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Three-strikes laws: An effective way to combat Internet piracy?

In 2009, sea-faring pirates attacked more ships and other vessels than in any other time in recent memory, plundering tens of millions of dollars in booty and demanding millions in ransom. But analysts point out that other so-called pirates – using the Internet – have caused even greater damage by plundering the potential revenues of media companies, software developers, and even individual artists by illegally trading and selling copyrighted works worth hundreds of *billions* of dollars, according to some estimates.

Nations around the world have tried to curb Internet piracy through various measures. But their success has been mixed. In recent years, more and more countries have been adopting "three-strikes" laws within their jurisdictions to stop Internet piracy. What are some of the provisions of these laws? Will they be effective? And what legal obstacles do these laws face?

Losing billions in potential revenue to Internet pirates

Copyright laws give the creator of a certain work – such as books, movies, and songs – exclusive rights to control the use and distribution of these works for a limited period of time. Others who wish to use these creative works have to obtain permission from or pay fees and royalties to the rights holder. But experts say that people have long violated copyright laws by making illegal copies of, say, books and other materials, and selling them to others.

Now the use of the Internet has allowed them to do so on a much larger scale which would have been unimaginable just a decade ago. Business analysts say that people all over the world are using the Internet to trade and sell electronic versions of songs, movies, electronic publications such as books and newspaper articles, and even software and videogame programs without permission from the copyright holders or compensating them for using such materials.

Analysts have described these activities as Internet piracy, digital piracy, and electronic piracy, among many other terms. But legal experts view these terms as different names for copyright infringement, which, they point out, costs the right holders of certain works billions of dollars in lost sales.

According to the 2008 Digital Music Report from the International Federation of the Phonographic Industry, individuals illegally trade tens of billions of music files annually at an estimated rate of 20 illegal downloads for every legitimate track sold worldwide. Piracy also extends far beyond the music industry. One analyst said that Internet piracy of movies – where people would enter theaters and record movies using digital cameras and then make illegal copies for sale – costs the global film industry $18 billion in revenues every year. In one case, pirates had taken a digital version of a movie (*X-Men Origins: Wolverine*) and posted it on the Internet in March 2009 even before the studio had released the film in theaters.

In the area of computer software, the Sixth Annual Global Software Piracy Study by the Business Software Alliance said that the industry loses $50 billion in revenues to piracy. *The New York Times* recently reported, for instance, that Chinese government computers (and those in many nations around the world) unknowingly use illegal copies of Microsoft programs.

Protecting copyrights and the limits of international law

Global efforts to protect copyrighted materials go back over 100 years, which shows that copyright infringement was a long-standing problem in the world even before the advent of the Internet, noted one observer. For example, many nations in 1886 signed the *Berne Convention for the Protection of Literary and Artistic Works* (or Berne Convention), which was the first international treaty to call on participating nations to recognize copyrights in other countries, and also established minimum standards of domestic copyright protection for "every production in the literary, scientific, and artistic domain, whatever may be the mode of form of its expression," among other provisions.

Under the heading of cinematography (or movies), for instance, the Berne Convention says that nations must pass their own laws giving authors the exclusive right to authorize "the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adopted or reproduced."

In addition to the Berne Convention, the world community in 1994 negotiated the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (known by the acronym TRIPs), which also set minimum standards of domestic copyright protection, including the length of such protection. The TRIPs agreement is administered by the World Trade Organization, and covers many non-Berne Convention members.

Although these treaties call on nations to pass domestic laws protecting copyrights, they did not explicitly mention how nations must address copyrighted and creative materials found and traded on the Internet (let alone the issue of Internet piracy). In fact, before 1994, most people around the world were not aware of or even used the Internet.

To fill in these gaps, the World Intellectual Property Organization (or WIPO) – a specialized UN agency which promotes the protection of intellectual property – created a WIPO *Copyright Treaty* in 1996, which updated the copyright protections found in the Berne Convention by expanding their reach to the Internet. For example, Article 11 requires that each contracting country pass legal measures which will penalize individuals who circumvent technological measures (such as encryptions) which protect electronic versions of copyrighted materials. Article 12 calls on nations to penalize individuals who remove the "rights management information" from copyrighted works – in order to distribute them without permission from the copyright holders. (Such information identifies the "author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work," says the WIPO treaty.)

People all over the world are using the Internet to trade and sell electronic versions of songs, movies, electronic publications such as books and newspaper articles, and even software and videogame programs without permission from the copyright holders or compensating them for using such materials.

Still, even with these various treaties in place, Internet piracy remains a major problem today. (Industry groups say that the number of copyrighted works which are transferred and illegally downloaded has increased in recent years.) What shortcomings to these treaties contain?

Some observers note that the penalties for not complying with a treaty are weak. For example, in order to comply with the WIPO *Copyright Treaty,* the European Union (or EU) in 2001 passed its *Copyright Directive* which, among other provisions, called on all of its member nations to pass domestic laws making it illegal for people to evade technological measures to protect copyrighted materials. But analysts note that when Spain, among other EU member nations, had not complied with the directive during a certain timeframe, the EU in 2006 (five years after the passage of the directive) sent a warning to that country (in the form of a "reasoned opinion") and later had to issue a fine before that country took any action.

Analysts also point out that while these treaties are legally binding, individual nations are largely responsible for implementing and enforcing their terms. ("Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention," says Article 36 of the Berne Convention, for example.) But enforcement has been uneven at best. Some countries have cited a lack of resources or say that they must give greater priority to other pressing matters.

Even when a country enforces its copyright laws, doing so has not substantially curbed Internet piracy. Under various laws, a copyright holder may file, for instance, a civil lawsuit against another party for copyright infringement, and ask the violator to pay damages. (Governments themselves generally do not proactively search out and prosecute copyright violators.) But analysts believe that it would be impractical to file lawsuits against potentially tens or hundreds of millions of people all around the world who may have engaged in copyright infringement using the Internet.

