed person whose wealth “has been subject to an extraordinary increase” while holding office, and if he had held office in a country with high levels of corruption. In contrast to previous regulations, the account holder would then have to prove that he had acquired the assets by lawful means. If he is unable to do so, Article 9 says that the “seized assets shall be returned in the form of financing for programmes of public interest.” The RIAA came into effect on February 1, 2011.

Other separate initiatives are trying to help countries recover assets stolen by public officials. For example, the Stolen Asset Recovery (or “StAR”) Initiative – an effort between the United Nations Office on Drugs and Crime (or “UNODC”) and the

World Bank – provides nations with legal and technical assistance to investigate and claim stolen assets. But unlike the RIAA where governments are directly involved in an investigation, both the UNODC and the World Bank simply provide countries with the tools necessary to carry out an investigation on their own, say officials. Though the StAR Initiative was launched in September 2007, officials have not released any statistics concerning the program or whether it has been effective in recovering stolen assets.

Many analysts believe that Duvalier had purposely chosen to return to Haiti before February 1, 2011 (the date when the RIAA would come into effect) and then planned to depart shortly afterwards, hoping that the government would be too weak to investigate him. (Even a year later, Haiti was still recovering from its massive earthquake.) Duvalier would then be able to say that the Haitian government was not actively investigating him in any criminal matters, and could claim his funds in the Swiss bank account without having to show (under the then-existing law) that he had acquired its assets legally.

“This was probably a calculation on Duvalier’s part, that the country was so weak that he could return to Haiti and leave without being charged with anything,” said Reed Brody, counsel and spokesperson for Human Rights Watch in that group’s Brussels office, in an interview with the *New York Times*. “Then he could go back to Swiss authorities and argue that he should get his money [under the old law] because Haiti’s not after him anymore.”

Instead, upon his return, the Haitian government took Duvalier into custody and charged him with corruption and embezzlement. Human rights groups have called on the government to prosecute him for human rights violations, including crimes against humanity, enforced disappearances, extrajudicial killings, and torture. In February 2011, Navi Pillay, the UN High Commissioner for Human Rights, said, “Haiti has an obligation to investigate the well-documented serious human rights violations that occurred during the rule of Mr. Duvalier and to prosecute those responsible for them,” and offered the UN’s assistance in his prosecution. In April 2011, Human Rights Watch issued a report (“Haiti’s Rendezvous with History”) where it documented human rights abuses under Duvalier’s rule and also laid out the legal rationale in holding him responsible for these abuses.

Prosecutors have barred Duvalier from leaving the country, and said that they would investigate human rights complaints filed by people who say that they had been tortured during Duvalier’s rule. When asked by a reporter whether Duvalier had any regrets about turning to Haiti, his lawyer answered: “He must have mixed feelings about it.” As of June 2011, Duvalier has not gained access to his frozen Swiss bank account. 

COMPARATIVE LAW

United Kingdom: Plastic wrap controversy

A luxury line of meat sold in the United Kingdom attracted media attention from around the world when a local government threatened to prosecute a supermarket chain for allegedly wrapping it with excessive packaging. What law currently governs the packaging of goods in the United Kingdom?

Why did that country pass such a law? Does the United States have a similar law? And what is the current status of the case?

In September 2010, the Lincolnshire County Council (a local government overseeing several municipal districts) announced that it would prosecute supermarket chain Sainsbury’s for using too much packaging to wrap its “Taste the Difference Slow Matured Ultimate Beef Roasting Joint,” which retails for around US\$9/lb. “The luxury joint is vacuum-packed in plastic then further packaged inside a 20cm by 15cm Apet plastic tray,” noted *The Guardian*, a major news daily. “Covered with a plastic lid, [the entire package] is 10cm tall and is wrapped around with a printed cardboard sleeve.”

Specifically, its Trading Standards office – the equivalent of a consumer protection agency which administers laws overseeing the selling of goods and services – said that the packaging violated national regulations requiring businesses to reduce packaging waste.

Unnecessary packaging is not only wasteful, say officials, but also damages the environment. According to the *Daily Mail*, another news outlet, “the UK produces 9.3 million tons of waste packaging a year – the equivalent of 245 jumbo jets every week.” Pointing out that supermarkets put shrink-wrap on coconuts and even individual bananas, environmentalists say that “more rubbish goes to landfills in Britain than in any other European country.” In an interview with the *Daily Mail*, a representative of the Local Government Association said: “Britain is the dustbin of Europe. Families are fed up with having to carry so much packaging home from the supermarket.”

For the first time, the UK government threatened to prosecute a large supermarket chain for violating a European-wide law which prohibits nations from wrapping their goods in too much packaging.

To reduce such waste, the *Packaging (Essential Requirements) Regulations* (SI 2003 No. 1941) – which came into effect across the United Kingdom in 2003 – says that people responsible for packaging products or even importing packaged products into the United Kingdom may not place them on the market unless they meet what are called “essential requirements.”

For example, “all packaging volume and weight must be the minimum amount to maintain the necessary levels of safety, hygiene, and acceptance for the packed product.” In addition, businesses must use packaging which can be reused, recycled, or is biodegradable, though there are exceptions. Furthermore, regulations prohibit companies from using packaging containing “noxious or hazardous substances” (such as lead and mercury) which can harm the environment when incinerated or placed in landfills. Businesses must also ensure that the products they import from other nations meet these packaging requirements. Violating them is considered a criminal offense.

The United Kingdom had enacted its packaging regulations to comply with a European-wide requirement passed by the European Council in 1994 called *Directive 94/62/EC* (“on packaging and packaging waste”), which calls all member nations of the European Union (or EU) to meet certain targets in reducing packaging waste by creating a system “for the return



The 2011 Otto L. Walter Lecture

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The Prosecution of International Terrorism



Lev Dassin
Former Acting United States Attorney, Southern District of New York

September 11, 2001, was a defining moment in the fight against terrorism. Up until then, the United States used its district courts as one of the primary weapons to prosecute those who committed acts of international terrorism targeting Americans. Since then, there has been a great debate on how to handle suspected terrorists. Lev Dassin will give a history of terrorism prosecutions in the district courts, and show how it provides important context to this debate, including the legal, practical, and political issues involved.

Visit www.nyls.edu/CIL for more information and registration.

and/or collection of used packaging.” How these targets are met and the exact system used to meet them are left to each member state. “To date, there is no standardization between member states in financing methods, logistical models, or even sources of packaging waste that must be collected and treated,” said a private group called RSJ Technical Consulting.

Observers note that Sainsbury’s became the first supermarket in the United Kingdom to face prosecution for violating packaging regulations. While the government had previously prosecuted five other companies for violating them, including a case where a video game company had “sold a stylus in a packet that was nine times the size of the item being sold,” the *Telegraph* (a major newspaper) noted that these companies were much smaller than Sainsbury’s, which is presently the United Kingdom’s second largest supermarket chain (in terms of market share), according to the BBC.

In several media interviews, a spokesman for Sainsbury’s responded that the company had already reduced the packaging for its beef joint by 53 percent, and that it was planning another reduction of 10 percent. The supermarket also noted its previous efforts to reduce the use of unnecessary packaging such as putting tomatoes into cartons rather than tin cans, and selling milk in thin bags rather than plastic bottles, according to reporting from the Library of Congress. And on the same day the council had announced it would prosecute the supermarket chain, Sainsbury’s had unveiled another initiative where it would use bags instead of cardboard boxes for a line of cereals.

Others note that, in 2005, a non-governmental organization called Waste & Resources Action Programme had created a voluntary agreement called the *Courtauld Commitment* where over 40 of the largest supermarket retailers and distributors in the United Kingdom had agreed to reduce the growth of packaging waste through several measures such as creating new packaging designs requiring less packaging, reducing the weight of packaging used, and by increasing the recycled content used in packaging, among others.

In October 2010, the Lincolnshire County Council dropped its prosecution of Sainsbury’s, explaining that it had received “evidence of a considerable reduction in packaging” of the beef joint, and that, as a result, “legal action against the company for the previous packaging [was] no longer in the public interest.”

In contrast to Europe, the United States does not have a comprehensive and nationwide system to reduce wasteful packaging, say legal experts. Federal laws currently do oversee the use of packaging by companies, points out Keller and Heckman, a Washington, D.C.-based law firm. For example, under the *Federal Food, Drug, and Cosmetic Act*, the U.S. Food and Drug Administration has the authority to review and prohibit the use of packaging in cases where it can affect food stuff. But the laws themselves neither call on businesses to reduce the use of wasteful packaging nor do they create recycling programs, for instance.

Instead, state and local governments in the United States have passed (largely for environmental reasons) their own laws and initiatives concerning only certain aspects of packaging. Both Connecticut and Oregon, for instance, ban the use of beverage containers with removable tabs, and also require the use of biodegradable plastic six-pack rings, according to a recycling

advocacy group. Several municipalities including New York City require government agencies to purchase paper with a minimum level of recycled content. To encourage recycling, 11 states have passed “bottle bill” laws which require consumers to pay a deposit (usually around 5 cents) when they buy beverage containers, which is refunded to them when they return the containers for recycling.

Still, in contrast to UK packaging regulations, the overarching purpose of these laws is not to reduce wasteful packaging in and of itself. Also, many believe that the wide variety of state and local laws have limited their effectiveness.

According to statistics from the U.S. Environmental Protection Agency and the European Commission, the United States trails the EU in recycling several major forms of packaging. While the EU recycled nearly 25 percent of all plastic packaging in 2005, the United States recycled around nine percent. Recycling rates of glass in the EU stood at nearly 60 percent in contrast to 25 percent in the United States. And in the areas of paper and cardboard, the EU recycled around 75 percent while the United States recycled 60 percent.

In 2009, a survey of 15 countries carried out by Datamonitor (a market analysis company) reported that “the United States is one of the countries least concerned about excessive packaging,” with 34 percent of Americans saying that they were “somewhat or extremely concerned about over-packaging in household goods.” The survey – called “Sustainable Packaging Trends: Consumer Perspectives and Product Opportunities” – also reported that American consumers (at 35 percent) were “the least likely to seek out products with less wasteful packaging.” 

INTERNATIONAL ENVIRONMENTAL LAW

Can international law clean up electronic waste?

Landfills usually conjure up images of mountains of mostly worthless and putrid garbage. But in the last several decades, consumers and companies have been sprinkling and, now, pouring mounds of electronic waste (or e-waste) into landfills and surrounding areas. Analysts warn that e-waste poses a growing threat to the environment and human health. How much e-waste does the world produce every year? How are they dangerous? Are there any international or regional treaties which address e-waste? Do experts consider them effective? And what more needs to be done to reduce the potential dangers posed by such waste?

Studies say that the world is awash in electronic goods, including air conditioners, desktop and laptop computers, DVD players, mobile devices such as cell phones, radios, refrigerators, television sets, washing machines, and many other items. In 2006, the United States alone produced more than 34 million television sets, and also 139 million communication devices (up from 90 million in 2003), according to a report from the United Nations Environment Programme (or UNEP). In 2005, the 27 member nations of the European Union (or EU) manufactured 9.3 million tons of electronic devices.