In fact, many media companies and other businesses have scaled back efforts in pursuing copyright infringement cases in the court system. For example, the Recording Industry of America will file lawsuits against only those parties who illegally download around 5,000 songs a month. Still, other groups such as the Anti-Piracy Unit of the International Federation of Phonographic Industry pursue individual cases.

In another approach, businesses and other copyright holders are working with various Internet service providers (or ISPs) – companies which offer Internet access – to slow down their services to customers who are sharing electronic files illegally over the Internet. But the results of these efforts have been mixed. Many industries are now offering free songs, publications, videos, games, and even movies which people can view, hear, or play only online to curb copyright infringement.

In another approach, over 30 nations are currently negotiating a treaty called the Anti-Counterfeiting Trade Agreement whose purpose is to stop copyright infringement and the production of counterfeit goods. Experts say that it also covers "Internet distribution and information technology." But the treaty is generating controversy because the participating nations are negotiating under what critics say are unusual levels of secrecy, though several governments say that they will publicly release the text of the treaty at the appropriate time.

A new approach in curbing Internet piracy: "Three-strikes" laws

Governments around the world are now trying to discourage digital copyright infringement by passing what are popularly known as "three-strikes" laws. Under this kind of law, nations generally impose stiffer penalties on individuals after they are convicted of engaging in certain kinds of illegal activities for a third time. For instance, in the United States, the state of California in 1994 passed a three-strikes law where a court must sentence an individual to 25 years-to life in prison if he commits any felony, and also has two prior convictions for violent or serious felonies.

How does the three-strikes concept work in the case of Internet piracy? A brief survey of existing and proposed laws reveals that either the government or a business will track the Internet Protocol (or IP) address of an individual who is engaging in copyright infringement using his computer. (Every computer has a unique digital address composed of several numbers.) They will then request that the ISP send a warning to that person each time he engages in illegal activities. After a third warning, the ISP will disconnect that person's access to the Internet for a specified amount of time.

A number of countries have already proposed or implemented three-strikes legislation to curb digital copyright infringement. For example:

***France*:** According to a government minister, France is "the [world's] number one" in illegal downloads of copyrighted works. One analyst noted that music sales over the past five years in France have dropped nearly 50 percent, and that more and more people are trading French cultural goods online, including electronic books and digital images of French works of art – all without the permission of the copyright holders. (But several polls generally do not include France in the top tier of countries whose population engages in Internet piracy, though that nation does appear in the top rankings for illegally downloaded video games.) To address this growing problem, President Nicolas Sarkozy called on legislators to pass stricter laws to prevent the Internet from becoming what he described as "a high-tech Wild West, a lawless zone where outlaws can pillage works with abandon or worse, trade in them in total impunity."

Under France's original three-strikes law introduced in 2008 (called the "Creation and Internet Law"), an ISP would send copyright violators a first warning by e-mail, and then a second by registered mail. On the third violation, the ISP would cut off a person's Internet access. But in June 2009, France's highest judicial review body, the Constitutional Council, ruled that the law violated several provisions in the French constitution, and also the "Declaration of the Rights of Man," which is mentioned in the constitution's preamble, and lists a wide variety of fundamental rights.

For example, it said that the law violated Article 9 of the Declaration by presuming the guilt of an individual in committing copyright infringement. (Under the Declaration, "all persons are held innocent until they shall have been declared guilty.") The Constitutional Council also ruled that the proposed three-strikes law violated Article 11 of the Declaration, which states that "the free communication of ideas and opinions is one of the most precious of the rights of man," and that "every citizen may, accordingly, speak, write, and print with freedom." Giving a non-judicial body (i.e., an ISP) the authority to cut off a person's Internet access without any means of appeal violated this right to communicate, said the Constitutional Council.

The French government later presented an amended version of the three-strikes law, which was approved by the Constitutional Council in October 2009, and went into effect in early 2010. The new law creates a regulatory body called the "High Authority for Diffusion of Works and Protection of Rights" which will warn people engaged in copyright infringement through e-mail and then by registered mail. After the third warning, a special judge will have the authority to order an ISP to cut a person's access to the Internet from three months to a year, and also issue fines up to €300,000 (or US$415,000).

Given its recent passage, there are no data showing whether the law is curbing Internet copyright infringement.

***United Kingdom*:** Britain is also debating whether to implement a three-strikes law to combat digital piracy. In June 2009, the government released a list of proposals from a project called "Digital Britain," which explores different ways to promote and protect the country's digital industries. Among many other provisions, the British government will call on its Office of Communications (or OFCOM, the agency regulating telecommunication services) "to secure a significant reduction in unlawful file sharing by imposing two specific obligations: notification of unlawful activity and, for repeat-infringers, a court-based process of identity release and civil action."

Legislators introduced a "Digital Economy Bill" in November 2009 which would, among other measures, allow OFCOM to work with ISPs in slowing down or cutting off Internet access of those individuals who repeatedly trade in copyrighted materials over the Internet. But critics said that the proposed bill still needed to clarify many provisions such as whether OFCOM would, for instance, cut off Internet access to an entire household "if only one member of a family was identified as a persistent file-sharer," reported several media outlets.

***Ireland*:** Ireland does not have a three-strikes law to combat Internet piracy. But analysts note that Ericom (Ireland's largest ISP) had reached an agreement with four major record companies, including EMI and Sony BMG, where the major record labels would provide Ericom with the IP addresses of people who are allegedly engaging in copyright infringement using the Internet. The ISP would then send out warnings to these individuals, and then cut off their Internet access after a third warning. According to news articles, the Irish music industry loses €13.8 million Euros (or US$20.63 million) annually from illegal downloads of songs and other digital products.

The record companies had originally filed a lawsuit against Ericom in 2008, arguing that the company should be held liable for copyright infringement because it knew that many of its customers were engaging in this illegal activity yet did nothing to stop them. Ericom, in turn, argued that it only provided its customers with Internet access and could not be held responsible for their online activities.