This development, however, is not limited to the developed world. Experts say that as developing countries became more prosperous and as the price of electronic goods continued to

drop, more and more people in the developing world began to buy electronic goods.

But as technological innovation creates a continuing flow of cheaper and improved products with new features, people have been replacing their electronic goods much more quickly, which, in turn, increases the amount of e-waste produced every year, say analysts. The Electronics TakeBack Coalition – a global coalition of international organizations which promotes “green design and responsible recycling in the electronics industry” – argues that the explosive growth of e-waste can be traced to a practice called “planned obsolescence” where manufacturers make products which are designed to be useless or undesirable in a short period of time.

Annual e-waste production currently stands at 40 to 50 million tons worldwide, says a group called Solving the E-waste Problem, an initiative created by several UN organizations to address e-waste. According to statistics from the United Nations and the Electronics TakeBack Coalition, the United States produces enough e-waste every year (about 3 million tons, the highest in the world) to fill 5,126 shipping containers, which, if stacked up, would reach higher than Mt. Everest. China comes in second with 2.3 million tons every year.

In February 2010, UNEP released a report (“Recycling – From E-Waste to Resources”) on the growth rate of e-waste by the year 2020 in developing nations. It predicts, for example, that e-waste from old computers in China, India, and South Africa will jump by 400 percent, 500 percent, and 200 percent, respectively, from 2007 levels. E-waste from discarded mobile phones will be seven times higher in China, and 18 times higher in India, also by 2020.

But unlike some garbage and waste products which sit harmlessly in landfills, e-waste often contains extremely harmful chemicals – such as lead found in the cathode ray tubes of television monitors, flame retardants in plastic pieces, and mercury in LCD monitors and television screens – which can seep into the surrounding land and water supplies.

Many nations also send shipments of e-waste to those developing nations with lax environmental laws where workers extract precious metals found in them. (In fact, a majority of e-waste, instead of being reused or recycled, is exported and dumped in developing nations such as China, India, and nations in Africa, says the Electronics TakeBack Coalition.) But taking apart e-waste and extracting any valuable commodities can be a dangerous process. Many people, for instance, simply burn e-waste – even in their own backyards – to remove anything of value and don’t properly discard the left-over parts, which, in turn, pollute the surrounding environment and threaten human health.

No international treaty directly addresses e-waste in a comprehensive manner for the world community. Instead, an existing treaty (passed in 1989) addresses only one aspect of e-waste. The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (or Basel Convention) sets global standards and restrictions on the movement of hazardous wastes across national boundaries. While it does not mention the term e-waste, the Basel Convention addresses e-waste indirectly by setting rules for the handling of hazardous wastes found in them. (The term “hazardous waste” includes substances that are

“toxic, poisonous, explosive, corrosive, flammable, ecotoxic, and infectious,” according to the treaty administrators.)

A signatory nation has several obligations under the Basel Convention, which came into force in 1992. For example, under Article 4, it must not ship hazardous wastes to other nations which prohibit their import. In addition, a state party must stop the import of hazardous wastes “if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner.” Furthermore, the Basel Convention allows the international shipment of hazardous wastes only if: (1) the exporting nation does not have the technical capacity or facilities to dispose of the wastes “in an environmentally sound and efficient manner,” or (2) the hazardous wastes being shipped are “required as a raw material for recycling or recovery industries in the State of import.” The agreement says that nations should treat violations of these provisions as a criminal offense.

Several global agreements are trying to address the growing accumulation of electronic waste, but some have questioned their effectiveness. Many countries also don't have active programs to handle e-waste.

As of May 2011, 176 nations have ratified the Basel Convention. While the United States signed the agreement in 1990, it has yet to ratify it. But most other major producers of e-waste, such as Japan and all 27 EU member nations, have ratified the treaty, along with developing nations such as China, India, most African states (47 out of 53), and every country in Latin America except Cuba.

Even with its large number of ratifications, observers question the effectiveness of the Basel Convention in handling e-waste and even hazardous wastes in general. (In September 2006, the UN reported that the illegal dumping of 500 tons of petrochemical wastes in 15 sites around the African nation of Côte d'Ivoire had killed 8 people and sickened 78,000 others.) UNEP notes that China “remains a major e-waste dumping ground for developed countries,” even though it bans the import of e-waste. It also pointed out that “most e-waste in China is improperly handled, much of it incinerated by backyard recyclers . . . [releasing] steady plumes of far-reaching toxic pollution.”

Analysts note that the agreement does not have a formal mechanism to force its signatory nations to comply with its provisions (though it does call on them to report violations). As a result, many believe that nations still export hazardous wastes (along with e-waste) to other nations which don't have the capacity to handle them properly. Some also say that Article 4 provides a loophole for industrialized nations to send hazardous wastes to developing nations under the guise of recycling or reusing them.

As the state parties to the Basel Convention began to recognize that the agreement did not adequately address the problem of e-waste, they began to create separate initiatives which would do so.

For instance, in 2003, they formed voluntary working groups with the mobile phone industry – called the Mobile Phone

Partnership Initiative (MPPI) – which would offer different approaches on reducing e-waste such as using longer lasting batteries and more recycle-friendly construction techniques. Observers note that almost every major mobile phone manufacturer, including Motorola, Nokia, and Sony Ericsson, had joined the MPPI, though some believe that they had done so as a way to preempt the creation of binding government regulations.

State parties to the Basel Convention chose the mobile phone industry as the first of other planned partnerships with private industries given the increasing use of mobile phones around the globe and the fact that the short-term use of these devices has contributed greatly to the creation of e-waste, said INFORM, a non-profit which promotes the use of environmentally sustainable business practices.

In another initiative, the state parties to the Basel Convention issued in 2006 what was called the *Nairobi Declaration* which (unlike the Basel Convention) specifically addresses the problem of e-waste by creating a number of pilot projects around the world to safely discard such waste through collection programs, by developing new technical guidelines for manufacturers to reduce the production of e-waste, and by targeting individuals and groups which illegally dump e-waste.

Other initiatives unrelated to the Basel Convention are also trying to address e-waste, including the European Union's *Directives on Waste Electrical and Electronic Equipment*, which is collectively known as the 2003 WEEE Initiative. (The EU – presently the world's largest political union and trading bloc – passes what are called directives which require all 27 member nations to pass domestic laws to address certain problems and to standardize responses concerning particular matters.)

Directive 2002/95/EC (“on the restriction of the use of certain hazardous substances in electrical and electronic equipment”) calls on member states to pass national laws which prohibit the use of certain hazardous materials (such as cadmium, lead, and mercury) when producing electrical devices.

Under Directive 2002/96/EC (“on waste electrical and electronic equipment”), EU member states must create their own domestic programs which: (1) encourage businesses to design electronic goods which can be easily dismantled, recycled, and reused; (2) require producers and distributors of electronic goods to set up free programs to collect and recycle e-waste; (3) require the use of the best available recovery and recycling techniques in treating e-waste; and (4) inform consumers that they must collect e-waste separately from other waste and return them to the appropriate collection facilities. But all of these regulations apply primarily to EU member states only.

While recycling rates have increased in Europe and even exceed those in the United States, according to statistics from the European Commission and the U.S. Environmental Protection Agency, officials say that EU nations need to do more in addressing e-waste. “Despite such rules on collection and recycling, only one third of electrical and electronic waste in the European Union is reported as separately collected and appropriately treated,” reported the European Commission this year on its home page. “A part of the other two-thirds is potentially still going to landfills and to sub-standard treatment sites in or outside the European Union.”

In the United States, no federal law specifically addresses the collection and disposal of e-waste. Instead, individual states (24 so far, says the Electronics TakeBack Coalition) have passed their own e-waste recycling laws. But their provisions vary in scope. Examples include:

- California: Beginning in 2005, under the *Electronic Waste Recycling Act*, consumers must pay a state recycling fee when they purchase covered items such as computer monitors, portable DVD players, and television sets. The state then reimburses the fee when a consumer returns the electronic goods to a collection and recycling site.
- Maine: The *Electronic Waste Law*, which became effective in 2006, aims to recycle computer monitors, desktop printers, digital picture frames, DVD players, game consoles, laptops, and television sets. Under the law, manufacturers must set up a recycling program for these products, municipalities must establish collection sites, and consumers must bring covered items to these sites.
- New York: The *Electronic Equipment Recycling and Reuse Act*, which came into force in May 2010, requires manufacturers to create a consumer program for the convenient collection, recycling, and reuse of e-waste, covering such items as computers, computer accessories (such as monitors, keyboards, and printers), DVD players, electronic games, television sets, VCRs, and other small electronic devices.
- Texas: Beginning in 2008, the *Computer Equipment Recycling Program* calls on manufacturers who sell new computers in Texas to set up a free and convenient program to collect and recycle computer equipment (including computer mice, desktop and laptop consoles, keyboards, and monitors) purchased primarily for personal or home-business use, said the Texas Commission on Environmental Quality. Also, each manufacturer is responsible only for the collection of its own brand.
- West Virginia: Under the *Comprehensive Plan for the Proper Handling of Covered Electronics Devices*, which came into effect in January 2009, manufacturers must pay a specified fee every year to a “Covered Electronic Devices TakeBack Fund” to pay for a recycling program covering only certain electronic devices, including computer monitors, desktop computers, laptops, and television sets. The law also prohibits people from dumping these items into landfills.

While no federal law specifically addresses e-waste in the United States, lawmakers have been trying to restrict its export to other nations. In September 2010, U.S. Representatives Gene Green (D-TX) and Mike Thompson (D-CA) introduced a proposed law – HR 6252, also known as the *Responsible Electronics Recycling Act* – to ban the export of certain e-waste to developing nations. A press release noted that the “Environmental Protection Agency currently has no framework to monitor the removal, disposal, and export [of e-waste] to developing nations.” (Again, the United States did not ratify the Basel Convention, which forbids nations to export hazardous wastes to other countries which cannot handle such wastes in an environmentally sound manner.) The proposed bill exempts still-functioning equipment to promote its reuse.

The bill’s supporters – including Apple, Dell, the Electronics TakeBack Coalition, the Natural Resources Defense Council, and

Samsung – also claim that it will create jobs in the United States to process e-waste “in a safe manner.” Violations of the proposed law can result in criminal penalties, and those found in violation will be put on a “public registry of violators.” While the U.S. House of Representatives referred HR 6252 to the Committee on Energy and Commerce for further examination, it did not take any further action on the bill. Further research indicates that the bill’s sponsors did not reintroduce the bill in 2011. 

INTERNATIONAL ENVIRONMENTAL LAW

New agreement to protect, share benefits of biodiversity

In October 2010, delegates from over 190 nations met in Nagoya, Japan, and agreed to what has been described as “historic” goals to better conserve and sustain the use of the world’s species and ecosystems, collectively known as biodiversity. They also created a new agreement to ensure that nations shared in the benefits and products derived from biodiversity. While many applauded these achievements, others said that various goals lacked measurable targets and worried that many nations didn’t have the capacity to implement their new obligations.

Scientific groups and international organizations use the term “biological diversity” (or biodiversity, for short) to describe both the planet’s wide variety of life forms and the broad range of their surrounding ecosystems. Experts have identified close to 2 million different species of animals, plants, and microorganisms (and believe that there could be anywhere between 3 million to 100 million more), all of which live in ecosystems such as those found in “deserts, forests, wetlands, mountains, lakes, rivers, and agricultural landscapes,” says the United Nations.

These life forms – interacting with each other and their surrounding environments over a time span of billions of years – have formed complex and dependent relationships which make the planet “a uniquely habitable place for humans,” according to *Sustaining Life on Earth*, a UN publication released in 2000.

For example, vast areas of coral reefs and wetlands provide sanctuaries to marine and other animal life to reproduce, and, later, supply people with a steady source of food and even employment. Large stretches of temperate and rain forests give shelter to animals and insects which not only help to pollinate plants, but also control the over-growth of other animals and pests. These various forests also provide a source of food and natural energy for people, absorb carbon dioxide from the atmosphere, and supply the raw materials used by various industries, including those which make agricultural goods, cosmetics, construction supplies, and pharmaceuticals, among other products. “Biodiversity,” said a UN publication, “provides a large number of goods and services that sustain our lives.”

But scientists say that the world’s ever-growing population of people (which will hit nine billion within 50 years) and its tremendous use of natural resources threaten the world’s biodiversity by pushing many species into extinction. While the UN notes that “the loss of species has always occurred as a natural phenomenon,” scientists say that species have been

disappearing 50 to 1,000 times faster than the natural rate “as a result of human activity.” The loss of some species can lead to an increase in certain pest populations, which, in turn, can become costly or impractical to control. The UN also notes that practices such as using fishing nets “big enough to swallow a dozen jumbo jets at a time” are reducing fish stocks around the world.

The world’s growing population and its use of natural resources also threatens biodiversity by damaging existing ecosystems. Experts note that practices such as deforestation not only depletes sources of raw materials and food, but also promotes soil erosion and destroys natural barriers to floods, which could take billions of dollars to repair. And the loss of wetlands and coral reefs due to pollution and overdevelopment could wipe out tourism and reduce fish populations.

The loss of biodiversity will largely affect poor people because 47 percent to 89 percent of their income comes directly from a wide range of ecosystems, according to the UN. For example, according to a 2010 report – “Mainstreaming the Economics of Nature” – issued by the UN Environment Programme, around 500 million people depend on fisheries and coral reefs for their livelihood. The loss of these marine species and ecosystems could lead to disruptive migration patterns as more people crowd into cities for employment.

As concerns mounted, the world community in 1992 created the first ever and only global agreement to protect biodiversity in a comprehensive manner. Negotiated under the auspices of the UN, the *Convention on Biological Diversity* (or Convention) calls on nations to (1) implement a variety of domestic measures to conserve biodiversity within their respective jurisdictions, (2) use biological resources in a sustainable manner (i.e., in a way which allows for their long-term use), and (3) share benefits derived from the use of genetic resources such as plants and microorganisms. (Unlike previous global environmental agreements which addressed only particular areas of concern, officials say that the Convention “covers all ecosystems, species, and genetic resources.”)

For example, under Article 7, nations must establish a system of protected areas to conserve biodiversity, protect threatened species and promote their recovery, and rehabilitate and restore damaged ecosystems, among other measures. (To dispel fears that the UN would try to take control of or directly administer a nation’s natural resources, Article 3 says that, under international law, nations have “the sovereign right to exploit their own resources pursuant to their own environmental policies.”) Article 11 calls on nations to adopt economic and social incentives to conserve and promote the sustainable use of biodiversity. But the treaty text itself does not set specific or numerical targets to reach these various goals.

More controversial provisions call on nations to share the benefits derived from genetic resources with their countries of origin. Noting that “most of the world’s biodiversity is found in developing countries,” observers say that scientists and researchers from mostly industrialized nations often extract genetic resources from these places, and then develop commercial applications (such as medicines) whose benefits and, ultimately, profits are not shared with them.

To protect the rights of these countries of origin, Article 15 states that “the authority to determine access to genetic resources

rests with [their] national governments,” and that such access must be based on “mutually agreed terms” and also be “subject to prior informed consent of the Contracting Party providing such resources.”

Article 15 also broadly says that nations must pass laws and policies which will ensure the “sharing, in a fair and equitable way, the results of research and development and the benefits arising from the commercial and other utilization of genetic resources.” Origin countries said that Article 15 would help to end what they describe as “bio-piracy,” which one media reporter defined as the “commercial exploitation of plants or other genetic matter without adequately compensating the communities where they are found.”

Still, analysts point out shortcomings in Article 15. For instance, it doesn’t set any specific procedures to ensure its implementation. Article 15 also does not mention how parties may resolve disputes between two nations concerning the use of genetic resources. Furthermore, it doesn’t specify the types of benefits which nations must share with each other such as profits, royalties, or user fees. As a result, many origin countries began to set strict limits on accessing to their genetic resources.

Under a new agreement, nations must conserve and sustain the use of the world’s species and ecosystems (described broadly as biodiversity) while sharing benefits derived from them with other countries.

Other provisions such as Article 20 say that signatory nations must provide not only technical, but also financial assistance – which is currently done through a Global Environment Facility – to poorer countries which cannot carry out their obligations under the Convention. But it did set any specific targets or dollar amounts.

Although the terms of the Convention are legally-binding on its signatory nations, they don’t impose, say, sanctions on members which don’t carry out their obligations. Instead, “compliance [depends] on informed self-interest and peer pressure from other countries and from public opinion,” says the UN. Also, each member must regularly submit reports, under Article 26, which describe the measures it has undertaken to protect biodiversity and whether they have been effective. Under Article 23, signatory nations meet together in a body known as the “Conference of Parties” (or COP) at “regular intervals” to review the implementation of the Convention, assess progress and set targets (if any) in protecting biodiversity, and establish new priorities for nations to undertake.

Presently, analysts say that the Convention has achieved near global acceptance, pointing out that over 190 nations have ratified it, meaning that their legislatures have agreed to implement its provisions. Exceptions include the United States (which signed but did not ratify the Convention), though many note that it has one of the world’s most far-reaching measures to protect biodiversity within its borders.

While the UN had described the Convention as a “landmark in international law,” it noted that the world had lost its focus on protecting biological diversity. The UN cited public indifference,

saying that “there is little public discourse of how to make sustainable use of biodiversity part of economic development,” and that the issue of biodiversity “remains an issue that few people understand.” It added that “a series of economic crises, budget deficits, and local and regional conflicts” drew attention away from biodiversity.

To elevate the importance of maintaining biodiversity, the COP, in 2002, adopted its first-ever “Strategic Plan” where nations “committed themselves to a more effective and coherent implementation of the three objectives of the Convention.” Specifically, the plan called on them “to achieve, by 2010, a significant reduction of the current rate of biodiversity loss at the global, regional, and national level.” But observers note that the plan did not set any specific numerical targets.

Over the past several years, several studies concluded that the loss of biodiversity had actually increased since the passage of the first Strategic Plan. For example, the *New York Times* reported that since the signing of the Convention, “an area of rainforest the size of California has been lost.” In addition, results from a study carried out by a group called Conservation International (and published in the journal *Science* in October 2010) noted that 20 percent of plant and mammal species faced extinction, but that conservation efforts had helped the survival rate of others. Still, the UN said that “the diversity of genes, species, and ecosystems continues to decline as the pressures on biodiversity remain constant or increase in intensity, mainly as a result of human actions.”

Calling on nations to “take effective and urgent action” to address these developments, the COP in October 2010 met in Nagoya, Japan, for its 10th meeting where it adopted – after long negotiations – another plan (called the “Strategic Plan for Biodiversity 2011-2020”) which finally set measureable targets to “halt the loss of biodiversity” by the year 2020 mainly through various domestic initiatives. Several news outlets described the agreement as “historic” and a “sea change” in conservation efforts.

For example, by 2020, the new strategic plan calls on nations to cut “the rate of loss of all natural habitats” by at least one-half or bring it down “close to zero.” In addition, each nation has to conserve at least 17 percent of “terrestrial and inland water” and 10 percent of “coastal and marine areas.” (Currently, the world protects 12.5 percent of land and less than one percent of the oceans, according to reporter Karl Malakunas.) Furthermore, nations should restore “at least 15 percent of degraded ecosystems.”

The new strategic plan also calls on nations to carry out general goals to protect biodiversity. They include reforming, phasing out, or eliminating subsidies which harm biodiversity; eradicating and controlling what it calls “invasive alien species” which harm biodiversity (such as plants and animals which reproduce quickly to the point where they threaten native species); preventing the extinction of threatened species; and “substantially” increasing the level of financial resources to help other nations implement the Convention – all by the year 2020.

Expressing some disappointment, observers note that the COP did not establish any specific targets for these general goals (though Japan offered \$2 billion and the European Union \$110 million in financing to help developing nations carry out conservation measures). In addition, the COP said that even specific targets should be viewed as “aspiration for achievement at the global

level” and also as a “flexible framework for the establishment of national or regional targets,” adding that “parties are invited to set their own targets.” Still, environmentalists said that they considered the overall agreement as a breakthrough in efforts to protect conservation.

The COP also adopted – after six years of negotiations – a supplemental agreement called the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* to fully implement Article 15, which again calls on nations to share benefits derived from genetic resources. Also known as the *Nagoya Protocol*, this agreement specifically calls on nations to create a domestic legal framework to ensure that (1) origin countries provide access to their genetic resources in a predictable and transparent manner and (2) the recipient nations of these resources share the benefits arising from their use (through research and commercial applications, for instance) in a fair and equitable manner with those nations which had provided the genetic resources in the first place.

By ensuring that the origin countries receive some of the benefits of their genetic resources, the Protocol will also give them an incentive to use and manage these resources in a way which protects biodiversity, says the UN.

For origin countries which control the genetic resources, Article 6 requires them to pass laws which establish fair and non-arbitrary procedures on how other nations may obtain the “prior informed consent” to access these resources, and to do so “in a cost-effective manner and within a reasonable period of time.” Origin nations must also issue a permit once they grant access to their genetic resources.

Under Article 5, nations which are given access to genetic resources must pass laws and regulations which will ensure that any benefits arising out of their use will be shared with the countries of origin in a fair and equitable way “based on mutually agreed terms.” In contrast to the broad outlines of Article 15 of the Convention, the Protocol explicitly include benefits such as payment of royalties, licensing fees, joint ventures, joint ownership of intellectual property rights, sharing of research benefits, and participation of product development, among many others, though it does not set any specific level of compensation.

To maintain compliance with these measures, Article 15 calls on the providers and users of genetic resources to pass domestic laws and policies which will ensure that genetic resources “have been accessed in accordance with prior informed consent and that mutually agreed terms have been established.” Once genetic resources leave a provider country, Article 17 calls on user nations to establish various checkpoints to monitor the actual use of the genetic materials, and that such use complies with the arrangement negotiated by the provider and user nations. (In a separate comment, the UN said that these checkpoints would be established “at any stage of the value-chain: research, development, innovation, pre-commercialization or commercialization.”)