***Australia*:** On the other hand, a court in Australia in February 2010 ruled that an ISP provider, iiNet, Ltd., was not liable for copyright infringements carried out by its Internet subscribers (many of whom used a homepage which iiNet did not control). While the complaining parties – including several movie studios – argued that iiNet had, in effect, "authorized" its subscribers to trade illegally in copyrighted materials by failing to take "reason-

able steps to combat copyright infringement," the ISP provider argued that the complainants had to prove their allegations in court before the company could take any action against certain customers. (Australia had also passed an Internet three-strikes law, but has postponed its implementation.)

***Asia*:** In July 2009, South Korea amended its copyright laws and became the first Asian country to implement an Internet three-strikes law which allows authorities cut off Internet connection for a maximum of six months if an individual engages in copyright infringement – such as illegally uploading or downloading protected works such as digital songs – after a third warning from regulators.

But many observers, as reported in *The Korea Times*, have criticized the law. They say that the definition for "copyrighted content" is vague, and worry that the government could use copyright infringement as an excuse to restrict Internet access for those who are critical of the government and its policies. Others note that, under the three-strikes law, the government will have the authority to shut down entire websites (including online message boards) if participants uploaded copyrighted content without permission.

Singapore is also considering its own Internet three-strikes law, but is analyzing laws in other nations before introducing its own version.

United States: While the concept of three-strikes laws is well-known in the United States, law makers have not extended its use to Internet piracy. In addition to filing lawsuits, copyright holders have largely relied on a number of federal and state laws to combat digital copyright infringement. For example, a California law now makes it a crime for a person to distribute electronically film, sound recording, and video game files to more than 10 people without including a valid e-mail address.

In 2008, the U.S. Congress took a more proactive step to curb Internet piracy when it passed the Prioritizing Resources and Organization for Intellectual Property Act, which increased both civil and criminal penalties for trademark and copyright infringement. Under the law, judges may award larger damages. The government may also seize and auction computers used to break copyright laws. The Act also created a new cabinet position (a "copyright czar") responsible for enforcing intellectual property rights and combating counterfeiting and piracy.

Arguments in support of and against Internet three-strikes laws

How do proponents defend the three-strikes approach in curbing Internet piracy? They argue that the penalties associated with Internet three-strikes laws are proportionate to the offense being committed. Whether it is done through a computer connected to the Internet or through other non-technological means, copyright infringement is still a form of stealing, they argue, and those engaged in such activities should face specified penalties. (One study by the Recording Industry Association of Japan states that 80 percent of those who illegally download copyrighted materials do so without any sense of guilt.)

Supporters also argue that cutting off people's Internet access is not as severe as it may seem. They point out people will receive at least two warnings before an ISP or regulator imposes any penalties. According to a study last year conducted by Entertainment Media Research, 45 per cent of consumers who downloaded music illegally would stop such activities if the government passed a three-strikes law.

Governments are trying to discourage digital copyright infringement by passing what are popularly known as "three-strikes" laws under which an Internet service provider will cut off a person's access to the Internet after he engages in piracy for a third time.

On the other hand, opponents worry whether a three-strikes approach to stop Internet piracy could be carried out in a fair manner. They note, for example, that many proposed three-strikes laws would not involve the judicial system where people can contest allegations of copyright infringement through an established framework giving defendants many legal protections and also the right to appeal a decision. Rather, many proposed laws would allow ISPs and private media businesses to act as judge, jury, and executioner, say critics.

They also argue that proposed three-strikes laws could wrongly target and punish individuals not directly involved in copyright infringement. Many people engaged in Internet piracy do so using a family computer (or those belonging to friends and relatives), and other members of a household may not even be aware of such activities until an ISP cuts off their Internet access.

This debate concerning the merits and drawbacks of Internet three-strikes laws continues today, and experts say that there is no resolution in sight.

Is Internet access a fundamental right?

In recent years, some have started to argue that Internet access is becoming a fundamental right on par with the rights to freedom of expression, thought, and peaceful assembly, among others. So any three-strikes legislation cutting off Internet access in an effort to combat copyright infringement would violate this proclaimed right.

While there is no treaty which explicitly states that people have a fundamental right to Internet access, supporters argue that it seems implicit in some existing international documents. For example, some point to Article 19 of the *Universal Declaration of Human Rights* (adopted by the UN in 1948), which states that people have the freedom to "receive and impart information and ideas through any media and regardless of frontiers." Under their interpretation, this would include a right to Internet access. Accordingly, any efforts to restrict such access (by implementing, say, a three-strikes law) would violate this right.

Using similar language, the *Charter of Fundamental Rights of the European Union* (which is comparable to a bill of rights for members of the EU) states that people have a right, under Article

11, "to receive and impart information and ideas without interference by public authority and regardless of frontiers." Article 14 says that "everyone has the right to education and to have access to vocational and continuing training." Opponents of three-strikes legislation argue that nations can neither protect the right to receive and impart information nor the right to education unless they also recognize and protect a right to Internet access. Analysts note that a growing number of countries and their populations rely heavily on the Internet to carry out vital services and also to disseminate information and educational services. Approximately 1.4 billion people around the world use the Internet, according to the 2009 "Information Economy Report" by the United Nations Conference on Trade and Development, and this number is expected to grow in the future.

Those who say that Internet access should be (or is now) a fundamental right also point to many recent developments around the world which they believe support their belief:

- In 2000, the parliament of Estonia declared that Internet access was a basic human right. Many also believe that Greece's constitution guarantees a right to Internet access. Article 5A states that "all persons are entitled to participate in the Information Society," and that "facilitation of access to electronically handled information, as well as of the production, exchange, and diffusion thereof constitutes an obligation of the State."
- According to an article by the BBC, a spokesman for the British Department of Culture and Sport said that Internet access was "as valuable as other utilities such as water and electricity." (Some also argue that access to water should be a legal right.)
- In March 2009, the EU Parliament voted down Internet three-strikes laws from its Telecom Package after expressing general concerns over its implications. One member of the EU parliament said that legislation (which would allow some authority to cut off Internet access) would violate fundamental rights such as the "respect for private life, data protection, freedom of expression, speech and association, freedom of the press, political expression and participation, non-discrimination, and education."
- In May 2009, the EU Parliament amended its Telecom Package, saying that people must have "the right to a judgment by an independent and impartial tribunal established by law and acting in respect of due process . . ." before a government or other entity cuts off Internet access. "This is a clear statement from European lawmakers that they consider access to the Internet to be a fundamental right in today's society," claimed La Quadrature du Net, a French advocacy group.
- As mentioned previously, in striking down France's proposed Internet three-strikes law in June 2009, the French Constitutional Council stated that, given the importance of freedom of expression and communication, "attacks on the exercise of this freedom must be necessary, appropriate and proportionate to the aim pursued." It then stated that "the Internet is a fundamental human right that cannot be taken away by anything other than a court of law, only when guilt has been established there."
- In October 2009, Finland became the first country to make access to high-speed Internet a legal right. Its laws now require telecommunication companies in Finland to provide an Internet connection speed of at least one-megabyte to its customers across the country, which will allow people to operate software and computer programs requiring high-speed Internet access, and also carry out Internet transactions more quickly. "We decided that broadband connections are no longer this kind of luxury product and just for entertainment," said Communication Minister Suvi Linden, saying that it has become a necessity in everyday life. Laura Vikkonen, the legislative counselor for the Ministry of Transport and Communication, added: "We think it's something you cannot live without in modern society. Like banking services or water or electricity, you need Internet connection."

But others say that there is no consensus among policymakers and other experts on whether access to the Internet has become a fundamental or human right under international law. Also, many question whether the examples cited by advocates do, indeed, support the claim that Internet access has become a fundamental right. For example:

- While many say that Internet access is a right in Estonia and Greece, it is unclear how either nation is enforcing such a right.
- In the case of the European Telecom Law, some point out that the EU Parliament did not declare in March 2009 that it was actually creating a right to Internet access. Others added that, in October 2009, the EU Parliament seemed to back off on its earlier suggestion (made in May 2009) that it would require member nations to get a court order before cutting off Internet access for those individuals suspected of copyright infringement.
- While the Finnish law says that people have a legal right to *high-speed* Internet access, the law does not require companies to provide an actual Internet connection in the homes of every single person in Finland. Also, Internet users would still be required to pay for such services.
- Some observers also question the belief that governments should not place restrictions on Internet access. They point out, for example, that while Article 11 of France's "Declaration of the Rights of Man" says that people have a right to communicate, it adds that people "shall be responsible for such abuses of this freedom as shall be defined by law," which seems to support the legality of carefully-crafted Internet three-strikes laws.

The United Nations has also not taken a clear stance on whether Internet access is a fundamental right. In 2003 and 2005, the UN organized the World Summit on the Information Society (or WSIS), which discussed, among other topics, ways for countries to extend Internet and communication services to poorer nations. While these summits did not explicitly decide whether Internet access should be a fundamental right, they did declare that Internet access should be provided to all people "to build an inclusive Information Society." Though this has given hope to those who say that Internet access should be considered a right, others say that such broad statements (which are open to varying interpretations) do not support such a view.

Conflict diamonds poised to make a comeback?

Countries around the world use their natural resources – including natural gas, oil, timber, rare metals, and precious minerals – to aid the development of their economies. They may, for instance, sell their commodities to companies and manufacturers all over the world, which then brings in tens of millions to hundreds of billions of dollars in revenue.

In addition to nations, many rebel groups sell the natural resources found on their territories, and then use the proceeds from these sales to fund their armies, buy weapons, and carry out activities used to destabilize or overthrow established governments. These conflicts have claimed the lives of tens of millions of people, according to human rights organizations such as Global Witness, which notes that rebel movements in Liberia had sold timber to fuel their civil conflict in that nation.

For over a decade, various groups have been trying to persuade nations to adopt international standards which would "[deny] combatants any income from the trade in natural resources." Many have also called on consumers worldwide to stop buying certain commodities from particular countries until their governments can certify that sales of those goods were not supporting destructive conflicts and abetting human right abuses.

In particular, the sale of diamonds from war-torn nations has helped to prolong many civil conflicts, according to human rights groups. In the face of public pressure, diamond exporting and importing nations in 2003 implemented an international agreement called the *Kimberley Process Certification Scheme* (or KPCS) which, supporters say, will prevent rebel groups from selling diamonds in international markets. How effective is the KPCS? Has it reduced the flow of conflict diamonds? Does the agreement have any shortcomings? And what is the status of the KPCS today?

Selling carats to fuel civil conflicts

Observers say that, since at least the 1990s, rebel groups in various civil conflicts in Africa had relied primarily on the sale of diamonds mined in territories under their control to fund their campaigns against established governments. Because these conflicts had killed millions of people, human rights groups have dubbed them "conflict diamonds" and even "blood diamonds." Dealers later sold these diamonds to wholesalers and retailers around the world who, in turn, passed them along to customers who were most likely unaware of their origins. Various sources say that conflict diamonds had once made up 15 to 25 percent (or approximately $2.75 billion) of the world's total rough diamond production.

When the United Nations became more aware of the growing trade in conflict diamonds, it began to pass several resolutions to stop rebel insurgencies in certain countries from exporting their diamonds to world markets. Some examples include:

- ***Angola***: In 1998, the Security Council passed a resolution (1173) prohibiting all UN member states from importing diamonds from Angola which have not been certified by the government as conflict-free.
- ***Sierra Leone***: The Security Council in 2000 passed Resolution 1306 banning the trade of rough diamonds from Sierra Leone unless they were accompanied by a government certificate indicating that they had come from mines under government control.
- ***The Democratic Republic of the Congo (or DRC)***: In 2001, the Security Council expressed its concern about warring parties engaged in the "the illegal exploitation of natural resources and other forms of wealth" in Resolution 1341, though it did not call on nations to take any specific action.
- ***Liberia***: In 2001, the Security Council called on all UN member nations (in Resolution 1343) to stop the direct and indirect imports of diamonds from Liberia.
- ***Ivory Coast***: In December 2005, the Security Council in Resolution 1643 called on nations to stop importing all rough diamonds from the Ivory Coast. In conjunction with this ban, the existing government had "suspended all official exports of rough diamonds to help its efforts to restore social stability." The ban remains in place today.