If one party believes that another had violated its terms of use, the Protocol calls on all sides to cooperate in resolving the matter. Specifically, under Article 18, each party must ensure that there is a legal system in place within their respective jurisdictions

to adjudicate such disputes. Article 18 also encourages user agreements to specify where exactly the parties will resolve their dispute and what law will be used to do so. (The Convention does not contain such provisions.)

To reduce confusion and enhance cooperation, Article 13 requires provider nations to designate what it calls a “national focal point” (such as a government agency) which will provide information to applicants on how to obtain prior informed consent and establish mutually agreed terms concerning genetic resources. In conjunction with these focal points, Article 14 establishes a COP-administered “Access and Benefit-sharing Clearing-House.” Every nation must provide various information to the Clearing-House, including information on its laws and regulations concerning access and benefit-sharing, its national focal points, and, if available, model contract clauses on accessing genetic resources and sharing benefits derived from them.

Analysts believe that the Protocol will come into force around the year 2012, which is the same year when the COP will hold its 11th meeting (in India) to assess progress in conserving biodiversity. 

INTERNATIONAL FINANCE

More money in the bank to prevent financial crises

Regulators from around the world reached an agreement where large banks with international operations must increase their levels of reserves, among other requirements, to help them better withstand future financial crises such as the one in 2008 and which also prevents them from taking overly risky investments. But critics argue that regulators should have imposed tougher measures on banks and also shortened the transition period for them to implement various reforms.

Analysts generally agree that the 2008 financial crisis began in the United States when tens of billions of dollars worth of securities tied to subprime mortgages began to lose their value. At the turn of the century, when the American housing market began to boom, banks approved more and more mortgages to subprime borrowers who generally have weak or poor credit histories. To make even more loans, these mortgage originators worked with investment banks and quasi-government agencies to “securitize” their existing mortgages where hundreds or even thousands of mortgages were packaged into securities—such as stocks and bonds—and then sold to investors who, in turn, provided banks with more capital to continue making loans.

As banks continued their activities, some experts began to question whether banks had enough capital reserves to cover possible losses resulting from delinquent borrowers. Others noted that many banks began to include certain non-liquid assets (such as deferred tax assets and mortgage servicing rights) to increase their capital reserves – all in an effort to alleviate concerns from banking regulators.

Regulations in almost every nation require banks to maintain a certain level of capital reserves to ensure that they can pay back their depositors and also to absorb unexpected losses, according to the *Wall Street Journal*. Capital reserves are generally composed of low-risk capital such as equity (e.g., a company’s common shares

and retained earnings, which are “earnings that banks retain rather than paying out to shareholders”) along with sovereign debt, both of which can be quickly converted to cash. They are collectively known as “Tier 1” capital. Within Tier 1 capital is a subset called “core Tier 1” capital. According to the *Financial Times*, “Tier 1 is essentially top-notch capital, with core Tier 1 a subset comprising the best of the best.”

Beginning in 2006, as more and more subprime borrowers began to default on their mortgage payments, the securities tied to subprime mortgages began to lose their value. Banks holding these securities began to record heavy losses in 2008. In response, depositors began to make large withdrawals from these banks, many of which failed because they didn’t have sufficient funds to continue normal business operations. (In the words of the American government, the banks were “undercapitalized.”) To keep the banking system solvent and prevent the effects of the financial crises from spreading further, individual governments provided taxpayer funds to these banks (derisively called “bail-outs”). As the *New York Times* pointed out: “The United States distributed more than \$165 billion to nine of the largest American banks” during the financial crisis.

Many countries then called for a variety of measures to prevent or lessen the severity of future financial crises. In addition to economic and monetary measures, they offered various legal measures including the creation of a global organization which would directly regulate financial markets within individual nations and even restrict banks from undertaking certain activities. Others called for a network of supervisory boards each having responsibility for monitoring the activities of the world’s largest banks in designated areas of the world. And some said that the International Monetary Fund should carry out mandatory “surveillance” reviews of every nation’s fiscal and monetary policies to catch the beginnings of any financial crisis.

Legal analysts say that there is no single international treaty or organization which oversees the individual components of the world’s sprawling financial system, each of which serve a certain function. Global payment systems, for instance, transfer cash from one party in a transaction to another. Specific agreements such as *UN Convention on Contracts for the International Sale of Goods* facilitate cross-border transactions. There are also several international organizations such as the Basel Committee on Banking Supervision – a forum of central bank and other regulatory officials – where nations can coordinate their financial policies.

Still, no global organization directly regulates activities occurring *within* a nation’s financial markets such as the trade of stocks and bonds, and also the securitization of various assets. Instead, individual nations directly oversee their respective financial markets using their own domestic laws, regulations, and agencies.

Most nations had never seriously considered these various legal reforms. But because many banks had exhausted significant portions of their capital reserves during the financial crisis and then called on their respective governments for assistance, regulators from around the world (led by the United States) decided to require banks to increase their capital reserves.

Specifically, in September 2010, the Basel Committee reached

an agreement (called Basel III) where individual nations must pass domestic regulations requiring their large banks with international operations to increase their levels of *core Tier 1 capital* to a minimum of 7 percent of all assets. (Previous standards under Basel I and II – both of which set a global standard for minimum levels of bank capital – required banks to hold around 2 percent of their assets while the United States required 4 percent for its large banks, according to the *Wall Street Journal*.) Banks must also raise additional capital if they undertake more risky investments. In an initial calculation, one analyst said that the new rules will “require banks to hold \$3 in capital for every \$100 they lend.” Nations also have the option of increasing the capital reserve requirements since Basel III had only set a new global minimum standard. (Switzerland, for instance, announced that its largest banks would eventually have to increase capital reserves to at least 19 percent of all assets.)

Increasing the level of reserves, according to the agreement’s supporters, would allow banks to withstand significant losses stemming from future financial crises. It would also make it less likely for banks to rely on the governments (and its taxpayer funds) as a lender of last resort, or – in the event that a bank does actually need a government bail-out simply to survive – would decrease the level of needed assistance. Others add that requiring banks to hold these higher levels of capital will prevent them from undertaking overly risky investments in the first place simply because many banks will be unable to build up a level of reserves to cover any catastrophic losses. Moreover, requiring banks to hold more liquid reserves will force them to shed securities with risky underlying assets such as subprime mortgages, say other analysts.

A new global agreement requires banks with international operations to increase their reserves to better protect themselves from future financial crises, and also makes it more difficult to take risky investments.

Governments must implement domestic rules on the new capital reserves by January 1, 2013, and then require their banks to fully comply with them by January 2018.

In addition to increasing their levels of reserves, the agreement will place limits on the types of assets banks may include when calculating their reserves. Specifically, banks may include only 10 percent of their deferred tax assets and mortgage servicing rights. The agreement will phase in these new limits through 2023.

Some critics said that the Basel Committee should have required higher levels of reserves and also should have called on banks to implement these reforms much more quickly, noting that financial crises are a regular feature of capital markets. The time frame given to the banks, said a commentator, “was enough to encompass the peak of the Nasdaq bubble in 2000, a bear market in equities, a bubble in credit, and the implosion of Bear Stearns in 2008.”

They also said that allowing banks to continue using non-liquid assets (including deferred tax assets) even with new limits could give the illusion that banks have sufficient capital to weather future financial crises. But the secretary general of the Basel

Committee described the reforms and its gradual implementation as a “balanced approach” which would protect the global financial system while allowing banks to strengthen and continue their operations.

On the other hand, many banking executives claimed that the higher reserve requirements under Basel III would, in their assessment, restrict lending and simply tie up assets which could be invested somewhere more productive. As a result, they claim that profits would decrease and lead to job losses in the banking industry, all of which could hurt economic recovery around the world. But studies cited by Jaime Caruana of the Bank for International Settlements (where the Basel Committee is based) say that these requirements and reforms “will not undermine economic growth,” while noting that “the long-term benefits of lowering the probability and costs of financial crises are substantial.” Other commentators added that many banks had already started to increase their capital reserves “in anticipation of the new rules,” and pointed out that American and European banks had “raised hundreds of billions of dollars in capital since the financial crisis struck two years ago.”

At a November 2010 summit, the nations of the G-20 (which represent the world’s 20 largest economies) formally agreed to implement the terms of the Basel III agreement. 

INTERNATIONAL HUMAN RIGHTS

Can Libya end its Arab Spring by using mercenaries?

In early 2011, popular discontent in Tunisia and Egypt (now popularly called the Arab Spring) soon spread to Libya where troops continue to battle rebel forces trying to overthrow its long-standing regime. As the world community debated whether and how to help rebel fighters, media reports claimed that Libya was hiring thousands of mercenaries in its effort to reassert control over the nation. Why do some nations recruit and use mercenaries? Does international law allow them to do so? Which existing treaties address this issue? And can they stop Libya from using mercenaries?

Various reports say that the Libyan government, under Col. Muammar el-Qaddafi, had hired 3,000 to 4,000 mercenaries from Chad, Guinea, Mali, Niger, Nigeria, and the Darfur region of Sudan (paying each one up to \$2,000 a day) to suppress public protests and also to battle rebel forces. Qaddafi had come to power in a coup d’état decades earlier, and had deliberately kept his army weak and divided to prevent a similar fate, say analysts such as Kareem Fahim and David D. Kirkpatrick of the *New York Times*. As a result, the Libyan government needed to hire mercenaries to quell protests, some speculate.

But some doubt whether Libya had, indeed, recruited thousands of mercenaries. “It’d be very difficult in just two or three weeks to organize a system to pay and recruit mercenaries,” said a Libyan observer in an interview in the *New York Times*. Also, noting that Libyan soldiers and pro-government factions had successfully pushed back rebel forces, many began to question whether mercenaries had played a decisive role on the battlefield. Still, many observers believe that mercenaries are fighting in Libya on behalf of its government.

Historians say that nations have recruited and used mercenaries since times of antiquity stretching back to the days of the ancient Greeks and Romans, and probably much further. Because their primary motivation is money and other forms of compensation, people have long viewed mercenaries with disdain and as unprincipled individuals who can be purchased for the right price.

In addition to having a reliable security force, experts point out other reasons why a nation would hire mercenaries. For example, employing mercenaries for specific missions is much less expensive than housing, feeding, and training a standing army, said Joshua Keating of *Foreign Policy Magazine*. He also points out that, during civil wars and revolutions, foreign mercenaries would be less hesitant to fire on civilians than soldiers who are from the same country as the protestors themselves.

Contrary to popular belief, private security contractors (or PSCs) are not synonymous with mercenaries. PSCs operating in Afghanistan and Iraq on behalf of the United States, for instance, are civilians who work as translators, interrogators, and security personnel for U.S. officials; provide military and police training to foreign governments; and protect infrastructure projects, among many other duties. Unlike soldiers, PSCs do not engage in active hostilities against enemy forces, though they can defend themselves from attacks. On the other hand, nations hire mercenaries to engage in direct combat.