While warring parties have used diamond sales to fund their activities, diamond industry representatives note that "the problem is not the diamonds themselves, but the rebel groups who exploit diamonds [along with other natural resources] to achieve

their illicit goals." They point out that the legitimate diamond trade provide nations with resources to improve schools, build and maintain infrastructure, and implement many needed social programs, including healthcare. Many nations in Africa – which provides 65 percent of the world's rough diamonds – also depend on diamond sales as a major source of their revenues. Others say that the diamond industry directly and indirectly supports over 10 million jobs worldwide.

The Kimberley Process Certification Scheme: Keeping conflict diamonds out

To spur the world community in addressing conflict diamonds, the UN General Assembly in 2000 passed a resolution (55/56) supporting the "the creation and implementation of a simple and workable international certification scheme for rough diamonds." In November 2002, major diamond exporting and importing nations (along with representatives from the diamond industry such as the World Diamond Council, and many non-governmental organizations, including Global Witness and Partnership Africa Canada) met in Kimberley, South Africa, and negotiated the KPCS – a voluntary, non-binding agreement which creates several barriers to prevent conflict diamonds from entering the legitimate diamond market.

The first line of defense: The KPCS says that a participating nation should establish its own "system of internal controls" (i.e., a system of domestic laws, regulations, rules, procedures, and practices) to document the source and trail of rough diamonds within its jurisdiction. While the KPCS agreement itself does not call on nations to implement a single global standard or regulation, it does recommend that participant nations – at a minimum – implement several broad measures. For example:

- A nation should license all diamond miners (such as mining and prospecting companies, and individual miners), who may, in turn, mine only in authorized mines. Analysts say that such a requirement will make it easier to find individuals who may be working for, say, rebel groups.
- A nation should also register and license "all diamond buyers, sellers, exporters, agents, and courier companies involved in carrying rough diamonds," and have them obey all appropriate regulations such as those prohibiting the trade of conflict diamonds. Without such a license, unauthorized individuals (such as rebels and those working for them) will be unable to buy or sell diamonds, say supporters.
- A nation should require these parties to keep detailed records of their transactions for a period of five years (though it doesn't specify, for instance, what information to collect and retain).
- Even in the absence of a conflict, participant nations must still create their own system of internal controls to document the source and trail of rough diamonds. So in addition to rebel groups, supporters say that this system will also keep out diamonds from other dubious sources, including those from drug traffickers and terrorists who trade in diamonds.
- But the KPCS does not call on nations to verify whether their systems of internal controls are actually keeping conflict diamonds from their markets.

The second line of defense: Once a package of rough diamonds is ready for shipment, the KPCS limits its export and import to participating countries only, which, supporters say, serves as the second line of defense in preventing conflict diamonds from entering legitimate diamond markets.

- For a shipment of rough diamonds, a government authority reviews information such as the source of the rough diamonds and whether they have complied with various domestic regulations meant to root out conflict diamonds.
- It then issues an actual Kimberley Process Certificate (each having its own unique serial number), which is placed into tamper-resistant containers together with the rough diamonds.
- Once the rough diamonds arrive at the importing nation, authorities inspect the shipment for tampering, and then open the container and verify its contents. At this point, the diamonds can be sold to buyers such as jewelry manufacturers and companies.

A nation that is not a part of the KPCS cannot export its rough diamonds to other KPCS nations. Supporters point out that the KPCS's 74 participating nations represent nearly all of the world's diamond suppliers and consumers. So any country or group outside of this arrangement would have great difficulty finding a market where it can sell its rough diamonds, they claimed.

There currently is no official legal definition of "conflict diamonds," though the KPCS defines them as "rough diamonds used by rebel movements or their allies to finance conflicts aimed at undermining legitimate governments." The KPCS also applies only to the export and import of *rough* diamonds. It does not apply to the trade of polished diamonds or diamonds contained in jewelry.

KPCS supporters add that the agreement is not a formal international treaty whose terms are enforceable by a court or global tribunal. Instead, they describe the KPCS – which does not have permanent staff or offices – as a "consulting intergovernmental mechanism" relying on contributions from governments, industry representatives, and civil society groups for its operations. Participating nations may also modify the agreement and make other decisions by consensus only.

***Monitoring the effectiveness of the KPCS*:** Several provisions in the KPCS call on its participants to monitor its effectiveness. For example, every participating nation must submit an annual report showing how it is implementing the agreement, and also inform other participants if its laws, rules, procedures, or practices "do not ensure the absence of conflict diamonds." In the case of "significant non-compliance," participating nations may send a "review mission" to verify compliance, but only with the *consent* of the nation in question.

In 2007, the KPCS Working Group on Monitoring completed its first peer review process where teams of experts (nominated by governments) visited over 50 participating countries to evaluate their compliance with the agreement, and then issued a separate report for each visit. Each report highlighted various shortcomings and urged governments (in a diplomatic fashion) to correct them, said one analyst.

The KPCS agreement itself is subject to "periodic review to allow Participants to conduct a thorough analysis of all elements contained in the scheme." The KPCS completed its first self-review in November 2006 (three years after its implementation), and concluded that the agreement worked well, though one observer said that its tone was generally self-congratulatory.

Since its implementation on January 1, 2003, many have claimed that conflict diamonds now make up less than 0.1 percent of the world's diamond trade. While analysts generally welcomed the KPCS agreement, they note that many conflicts in diamond-producing nations had already ended or were winding down by the time the KPCS agreement had come into effect. As a result, they say it would be problematic to give sole credit to the agreement for the decline in the trade of conflict diamonds.

The System of Warranties: The diamond industry and conflict diamonds

Even with domestic internal controls in place, the KPCS doesn't specifically call on nations to pass laws to regulate the diamond industry itself, which include thousands of retailers, wholesalers, and manufacturers. The KPCS does not "certify individual jewelers," said the KPCS.

But critics have said that, because the KPCS does not regulate the diamond industry itself, unscrupulous dealers would be able to introduce conflict diamonds into the legitimate diamond market. They can, for instance, smuggle rough diamonds (including conflict diamonds) out of unauthorized regions and sell them directly to diamond buyers who may not realize (or don't care) that they are buying such diamonds. In addition, conflict diamonds can quietly enter the diamond marketplace through many other entry points. Manufacturers buy rough diamonds (which they cut and polish), and then sell them to companies who set the diamonds to rings, necklaces, and watches, which are, in turn, sold to large and small retailers, and then along to individual customers.

To block these entry points and encourage various dealers to shun conflict diamonds, an industry group called the World Diamond Council devised a *voluntary* plan of self-regulation for their members called the "System of Warranties" (or SoW). Under the SoW:

- Anyone who sells diamonds (whether they are rough, polished, or set in jewelry) must provide to the buyer a warranty which states: "*The diamonds herein invoiced have been purchased from legitimate sources not involved in funding conflict and in compliance with United Nations resolutions. The seller hereby guarantees that these diamonds are conflict free, based on personal knowledge and/or written guarantees provided by the supplier of these diamonds.*" Providing this written warranty is the "core" of the SoW. There is no government agency or industry group which actually issues these warranties using any set standards, procedures, or criteria. (Again, individual buyers and sellers issue these warranties.)
- The buyer, in turn, must provide the same warranty when it sells the diamond to others.
- This will create what the diamond industry describes as a chain of traceable warranties which buyers must keep for five years, and also audit on an annual basis using their own procedures. The diamond industry must also educate their members on the Kimberley Process.
- Furthermore, members of the diamond industry must refuse to deal with vendors who cannot or will not provide a warranty. A supplier who doesn't abide by the SoW could be expelled from industry organizations, which could make it harder to carry out business, says the World Diamond Council. (This seems to be the harshest penalty, say observers.)

The SoW itself is not an international agreement. Instead, industry groups have distributed the SoW requirements in the form of "compliance guides" to their members. The SoW also *does not* call on the diamond industry (or even governments) to create standardized auditing, record-keeping, and monitoring procedures to ensure that its members are not dealing with conflict diamonds. Instead, the diamond industry and its members must comply with the broad suggestions of the SoW largely on their own initiative.

Observers say that the diamond industry supported an SoW because alternative means to track diamonds could be more difficult and expensive. One industry group even said that "there [currently] is no implementable means of tagging, tracking, and identifying finished polished diamonds."

The KPCS said that the SoW "complements, but is distinct

Rebel groups in various civil conflicts in Africa have relied heavily on the sale of diamonds found on their territories to fund insurgencies against established governments. Human rights groups have dubbed them "conflict diamonds" and even "blood diamonds."

from" its own agreement. In fact, the KPCS agreement itself (in Section IV) calls for a "voluntary system of industry self-regulation . . . [which] will provide for a system of warranties underpinned through verification by independent auditors of individual companies and supported by internal penalties set by industry."

Today, both the KPCS and the System of Warranties still serve as the main barriers in stopping conflict and undocumented diamonds from entering the legitimate diamond market.

How effective are the KPCS and System of Warranties in stopping conflict diamonds?

Doubts about the effectiveness of the KPCS began to grow only a year after its implementation. Not only are KPCS nations having difficulty in stopping the export of diamonds from actual conflict regions, say experts, but many nations in non-conflict situations are having problems in carrying out their basic obligations under the KPCS. According to critics, why is the KPCS ineffective?

***Many governments are not implementing and enforcing internal controls within their jurisdictions*:** In a November 2008 report, Global Witness (a nongovernmental organization which analysts say has been at the forefront of combating conflict diamonds) said that "in most cases, government monitoring and oversight of the diamond trade is not effective enough . . . and enforcement mechanisms designed to halt and prevent the trade in illicit and conflict diamonds are either failing or nonexistent." Partnership Africa Canada (another prominent organization which has worked to stop conflict diamonds) concluded in an October 2009 review that "the failure of the KPCS is not caused by warlords and sanctions busters, but by governments at the centre of its administration which refuse to get tough . . ."

Even the KPCS itself had acknowledged in its first formal review of the agreement (issued in November 2006) that "there are issues related to weak or total non-compliance . . ." And in a reference to the internal controls in many nations overseeing their diamond sectors, the KPCS confirmed that "not all Participants apply every technical provision to the full; and sometimes it takes time and/or imposes costs on industry to comply with requirements." These various reviews have cited many examples of noncompliance:

- **Republic of the Congo:** In 2004 (only a year after the implementation of the KPCS), participant nations decided to expel the Republic of the Congo from the KPCS because its government failed to keep track of its diamond production. "The removal of the Republic of Congo from the list of participants is necessary to safeguard the credibility and integrity of the Kimberley Process Certificate System," said one official. While the KPCS readmitted that country in 2007, many experts say that its internal controls remain weak even today.
- **Angola:** Partnership Africa Canada concluded in its 2009 review that Angola's regulations did not create any specific procedures on how the government was supposed to track diamond production from its mines to its ports, which is a minimum requirement under the KPCS. It also noted that a Kimberley Process review team in 2005 had urged Angola to correct this problem.
- **The DRC:** Many observers believe that two rebel groups continue to sell diamonds – though in very low volumes – in international markets, and that the government does not have

strong enough measures in place to weed out these conflict diamonds from legitimately-mined diamonds. In its 2009 review, Partnership Africa Canada said that authorities in this nation "have never put more than the rudiments of an internal control system in place," and that "there are no systems for gauging diamond production or tracking internal sales." It also claimed that "nearly half of the 30 million carats exported each year from the Congo are untraceable." Although many civil society groups have reported these problems, Partnership Africa Canada said that "the KP has chosen to do nothing." A United Nations report released in December 2009 by the Independent Group of Experts Monitoring UN Sanctions on the DRC said that rough diamond smuggling was still helping to fuel rebel movements in that country.