While the use of mercenaries has spanned thousands of years, modern-day concerns over this practice grew during the second half of 20th century when colonial powers – during a post-war era which saw the adoption of major human rights treaties such as the *International Covenant on Economic, Social and Cultural Rights*, among others – recruited mercenaries to squash independence movements in their respective colonies, particularly those in Africa.

In response, the world community – primarily through the United Nations – began more concerted efforts to address mercenaries, though their development was slow-paced and uneven (which can be said of most other global initiatives in tackling certain issues). The UN passed, for instance, several resolutions to address, in part, the use of mercenaries. But legal observers largely view General Assembly resolutions as non-binding and aspirational statements which don't have the force of law.

In November 1968, for instance, the UN General Assembly passed (in an 85-3 vote with 15 abstentions) Resolution 2395 (XXIII) where it specifically called on Portugal to grant independence to its colonies in Africa, and also to stop using force in suppressing movements towards independence.

Concerning mercenaries, Paragraph 9 of the resolution called on nations “to take all measures to prevent the recruitment or training in their territories of any persons as mercenaries for the colonial war being waged in the Territories under Portuguese domination.” (Analysts say that, in addition to using its own nationals, Portugal had also recruited mercenaries to suppress independence movements.)

Legal experts point out that Resolution 2395 applied only to the use of mercenaries in Portugal's colonies, and was not meant as a comprehensive approach in addressing mercenaries on a global scale. In addition, the resolution neither defined the term

“mercenary” nor did it call on nations to take specific actions against those who recruited or trained mercenaries.

In December 1968, the General Assembly passed (in a 53-8 vote with 43 abstentions) Resolution 2465 (XXIII) where it specifically called on Portugal and South Africa to grant self-determination and independence to their colonies, and also stated that using repression to stop national liberation movements was incompatible with the *UN Charter* and the *Universal Declaration of Human Rights*.

Concerning mercenaries, paragraph 8 of the resolution declared that “the practice of using mercenaries against movements for national liberation and independence is punishable as a crime.” Unlike Resolution 2395, the current resolution called on nations to take more specific measures such as “[enacting] legislation declaring the recruitment, financing, and training of mercenaries in their territory to be a punishable offence and prohibiting their nationals from serving as mercenaries.”

But, as in the case of Resolution 2395, the current resolution was not meant as a broad measure to stop the use of mercenaries on a worldwide basis, and its primary purpose was not to address mercenaries. Again, it outlawed the use of mercenaries only when they were used “against movements for national liberation and independence.” The resolution also did not define the term mercenary.

In October 1970, the General Assembly passed (by consensus) the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States* (Resolution 2625) which called on nations to adhere to certain principles which it said would strengthen world peace.

The declaration called on states to “settle their disputes by peaceful means,” for instance, and said that they also had a “duty not to intervene in matters within the domestic jurisdiction of any State.” Another principle said that “States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State . . .” Buried within this particular principle, the declaration briefly adds that every state had “the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.”

[Libya allegedly hired thousands of mercenaries to fight rebel forces who are trying to overthrow the current regime. Under international law, can Libya hire mercenaries to fight on its behalf?](#)

Similar to other General Assembly resolutions, the declaration did not define the term mercenary. Also, it did not call on nations to take any specific actions to stop the use of mercenaries such as passing domestic laws outlawing that practice.

In December 1974, the General Assembly passed (by consensus) Resolution 3314 which primarily defined the term “aggression” (as “the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State”), and then listed several acts which, if carried out by states, could be viewed as aggression. One of these acts – under Article 3(g) – includes “the sending by or on behalf of a State of armed bands,

groups, irregulars, or mercenaries . . .”

But as in the case of past resolutions, this resolution did not address the use of mercenaries as its primary and overarching purpose. Also, Resolution 3314 did not call on states to enact any specific measures to stop the use of mercenaries. It did not even define that term. Furthermore, while Resolution 3314 defined aggression and listed several acts which can be considered aggression (such as sending mercenaries to another state), it did not specifically criminalize any of those acts.

Despite their various shortcomings, these resolutions and declarations gradually established an underlying legal basis to stop the use of mercenaries, and soon led to the adoption of particular treaties, which (unlike resolutions passed by the General Assembly) are legally binding on their signatory nations.

For example, in June 1977, the world community adopted a supplemental agreement to the *Geneva Conventions of 1949* called the *Protocol Additional to the Geneva Conventions* (or simply Protocol I). Comprising four separate treaties, the Geneva Conventions are the most comprehensive set of laws governing the treatment of armed combatants, prisoners-of-war, and civilians during international armed conflict, which is a conflict between two nations. Protocol I clarifies and creates new restrictions on how nations may carry out warfare and also creates more protections for civilians during armed conflict.

Most notably, Protocol I became the first global agreement to define the term mercenary. Article 47(2) says that a mercenary is a person fighting in an armed conflict who is primarily motivated by “private gain” and “material compensation,” and is neither a national nor a member of the armed forces of either side of a conflict. But as in the case of the previous UN resolutions, the overarching purpose of Protocol I is not to address the use of mercenaries as a general matter or even call on nations to take specific actions such as making it a criminal offense to engage in mercenary activities. (In fact, it does neither.)

In addition to defining mercenary, the Protocol addresses how to treat them during international armed conflict. Specifically, Article 47(1) says that mercenaries do not have any legal right to engage in combat during international armed conflicts, for example. And if they are caught by either side during a conflict, it says that they may not invoke those rights which are reserved for prisoners-of-war such as protecting them from harm or providing them with medical attention.

In July 1977, the Organization of African Unity (which, in 2002, became the African Union or AU) passed the *Convention for the Elimination of Mercenarism in Africa*, which was the world’s first *regional* agreement addressing the “grave threat” posed by mercenaries to the “independence, sovereignty, security, territorial integrity, and harmonious development” of nations in Africa. (Historians note the extensive use of mercenaries during both colonial and post-colonial eras in politically unstable nations across Africa.) In contrast to Protocol I and even past UN resolutions, the overarching purpose of this convention is to stop the use of mercenaries, though its provisions apply only to AU member nations.

Article 1 says that an individual, group, or even a state itself commits the “crime of mercenarism” if it “shelters, organizes, finances, assists, equips, trains, promotes, supports, or in any manner employs bands of mercenaries” specifically for the



C.V. Starr Lecture

April 4, 2011

The Challenge of Global Governance in a World of Rising Powers



William Burke-White
Member, Policy Planning Staff, U.S. Department of State; and Professor of Law, University of Pennsylvania Law School

Global governance – the collective management of common problems at the international level – is at a critical juncture. Although global governance institutions have racked up many successes since their development after World War II, the growing number of issues on the international agenda, and their complexity, is outpacing the ability of international organizations and national governments to cope. How do we ensure effective global governance in a world of rising powers, conflicting state interests, and ever greater transnational challenges? William Burke-White will discuss this question and other issues.

Visit www.nyls.edu/CIL for more information and registration.

purpose of opposing another state's self-determination or territorial integrity. (Given this specific wording, some observers believe that Article I allows AU nations to use mercenaries for various other purposes.) Under Article 7, nations must make this crime punishable "by the severest penalties under its laws, including capital punishment." All signatory parties must also, under Article 6, prevent people from engaging in such acts and prevent mercenaries (including their equipment) from entering or passing through their territories, among other measures.

The convention's definition of the term "mercenary" is almost identical to the one found in Protocol I, though – in Article 1(1)(f) – it allows an AU member state to recruit (and, by extension, compensate) armed service members from another nation (which is not a party to a conflict) to carry out an "official mission." Many nations have recruited and continue to recruit such forces from other nations to engage directly in combat on its behalf, say analysts, some of whom consider this a significant loophole which undermines the very purpose of the AU convention, which is to stop the recruitment of fighters for pay. Others believe that nations which send their armed forces abroad probably have strategic and political interests in the requesting country.

As of May 2011, 30 out of the 53 member nations of the AU have ratified the convention, meaning that their respective legislatures have formally agreed to implement the terms of that agreement. But analysts note that several influential AU members, including Kenya and South Africa, have neither signed nor ratified it.

Many question the effectiveness of the AU convention in stopping mercenary activities. "Despite efforts by African governments to stamp out the practice," reported *BBC News*, "there seems to be no shortage of men prepared to use their training on behalf of anyone willing to pay the right price." Many point out that, in the last decade, several nations (such as Equatorial Guinea, Ivory Coast, Sierra Leone, and Zimbabwe) have arrested many South African mercenaries within their borders, leading the South African foreign minister to say: "We definitely do not like the idea that South Africa is a pool for mercenaries." Also, the AU convention does not have a mechanism to enforce its terms.

In December 1989, the UN General Assembly voted to pass by consensus the world's first comprehensive international treaty addressing the use of mercenaries called the *International Convention against the Recruitment, Financing, and Training of Mercenaries*. Like the AU agreement, the UN convention – in Article 5(2) – prohibits nations themselves from recruiting, using, financing, or training mercenaries for the specific purpose of opposing a nation's right to self-determination. But, under Article 5(1), it departs from the AU agreement by also prohibiting the general use of mercenaries under all other circumstances. To ensure that people comply with these restrictions, the UN convention requires nations to implement "all practicable measures," though it does not specifically mention legislation.

The UN convention's definition of mercenary is also similar to those found in Protocol I and the AU convention, both of which generally say that mercenaries are those individuals who fight in an armed conflict for private gain. But unlike those agreements, the UN convention expands its definition of mercenary (in

Article 1(2)) to include individuals who are recruited specifically to overthrow a government or undermine its "constitutional order" or "territorial integrity" for private gain.

Analysts also point out that the UN convention contains the same shortcoming as the one found in the AU convention. Under Article 1(1)(e), the UN convention allows a nation to a conflict to recruit armed forces from another country (which is not a party to a conflict) to carry out an official mission. Also, the UN convention does not have a mechanism to enforce its provisions on its signatory nations.

As of May 2011, only 32 out of 192 UN members have ratified the UN convention. Analysts note that, of the 53 nations in Africa, only 7 have ratified it. Also, influential developed and developing nations – including Brazil, China, France, Germany, India, Japan, Kenya, Nigeria, Russia, South Africa, the United Kingdom, and the United States – have not ratified the UN convention.

So can Libya hire mercenaries under international law? Though Libya had ratified both the UN convention (in 2000) and the AU Convention (in 2005), its government had allegedly recruited thousands of mercenaries from other African nations specifically to fight rebel forces within its own borders. Strictly speaking, one analyst said that doing so probably does not violate the AU convention, which only prohibits the use of mercenaries "with the aim of opposing by armed violence a process of self-determination stability or the territorial integrity of another State . . ." Libya, say analysts, is a sovereign state which achieved independence long ago.

On the other hand, the UN convention generally prohibits the recruitment of mercenaries under all circumstances. While Libya could argue that Article 1(1)(e) of the UN convention allows it to recruit armed forces from another nation for an official mission, some observers say that the alleged fighters do not seem to be a part of any nation's armed forces. (In fact, most other nations in the region are highly unlikely – at least in public – to send their armed forces to help Libya whose leadership is largely reviled around the world, say political observers.) Overall, existing treaties do not seem to be an effective way to stop Libya from using mercenaries.