- **Sierra Leone:** The 2009 review said that dealers continue to smuggle untraceable diamonds from neighboring countries into Sierra Leone and sell them in open markets, and that the government has done little to stop this these activities. The review also described the government monitors overseeing mining operations and sales as "poorly trained" (in some cases, illiterate), and susceptible to corruption.
- **Venezuela:** In 2008, Venezuela had "voluntarily suspended [its] exports and imports of rough diamonds until further notice" to address problems in compliance with the KPCS. (Various groups say that nation had failed to keep track of its diamond production and exports.) But it is still a member of the agreement, and hopes to complete the reorganization of its diamond sector this year. Still, the 2009 annual review claimed that "it is an open secret that Venezuela's diamonds are still being smuggled out of the country daily."
- **Guinea:** The 2009 annual report said that "Guinea's internal diamond controls have ranged from weak to non-existent," and that the "government has no way of knowing where most of its artisanally produced diamonds are mined . . ." It concluded that "very little information has become available about what the new government is doing to improve matters."
- **Ivory Coast:** The UN says that rebel groups continue to sell diamonds to fuel their insurgencies. Even with UN sanctions on the import and export of diamonds in place since December 2005, Global Witness notes that weak internal controls and oversight have allowed what it says are hundreds of thousands of informal diggers to smuggle and then sell rough diamonds in neighboring countries which are part of the KPCS system. Exporters then (knowingly or unknowingly) label these diamonds as "conflict-free." Even that country's government acknowledged that "despite the implementation of the Kimberley Process, Ivorian [conflict] diamonds have been sold to the international market . . ."
- **United States:** In a 2006 report, the Government Accountability Office (or GAO, an independent government agency which investigates the effectiveness of government programs) pointed out several shortcomings which could allow conflict diamonds to enter the United States market. Even though Congress enacted the Clean Diamond Trade Act in 2003 to track the import and export of rough diamonds, the GAO pointed out that the United States – which is the world's seventh largest exporter of rough diamonds – did not "periodically or regularly inspect rough diamond imports or exports" to make sure that diamond shipments matched the information on their Kimberley certificates. The United States also relies on importers themselves to verify the contents of diamond imports, but does not call on any specific agency to oversee such verification efforts, said the GAO.

Major diamond exporting and importing nations (along with representatives from the diamond industry and human rights groups) negotiated a voluntary, non-binding agreement which creates several barriers to prevent conflict diamonds from entering the legitimate diamond market.

In addition to these individual cases, Global Witness noted what it described as several other shortcomings. For example, it says that many governments don't share enforcement information with each other, which is required by the KPCS. Furthermore, very few governments fully answered a Global Witness survey which had asked for information on arrests, prosecutions, and convictions of KPCS violations, said the group.

Self-regulation in the diamond industry (through the SoW) has not kept out conflict diamonds from world markets: Organizations such as Global Witness have said that the diamond industry has still not clarified how the SoW would function exactly. For example, it said that "there [still] are no clear standards [under the SoW] detailing how records are to be kept and other elements that should be examined." Given these uncertainties, many in the diamond industry (such as retailers) will not be sure of their exact responsibilities, say critics.

In fact, Global Witness said its 2004 survey of 85 major diamond retailers revealed that many of the "leading diamond companies and stores" in the United States and the United Kingdom could not explain how they were complying with the SoW. For example, "staff in only 42 percent of stores were aware of their company's policy" concerning conflict diamonds. The group also noted that 48 companies (or 56 percent) failed to respond to the survey. Out of the 37 companies that did respond, 32 said that they are "implementing the system of warranties and have a policy to prevent dealing in conflict diamonds," though 30 did not say exactly how they were implementing and auditing the SoW.

In a follow-up 2007 survey of the top 42 British diamond retailers carried out by Global Witness and Amnesty International, 79 percent of respondents "reported having no auditing procedures in place to combat the trade in conflict diamonds." Also, 62 percent of respondents "[did] not post any information

on their websites about their policies on conflict diamonds." And while the diamond industry said it would expel members who did not meet self-regulation requirements, Global Witness claimed that the industry had not yet provided any public information about expelled members.

Given these findings, Global Witness concluded that "a written guarantee [which serves the core of the SoW] simply stating that diamonds are not from conflict resources is meaningless."

***The KPCS doesn't address problems proactively and quickly*:** Critics say that participant governments do not take quick action against nations which are not complying with the KPCS. For instance, Global Witness said that governments and diamond industry groups are reluctant to take stronger measures to stop the flow of diamonds from the Ivory Coast where, according to experts, rebel groups are selling diamonds in various markets. What are the reasons for this inaction?

Groups such as Partnership Africa Canada point out that the KPCS doesn't have a permanent central authoritative figure or office which can provide strong leadership in cases where participating members can't make a decision, especially on difficult issues. Instead, one participant nation takes on the role of "chair" every year, which has "virtually no responsibility beyond a convening function." As a result, "no one takes responsibility for action or inaction, failure, or success," and problems are "shifted from 'one working group' to another; debates on vital issues extend for years," said Global Witness.

In addition, observers say that it can be difficult to make hard decisions (such as taking disciplinary actions against a participant nation) because, under the KPCS agreement, governments must make decisions by consensus. As a result, this allows a handful of participants (or even just one) to block any action. (According to recent press reports, many KPCS nations did not want to take strong measures against Zimbabwe for its failure to comply with KPCS obligations.) Also, the agreement does not specify what participants must do if a decision cannot be reached by consensus.

Strengthening the system in stopping conflict diamonds

Over the years, many groups have proposed ways which they believe will strengthen the KPCS and prevent conflict and other diamonds from questionable sources from entering the legitimate diamond market.

Reforming the KPCS itself: Human rights groups say that the KPCS should strengthen its leadership and administrative functions. The Kimberley Process International Civil Society Coalition recommends, for instance, the creation of a "professional [and permanent] KPCS secretariat to handle administrative and technical issues." As mentioned before, various KPCS committees composed of a constantly rotating bloc of nations currently handle these issues. Some observers believe that frequent changes in committee membership prevent nations from committing themselves to follow through in addressing problems.