Some observers say that the world community can look to the International Criminal Court (or ICC) to stop the Libyan government from recruiting and using mercenaries in its fight against rebel forces. They note that, last year, the member nations of the ICC had completed ground-breaking negotiations which will allow that tribunal to prosecute national leaders for the crime of aggression.

As the world's only permanent criminal tribunal, the ICC (based in The Hague) is responsible for prosecuting individuals (even state leaders) for only acts of genocide, war crimes, and crimes against humanity. Currently, 114 nations are States Parties to the 1998 *Rome Statute of the International Criminal Court* (or Rome Statute), the international treaty which created the ICC.

In addition to the previously mentioned crimes, the ICC has jurisdiction to prosecute the crime of aggression. But at the time of its adoption, the Rome Statute neither defined that term nor did it say under what circumstances the ICC may begin a prosecution of that crime. Instead, it stated that the ICC would have jurisdiction over the crime of aggression once the States Parties adopted a definition.

In May and June 2010, the States Parties gathered in Kampala, Uganda, for a first-ever conference to review the effectiveness of the Rome Statute and also to adopt amendments (known as resolutions) to the agreement itself. In a major development, RC/Res. 6 formally attached the definition of “acts of aggression” from UN Resolution 3314 (which includes “the sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries”) to the Rome Statute itself. RC/Res. 6 also made these acts criminal offenses under the Rome Statute.

But using the ICC to stop Libya from recruiting and using mercenaries presents many hurdles. For example, many note that RC/Res. 6 will not come into effect for at least another six years. In addition, it allows States Parties to opt out of the ICC’s jurisdiction in prosecuting crimes of aggression. Furthermore, because Libya did not sign the Rome Statute, analysts say that the ICC does not have the legal authority to prosecute individuals from non-signatory nations. Moreover, if the ICC determined that Libya had, indeed, hired mercenaries to fight against its own people, it may not even constitute an act of aggression, which again is defined as “the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State.” Libya, say analysts, is allegedly using mercenaries against its own people.

Even the ICC itself has not focused its attention on Libya’s alleged use of mercenaries. Instead, the ICC announced in March 2011 that it had opened an investigation to determine whether high-ranking Libyan officials, including Muammar Gaddafi himself, had committed “crimes against humanity” by ordering security forces to kill hundreds of protestors. Under Article 7 of the Rome Statute, crimes against humanity include murder and “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health,” but only if they were carried out “as part of a widespread or systematic attack directed against any civilian population.” According to the ICC’s chief prosecutor: “We have evidence that after the Tunisia and Egypt conflicts in January, people in the regime were planning how to control demonstrations inside Libya . . . The planning at the beginning was to use tear gas and [if that failed to work] . . . shooting.”

In a separate development, the UN High Commissioner for Human Rights said in April 2011 that Libya may have committed war crimes for its alleged use of heavy weaponry against residents of a city called Misrata. 

INTERNATIONAL HUMAN RIGHTS

New York: Entire corporations cannot be sued for human rights abuses

In a major decision, New York’s highest court ruled that it does not have the authority to hear lawsuits where foreign victims of human rights abuses (using a unique federal statute) try to hold a corporation responsible for their injuries. Critics worry that the decision could remove a tool to hold people accountable for human rights violations. But others believe that such concerns are overblown.

During the last century, many groups have struggled to hold individuals responsible for ordering or carrying out massive

human rights violations. Many countries, they point out, neither had the legal resources nor the political will to prosecute these individuals. To counter this trend, human rights advocates began to use different approaches in trying to hold them accountable for their actions.

The main approach still involves *criminal prosecution* using special outside courts. For instance, many nations have asked the United Nations to establish temporary criminal tribunals to prosecute individuals for ordering or carrying out alleged abuses during specific conflicts in particular countries such as those in Cambodia, Rwanda, Sierra Leone, and the former Yugoslavia. In addition, nations in 2003 established the International Criminal Court (or ICC), which is the world’s first permanent criminal tribunal with the authority to prosecute individuals (including high-level government leaders) accused of genocide, war crimes, and crimes against humanity.

In an alternative approach, victims of human rights abuses began to file *civil lawsuits* against the alleged perpetrators by using the *Alien Tort Claims Act* (or simply the Alien Tort Statute or ATS), which the U.S. Congress passed in 1789 and is now codified in 28 U.S.C. §1350. The ATS simply states: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” In other words, the ATS grants jurisdiction to an American court to hear civil cases filed only by foreign plaintiffs who claim that the defendant had injured him through a particular act that is prohibited by international law. Under the ATS, the plaintiff can seek only financial compensation and punitive damages from the defendant for those injuries.

Since the 1980s, many foreign nationals have filed civil lawsuits in American courts (under the ATS) against other foreigners for alleged violations of international human rights law committed outside of the United States and which have no connection to the United States or any of its nationals. (Many foreign defendants had moved to and settled in the United States even before the plaintiffs had sued them.)

Although this one-sentence act may seem simple and straightforward, ATS cases have, in fact, been known for their complexities. Legal analysts point out, for instance, that the statute itself does not provide any explicit guidance as to how the courts must resolve claims brought under the ATS. As a result, courts have developed (and are still developing) standards of adjudication to resolve such cases, including guidelines to determine whether an alien may even file a lawsuit and whether an alleged action did, in fact, violate a generally accepted norm of international law.

Jurists now generally agree that certain acts, when carried out by government officials and agents against their own citizens, do violate rules and norms of international law, and that their perpetrators could be held legally responsible (under the ATS) for damages arising from those acts. Some include genocide, slavery or the slave trade, the murder or disappearance of people, and torture.

In its first and only ATS case, the U.S. Supreme Court (in a 2004 decision called *Sosa v. Alvarez-Machain*) devised a two-part test which lower courts must use to determine whether they had

jurisdiction to hear an ATS case. It said that a plaintiff's claim of injury under the ATS must first "rest on a norm of international character accepted by the civilized world" (which can be determined by examining treaties, decisions of international bodies, and the work of scholars). Second, the norm must be defined with "specificity." Therefore, "general or aspirational assertions of international norms are clearly insufficient under that standard," said one expert.

Initially, plaintiffs used the ATS to target former government officials accused of wrong-doing, but who were never brought to justice in the nations where the alleged abuses had occurred. But other courts soon allowed plaintiffs to file ATS suits against non-state entities – such as private individuals and groups – if the defendants had violated some universally recognized norm of international law.

In addition to suing state agents and private individuals and groups, plaintiffs in the last two decades have filed scores of ATS lawsuits specifically against corporations which were working in conjunction with host governments on certain investment projects. (Corporate entities are generally described as "juridical" persons in contrast to "natural" or real persons.) A majority of these lawsuits claimed that the corporate defendant had provided financial and logistical support to the security forces of a host government in order to carry out certain acts prohibited by international human rights law against the plaintiffs. (Plaintiffs argued, for instance, that their protests against certain investment projects led to harsh government crackdowns.) Because the corporate defendants were complicit in these abuses, reasoned the plaintiffs, they should also be held legally responsible for them.

So far, courts have dismissed many corporate ATS lawsuits. In other cases, corporations settled with the plaintiffs without admitting guilt or wrong-doing. Juries have also voted to acquit corporations. (Up to the present, no jury had ruled against a corporation in an ATS lawsuit.)

But some analysts have questioned whether the ATS actually gives jurisdiction to courts to decide cases filed specifically against corporate defendants. Recently, the U.S. Court of Appeals for the Second Circuit (which is the highest court in New York) answered this question in an important decision.

In September 2002, plaintiffs (all citizens of Nigeria) filed an ATS lawsuit in U.S. District Court for the Southern District of New York, claiming that Royal Dutch Petroleum Company and Shell Transport and Trading Company had assisted Nigerian military forces in "beating, raping, and arresting" residents in the Ogoni region in Nigeria who were protesting oil exploration on their territory.

Specifically, in *Kiobel v. Royal Dutch Petroleum, Co.*, the plaintiffs alleged that the defendants provided soldiers with food, transportation, compensation, and a staging area to carry out their attacks. By doing so, the oil companies had aided and abetted security forces in carrying out: (1) extrajudicial killings, (2) crimes against humanity, (3) torture or cruel, inhumane, and degrading treatment, (4) arbitrary arrests and detention, (5) violations of the rights to life, liberty, security, and association, (6) forced exile, and (7) property destruction – all in violation of international human rights law, claimed the plaintiffs.

In September 2006, the district court – in a decision by Judge Kimba Wood – dismissed four of the claims (extrajudicial killings; violation of the rights to life, liberty, security, and association; forced exile; and property destruction), saying that these particular acts did not, under the Supreme Court's *Sosa* decision, violate widely-accepted norms of international law. On the other hand, the remaining alleged acts – crimes against humanity; torture or cruel, inhumane, and degrading treatment; and arbitrary arrests and detention – did violate specific norms of international law, it ruled.

Foreign victims of human rights abuses which took place in other nations cannot sue entire corporations for their alleged injuries in lawsuits filed in New York, said a federal appeals court.

However, before proceeding to an actual trial where a jury would decide whether the defendants' actions, indeed, violated specific norms of international law and to what extent they should be held responsible, the district court asked the appeals court – in a motion called an interlocutory appeal – to review its ruling.

In September 2010, the appeals court – in a three-judge panel decision written by Judge José Cabranes – dismissed the entire case by declaring that it did not have jurisdiction under the ATS to decide civil lawsuits filed specifically against any corporation alleged to have violated international human rights laws.

While various plaintiffs have – for the past several decades – filed many ATS lawsuits against corporations, the appeals court said that there were "a number of unresolved issues lurking in our ATS jurisprudence," and that the current case (*Kiobel*) involved "one such unresolved issue – Does the jurisdiction granted by the ATS [actually] extend to civil cases brought against corporations under the law of nations?"

The appeals court noted that while several plaintiffs did, in the past, file ATS lawsuits specifically against corporations, the judiciary had "no occasion to address" whether corporations actually could be held liable for violations of international law (and, accordingly, under the ATS). Many corporate defendants had, for instance, settled these lawsuits before they went to trial. The appeals court also surmised that "just as corporations are generally liable in tort under our domestic law," the nation's legal culture "may, at first blush, [have simply assumed] that corporations must be subject to tort liability under the ATS."

But it said that making such an assumption would be a mistake. "The fact that corporations are liable as juridical persons under domestic law," said the court, "does not mean that they are liable under international law (and, therefore, under the ATS)." It added: "The fact that a legal norm is found in most or even all 'civilized nations' does not [automatically] make that norm a part of customary international law." As an illustration, the court cited a statement from its own decision concerning a previous ATS case: "[T]he mere fact that every nation's municipal [i.e., domestic] law may prohibit theft does not incorporate the Eighth Commandment, 'Thou Shalt not steal,' . . . into the law of nations."

Instead, to determine whether a widely-accepted practice existed among nations to hold corporations liable for violations of international law, the appeals court said it had to examine present-day customary international law, which is embodied in treaties and conventions, decisions issued by international judicial bodies, and the work of legal scholars. “Whether a defendant is liable under the ATS depends entirely upon whether that defendant is subject to liability under international law,” it said.

The appeals court – carrying out its own survey of tribunals, treaties, and the work of legal scholars – concluded that “customary international law has steadfastly rejected the notion of corporate liability for international crimes.” For instance, it noted that “no international tribunal [had] ever held a corporation liable for a violation of the law of nations”:

- The Nuremberg trials of Nazi war criminals after the end of World War II, said the appeals court, held that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”
- In another example, it said that both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda “expressly confined the tribunals’ jurisdiction to ‘natural persons.’”
- The signatory nations of the ICC “soundly rejected” a proposal to give jurisdiction to the ICC to try corporations and other “juridical” persons, it pointed out.

The appeals court also said that no treaty seemed to hold corporations liable specifically for violating international human rights law.

- It argued that any given treaty would serve as “proper evidence of customary international law,” but only if an “overwhelming majority of states [had] ratified the treaty, and those States [had] uniformly and consistently act[ed] in accordance with its principles.”
- Using this argument, the court criticized a previous district court decision (*Presbyterian Church of Sudan v. Talisman Energy, Inc.*) which had relied on several international treaties to conclude for itself that the world community now held corporations responsible for violating international human rights law.
- But the appeals court said that “none of the treaties relied upon in the district court’s [decision] has been ratified by the United States, and most of them have not been ratified by other States whose interests would be most profoundly affected by the treaties’ terms.” Therefore, these treaties failed “to demonstrate that corporate liability is universally recognized as a norm of customary international law,” it said.
- The appeals court further argued that even if an “overwhelming majority of states” had ratified those treaties, they said “nothing about whether corporate liability for, say, violations of human rights – which are not a subject of those treaties – is universally recognized as a norm of customary international law.”

Finally, it examined the work of legal scholars to determine whether customary international law presently held corporations

liable for violations of international human rights law. It concluded that such work did not support this view.

- To bolster this conclusion, the appeals court cited what it called “two renowned professors of international law” – Professor James Crawford of the University of Cambridge in England, and Professor Christopher Greenwood of the London School of Economics who is now a judge on the International Court of Justice.
- In a statement made during litigation in the *Presbyterian Church of Sudan* case, Professor Crawford said: “No national court [outside of the United States] and no international judicial tribunal has so far recognized corporate liability, as opposed to individual liability, in a civil or criminal context on the basis of a violation of the law of nations or customary international law.”

Viewing its survey as a whole, the appeals court concluded that “imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world . . .” Accordingly, it ruled that it did not have jurisdiction under the ATS to adjudicate civil cases filed specifically against corporations alleged to have violated international human rights laws.

The appeals court also clarified that its decision did not shield specific individuals working in a corporation from liability under the ATS for violating international human rights law: “Nothing in this opinion limits or forecloses suits under the ATS against the individual perpetrators of violations of customary international law – including the employees, managers, officers, and directors of a corporation – as well as anyone who purposefully aids and abets a violation of customary international law.” So foreign plaintiffs may file ATS lawsuits targeting specific individuals within a corporation whom they believe had aided and abetted the Nigerian government in violating international human rights law.

In a concurrence, Judge Pierre Leval agreed with the final judgment of the court, but strongly criticized its ruling that courts may not hold corporations liable for violations of international law under the ATS just because most nations did not make it a widely-accepted practice of doing so. “The position of international law on whether civil liability should be imposed for violations of its norms is that international law takes no position and leaves that question to each nation to resolve,” he said. After prohibiting certain conduct, Judge Leval wrote that international law “leaves the manner of enforcement, including the question of whether there should be private civil remedies for violations of international law, almost entirely to individual nations.” In the case of the United States, noted Judge Leval, that nation “has opted to impose civil compensatory liability on violators [through the ATS] and draws no distinction in its laws between violators who are natural persons and corporations.”

Judge Leval also expressed concern that the decision would allow human rights abusers to hide behind a corporate veil. “The new rule offers to unscrupulous businesses advantages of incorporation never before dreamed of,” he wrote. “So long as they incorporate . . . businesses will now be free to trade in or exploit slaves, employ mercenary armies to do dirty work

for despots, perform genocides or operate torture prisons for a despot's political opponents, or engage in piracy – all without civil liability to victims.”

The plaintiffs later asked the appeals court for an *en banc* hearing where all of the judges would hear the case. But the judges denied such a hearing on a 5-5 vote. Some legal analysts believe that the plaintiffs will appeal the case to the U.S. Supreme Court. Even though the appeals court had dismissed the case, its ruling is not automatically binding on courts outside of New York, though they may look to its reasoning when deciding similar cases in the future. 

INTERNATIONAL NUCLEAR LAW

Japan: Nuclear power accident too hot for international law?

A recent earthquake set in motion a series of events leading to a nuclear power accident in Japan which experts say rivals the nuclear disaster in Chernobyl in 1986. As part of its efforts to bring its disabled nuclear plant under control, Japan dumped over 10,000 tons of radioactive water into the ocean, raising alarms from neighboring countries. Can Japan legally dump radioactive water into the ocean? Are there international treaties which address this issue?

In March 2011, an earthquake originating in the Pacific Ocean knocked out electrical power to the Fukushima Daiichi Nuclear Power Station located about 170 miles north of Tokyo. (It was the most powerful earthquake in Japan's recorded history, say geologists.) Plant personnel then activated backup generators to keep water flowing around the nuclear reactors to prevent them from overheating. But about 30 minutes later, a tsunami hit the nuclear plant area (which is located directly on Japan's coast) and disabled the backup generators. The reactors then overheated and exploded, releasing large amounts of radiation into surrounding areas.

Does international law allow Japan to dump thousands of tons of radioactive water into the ocean as part of its efforts to bring under control several nuclear reactors disabled by an earthquake and tsunami?

In early April 2011, the operator of the Fukushima nuclear power station (the Tokyo Electric Power Company or Tepco) announced that it would dump 11,000 tons of low-level radioactive water from the plant's storage containers into the Pacific Ocean to make room for accumulating water which was much more radioactive. Tepco told the *New York Times* that while the low-level radioactive water contained 100 times the legal limit of radiation, the high-level radioactive water exceeded that limit by 10,000 times.

As news spread that Japan was dumping radioactive water into the ocean, analysts and officials began to debate whether it was legal to do so under international law.

Various treaties try to protect the marine environment by prohibiting the dumping of wastes into the world's oceans. For

example, the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* (1972) – also known as the London Convention – was one of the first global treaties to prohibit the dumping of wastes into the world's oceans, according to the International Maritime Organization (or IMO), which is the primary UN agency responsible for the safety of ships and the prevention of pollution by ships.

The London Convention, under Article IV, called on its signatory nations to pass domestic laws which would specifically forbid only ships, aircraft, platforms, and other man-made structures at sea from deliberately disposing of particular wastes into the ocean. They included cadmium, crude oil, mercury, persistent plastics, and high-level radioactive wastes, among many others, listed in what is called Annex I.

But the agreement contained what many analysts considered shortcomings. For example, it allowed governments to dump other potentially harmful wastes – listed in what is called Annex II, including arsenic, lead, pesticides, scrap metal, and even low-level radioactive wastes – if they simply issued general or special permits which took into account criteria such as a waste's toxicity, persistence in the environment, and whether it could affect marine life, among other considerations.

Also, the London Convention did not address the dumping of wastes originating from land-based sources such as factories or nuclear power plants, for instance. (Again, the agreement specifically prohibited only ships, aircraft, platforms, and other man-made structures at sea from discarding certain wastes into the ocean.) The London Convention entered into force in 1975.

To address these shortcomings, the parties to the London Convention adopted the *1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972*, which replaced the London Convention as “a more modern and comprehensive agreement on protecting the marine environment from dumping activities,” said that IMO. Unlike the previous agreement, the 1996 Protocol prohibits the dumping of *all* wastes (and not just those listed in Annex I) into the ocean unless the signatory parties agreed to make specific exceptions. Analysts say that the 1996 Protocol presumably forbids the dumping of low-level radioactive wastes into the oceans.

The 1996 Protocol entered into force in 2006. Japan began to enforce that agreement within its jurisdiction in the following year.

So did Japan violate the 1996 Protocol by dumping low-level radioactive water into the Pacific Ocean? Some point out that, under Article 8(2) of that agreement, a nation may dispose of wastes into the ocean “in emergencies posing an unacceptable threat to human health, safety, or the marine environment and admitting of no other feasible solution.” Japanese officials had argued that it had to dump the low-level radioactive water to make room for large quantities of high-level radioactive water which was being used to cool down the disabled reactors.

At the same time, Article 8(2) adds that, before taking any action, Japan had to consult not only with “any other country or countries that are likely to be affected” by the dumping, but also with the IMO on the “most appropriate procedures to adopt.” But media reports seem to indicate that Japan did not fully

inform neighboring countries of its plans to dump the low-level radioactive water into the Pacific Ocean.

For example, according to reporting from *TIME* magazine: “Tokyo had briefed diplomatic corps in Japan on the start of radioactive water disposal hours before Tepco began releasing the liquid into the Pacific Ocean.” One neighboring country, South Korea, lodged a protest, stating: “It’s the proximity between the two countries that makes Japan’s release of water a pressing issue for us.” China issued a statement which said that “it is natural for us to express concern,” but hoped that “Japan will act in accordance with relevant international laws” to protect the marine environment.

In response to these concerns, a spokesperson for Japan’s Nuclear and Industrial Safety Agency said that “we feel very sorry for causing anxiety among our neighbors,” and added that “we could not help but resort to the measure, but will provide full explanations from now on.” So even though Japan did not give adequate warning about its plan to dump tons of low-level radioactive water into the ocean, some note that the 1996 Protocol doesn’t have a robust mechanism to enforce compliance with its provisions. Article 10(2), they note, calls on nations themselves “to prevent and if necessary punish acts contrary to the provisions of this Protocol.”

Legal observers point out that other agreements regulate the dumping of radioactive wastes into the oceans, but contain significant shortcomings. In 1974, the world community passed the *Convention on the Prevention of Marine Pollution from Land-Based Sources* (known as the Paris Convention), which, as its title implies, calls on nations to “adopt individually and jointly measures to combat marine pollution from land-based sources . . .” Under Article 5, nations must not dump radioactive substances from land-based sources into the oceans. But analysts say that Paris Convention was not effective because it gave signatory nations wide latitude in carrying out its obligations. (Preventing land-based radioactive wastes from polluting the oceans, they say, is largely considered a matter of domestic sovereignty.)

Several regional agreements also regulate the dumping of radioactive wastes in the oceans, including the *Convention on the Pollution of the Mediterranean Sea* (1976) and the *South Pacific Convention for the Protection of the Natural Resources and Environment of the South Pacific Region* (1986). But Japan is not a party to any of them.

Observers also expressed concern that Japan may have violated the 1986 *Convention on Early Notification of a Nuclear Accident*. The agreement requires a country to report any nuclear accidents from any facility which has released or could potentially release radiation which poses a “safety significance” to other nations.

Specifically, under Article 2, a nation must provide information (such as the nature of the nuclear accident, its time of occurrence, and location) to those nations which may or will be affected by the accident. It must do so either directly to those nations or through the International Atomic Energy Agency (or IAEA). This agreement was adopted in the wake of the world’s worst nuclear accident which occurred in April 1986 (almost exactly 25 years earlier than Fukushima) at a nuclear power station in

Chernobyl in the former USSR. According to the U.S. Nuclear Regulatory Commission, the accident “released massive amounts of radioactive material into the environment” and across several nations. Soviet officials had waited several days before they announced the accident to the world, and, only later, began civilian evacuations from the area.

Some observers say that Japan (which ratified the 1986 Convention) had initially alerted only the IAEA on its plan to dump the low-level radioactive water into the Pacific Ocean because doing so, said a Japanese spokesperson, would “not cause immediate radioactive contamination in neighboring countries.” Also, the 1986 Convention gives nations the option of reporting an accident only through the IAEA. On the other hand, legal analyst James Harrison, in a post on a blog called *InternationalLawObserver.eu*, noted a 2008 decision (called “Case Concerning Pulp Mills on the River Uruguay”) issued by the International Court of Justice where it “made clear that the duty to inform other states was a duty incumbent on the state, and it could not be satisfied by the release of information from other sources.”

Analysts also discussed whether Japan complied with provisions in a 1982 treaty called the *UN Convention on the Law of the Sea* when it dumped the low-level radioactive water into the ocean. This treaty, also known by its acronym UNCLOS, is the most comprehensive international agreement that governs various aspects of the world’s oceans, including navigation rights, offshore territorial limits, and exploitation of natural resources.

UNCLOS also calls on nations to pass pollution control measures. For example, under Article 194(1), nations must enact measures “to prevent, reduce, and control pollution of the marine environment from any source,” which analysts say include land-based sources. In addition, Article 194(2) says that nations must ensure that “pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.” Furthermore, Article 198 adds that “when a State becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution, it shall immediately notify other States it deems likely to be affected by such damage, as well as the competent international organizations.” Japan ratified UNCLOS in 1986.

Analysts say that while provisions such as Article 194(2) call on nations to control the flow of pollution from its borders, it does not say exactly how to do so, which leaves nations such as Japan with some leeway on how they carry out their obligations. Also, while Article 198 says that nations must “immediately notify” other states on imminent damage to the marine environment, *Kyodo News* (a major daily) reported that Japan “has been making its best efforts to minimize the sea contamination.” Observers point out that because Japan had disposed of the radioactive water on the eastern side of its island, the neighboring countries of China, Korea, and Russia (which faces the western side of Japan) did not face any imminent damage to their surrounding waters. 

Asteroids: Can international law address an out-of-this-world problem?

Are there asteroids on a collision course with Earth and which have the potential to cause catastrophic damage or even wipe out humanity? For decades, scientists and other experts have tracked comets and asteroids near Earth and throughout the solar system. In recent years, experts have called on governments to take stronger measures against asteroids, though some believe the chances of a strike are small. What measures have they taken so far? And what role can international law play?

As of May 2011, the Near-Earth Object Program administered by the National Aeronautics and Space Administration (or NASA) has identified over 8,000 near-earth objects (or NEOs), which are comets and asteroids that have moved within 93 million miles of Earth. (This is approximately the distance between the Earth and the Sun). Of this number, the NASA program has labeled 1,225 of them as “potentially hazardous asteroids” (or PHAs), meaning that their orbits could possibly put them in striking range of the planet one day.

Scientists say that the force of an asteroid hitting Earth at speeds exceeding 25,000 miles per hour can be tremendous, and that several strikes throughout history had caused great damage. For example:

- In 1908, a two-block long asteroid (around 400 feet in diameter) exploded 3 to 6 miles above Tunguska, Siberia, but knocked down 800 square miles of forest.
- Scientists believe that, 65 million years ago, a meteorite – only a few miles in length – had struck what is now called the Yucatan Peninsula (in modern-day Mexico) and caused enough damage to wipe out all of the dinosaurs.
- In January 2010, NASA said that asteroid “2010 AL30,” which was the length of a New York City public bus (around 50 feet), came within 76,000 miles of Earth (or one-third of the distance to the moon). If the asteroid had entered Earth’s atmosphere, it could have exploded with the force of 50 to 100 kilotons of dynamite, said NASA. In comparison, the atomic bomb dropped on Nagasaki, Japan, exploded with a force of around 13 to 18 kilotons.
- In 2004, experts believed that an asteroid called “Apophis” (around 885 feet in diameter) would hit Earth in 2029, but later changed the date to 2036, though the asteroid’s trajectory and impact are still uncertain, according to reporting in *Wired* magazine.

Of the 8,000 NEOs identified by NASA, over 640 have a diameter of 1 kilometer in length (or two-thirds of a mile). NEOs of this size could threaten human civilization, according to the B612 Foundation, an organization of scientists and experts trying to stop PHAs from striking Earth, and which is named after the home asteroid of the main character in the book *The Little Prince* by Antoine de Saint-Exupéry. The B612 Foundation also said that asteroids which are 10 times smaller in length could still harm local and regional populations.

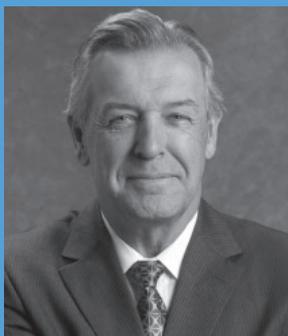
While the threats posed by NEOs are real, many scientists believe that no NEOs which are one kilometer in length or longer will hit Earth in the next 100 years.

Still, many experts are calling on governments to take preventive measures. In April 2009, the International Academy

C.V. Starr Lecture

April 28, 2011

Images of the Arctic and the Law and Politics They Suggest



David Caron
President, American Society of International Law, and C. William Maxeiner Distinguished Professor of Law, University of California, Berkeley Law

As the polar ice caps in the Arctic region begin to melt and recede, various peoples and nations are approaching this change with quite different images of that region. In this wide-ranging lecture involving boundary disputes, environmental and resource concerns, as well as indigenous peoples, David Caron – the President of the American Society of International Law – identifies the images involved, the politics and law implicit in each, and the futures for the Arctic that are both possible and likely.

Visit www.nyls.edu/CIL for more information and registration.

of Astronautics Planetary Defense organized a widely attended conference where experts presented various suggestions to address NEOs. “The Planetary Defense Conference [was] the premier international venue for sharing scientific research” on NEOs, according to Dr. Ray Williamson, Executive Director of the Secure World Foundation, a co-sponsor of the conference.

Experts said that the main options focused on deflecting an asteroid from its present trajectory, according to a March 2009 analysis in *Wired* magazine. For instance:

- One approach is to hit an asteroid directly with nuclear weapons to knock it off course. But many believe that a nuclear explosion could break the asteroid into several parts, each of which could still threaten Earth.
- Others say that detonating nuclear weapons near an asteroid could change its orbit, though many believe that such nuclear blasts might not be powerful enough to do so.
- In an approach using “laser sublimation,” nations would aim pulses of energy or lasers at an asteroid over long periods of time, which would melt ice and loosen enough debris to change the asteroid’s orbit, said the Association of Space Explorers. But others say that such technology does not exist.
- More far-fetched options include landing a spacecraft on an NEO and then blasting off to change its trajectory, or catching photons emitted by the Sun using what are called “solar sails” planted in the asteroid, which would then shift its orbit. But experts have dismissed these ideas, saying that landing on a fast moving asteroid and then setting up solar sails would be extremely difficult.

Over 1,000 asteroids have the potential to strike Earth and cause catastrophic damage. What is the world community doing to address this problem, and can international law play an effective role?

Can international law play some role in addressing NEOs? Several existing international treaties currently regulate a wide range of activities related to or in outer space. For example, the 1967 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space* prohibits its signatory nations from stationing objects in orbit that carry weapons of mass destruction, among other restrictions. The 1984 *Agreement Governing the Activities of States on the Moon and other Celestial Bodies* (or the “Moon Agreement”) calls for an “international regime” to govern the exploitation of the Moon’s natural resources.

But none of these treaties specifically or directly address the threats posed by NEOs. On the contrary, some of them may actually limit certain approaches in dealing with them. Article 3(2) of the Moon Agreement, for example, says that no party may use a “hostile act” on the Moon or near other celestial bodies. While the agreement does not define the term “hostile act,” it could be interpreted to prohibit the use of nuclear weapons in deflecting asteroids. In addition, a 1963 agreement called the *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer*

Space, and Under Water explicitly outlaws the use of nuclear weapons in space. Article I(1)(a) calls on nations “to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control,” including the atmosphere, and also in outer space. So if the world community wanted to use nuclear weapons to address PHAs, it may have to amend or update these treaties.

Because no existing treaty deals specifically or directly with NEOs, and because addressing such a threat will require extensive international cooperation, many argue that the world community needs to create what the B612 Foundation calls a “Deflection Treaty,” which would require nations to devise, coordinate, and then implement a plan (even one using nuclear weapons) to deflect an approaching NEO from its current trajectory. Such a treaty would also have to address where to deflect an asteroid. (Any deflection, say observers, may not be wide enough to steer an asteroid completely away from Earth. So parties to a deflection treaty may have to decide where exactly on Earth to divert the asteroid.)

Working in conjunction with a deflection treaty, the United Nations would carry out three functions in plans to deflect an asteroid, according to a 2008 report (“Asteroid Threats: A Call for Global Response”) issued by the Association of Space Explorers’ Panel on Asteroid Threat Mitigation. First, it would create an international communications network to detect and then spread warnings on NEOs. Second, the UN would create a group to plan a deflection campaign using the most up-to-date knowledge from around the world. Third, it would create another group to carry out plans of action based on political and scientific information. Any recommendations made by these groups would go through the UN Security Council for consideration.

But as of June 2011, no country or international organization has formally called on others to start negotiating a deflection treaty.

In the meantime, the UN and its member nations are still studying NEOs and also debating ways to deflect them. In 1999, the UN created the *Action Team on Near Earth Objects* (a working group based in Vienna, Austria) to look for international solutions in addressing NEOs. But it hasn’t issued any concrete recommendations yet. Working group members include Australia, Brazil, China, Germany, Iran, Japan, Nigeria, Russia, Saudi Arabia, the United Kingdom, and the United States, and also organizations such as the Association of Space Explorers and the European Space Agency, among many others.

Compared to other nations, the United States currently has the most active NEO program where it uses six observatories (at home and abroad) to reach its goal of finding at least 90 percent of asteroids that are 1 kilometer in length or longer, according to NASA’s Jet Propulsion Laboratory. A spokesperson said that the program has found more than 82 percent so far. In 2009, the NEO program had a \$4.1 million budget, far less than the \$1 billion needed to perform more inclusive research, according to former NASA administrator Michael Griffin. 

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