Others say that the KPCS nations must amend the agreement itself so that they can act more swiftly in addressing compliance problems. Global Witness said that the KPCS should, for example, "develop a [formal] mechanism that would temporarily suspend a country with significant compliance issues from the KP until its problems have been rectified." (The agreement itself does not even describe how and under what circumstances participating nations may expel another country.) It also recommends that the KPCS should make decisions concerning a participating government (such as whether it should be suspended or expelled) by a majority vote rather than by consensus.

Some groups also say that the KPCS must require all participating nations to implement standardized internal controls to track diamond production. "Currently, there are no baseline standards that all participants control systems must meet," said Global Witness. As a result, different nations have implemented a patchwork of internal controls whose effectiveness varies from one jurisdiction to the next.

Many believe that these proposals could improve efforts to stop conflict diamonds. But others worry that penalizing nations much more forcefully – by suspending or expelling nations more quickly, for instance – could hamper the trade in legitimate diamonds (which make up an overwhelming portion of all diamonds), especially in nations which have few resources to enforce regulations but are highly reliant on the diamond trade for their revenues.

Calling on governments and the diamond industry to implement stronger internal controls: Many say that governments must pass better internal controls and actually enforce them, and that they should provide assistance to those countries which need help in carrying out their KPCS obligations. Others such as Amnesty International say that governments must carry out formal audits and inspections to verify that the diamond industry is actually stopping its members from dealing in conflict diamonds.

Human rights groups say that the diamond industry must also develop a system that goes beyond the issuance of written guarantees. It must, for example, establish mandatory criteria for choosing diamond suppliers, require the use of third-party auditing procedures, and create specific record-keeping standards. "A written guarantee simply stating that diamonds are not from conflict sources is meaningless," said Global Witness, "unless it is backed up by actions and policies to monitor that the statement is true." They also recommend that the diamond industry implement a standardized and obligatory monitoring program (including the use of mystery shoppers and spot checks) to determine whether members are complying with self-regulation. Despite all of these recommendations, some analysts believe that there is little political will and financial means to pass and then enforce stronger measures.

How is the KPCS itself addressing these problems? Analysts say that publicly-available reports (written by review teams visiting individual countries) show that the KPCS is well aware that many participating governments have problems – to varying degrees – in fully complying with the agreement itself, and, in response, has gently nudged them to take corrective measures. (In an examination of publicly-available KPCS documents, the group Global Witness said that it discovered that "a majority of KP countries [were] failing in their responsibility to tackle infringements and enforce control" of the agreement.) Critics say that the KPCS did not undertake any follow-up measures to ensure that participating nations complied with the agreement.

Critics also say that KPCS nations don't have any plans to amend the agreement or take stronger measures against non-complying members. For instance, the KPCS claimed in its first formal review in 2006 that the "flexible structure of the KP – including a rotating

Chair, and devolution of considerable responsibilities to smaller Working Groups – [had] achieved remarkable progress in a very short time." It also said that the KPCS should retain its consensual decision-making process because it has "proved effective," though it did not provide specific examples of its effectiveness. And during a November 2007 meeting in Brussels, KPCS nations issued a communiqué which "called on Participants to ensure stronger government oversight of rough diamond trading and manufacturing," though it did not recommend any specific measures.

Efforts to go beyond conflict diamonds

In addition to discussing the effectiveness of the KPCS, various groups are currently debating whether to broaden the definition of conflict diamonds. Late last year, the media had used Zimbabwe (which is a KPCS nation and is *not* embroiled in civil conflict) to highlight the shortcomings of the KPCS agreement. Not only did the KPCS have to decide how to address Zimbabwe's extensive non-compliance with the agreement itself, but also how it would handle documented allegations that the country's mining operations led to extensive human rights violations.

In a June 2009 investigative report, Human Rights Watch said that most of the miners in that country's Marange diamond fields did not have licenses, and that the military smuggled diamonds out of the country and sold them in other nations – all of which violate KPCS provisions. It called on KPCS participants to suspend Zimbabwe until its government has addressed this problem.

The report also said that the military in Zimbabwe had forced thousands of men, women, and children to work in the Marange diamond fields since October 2008, claiming that those who refused were beaten and tortured. In response, the KPCS should broaden the definition of conflict diamonds to include those which are "mined in the context of serious and systemic human rights abuses," and that these changes should be reflected in the actual KPCS agreement, said Human Rights Watch.

The KPCS had also confirmed many of the allegations described in the Human Rights Watch report after it had sent a review mission to Zimbabwe in June 2009. In its own report, the KPCS review mission documented "widespread smuggling" of diamonds out of Zimbabwe, and also many other examples of that country's "significant non-compliance" with the KPCS. (One news report said that 59 percent of Zimbabwe's rough diamonds in 2008 "[weren't] exported through official channels.") While the report said that Zimbabwe was not exporting conflict diamonds, it concluded that "an established smuggling channel as exists from Marange could easily be viewed as a feasible mechanism for a trafficker of conflict diamonds." (That is to say, diamonds from other dubious sources could use Zimbabwe as a path to the legitimate diamond market.) In its report, the review mission called on that government to comply with its duties under the KPCS or face suspension. "Urgent corrective action is required if the integrity and effectiveness of the KPCS are to be preserved," it said.

The review mission also interviewed many people whom they described as victims of abuse at the hands of soldiers and illegal miners at Marange, and deemed their accounts of violence as "credible." It said that "lawlessness, particularly when combined with violence and largely overseen by government entities, should not be the hallmark of any system of internal controls deemed to be compliant" with the KPCS. But a Chair of the KPCS had previously remarked – in the words of one media reporter – that "the [Kimberley Process] scheme is not a human rights organization but that it monitors compliance with the scheme."

In November 2009, the KPCS announced in a communiqué that it had decided to give Zimbabwe six months to contain the "illicit trade in Marange diamonds." (It didn't say that the nation would face any disciplinary measures.) Shortly afterwards, Zimbabwe's government had proposed to withdraw its military from the Marange diamond fields, and also agreed to accept a monitor who would examine diamonds mined in that region.

Doubts about the effectiveness of the scheme used to prevent sales of conflict diamonds are growing as nations find it not only difficult to stop the export of diamonds from actual conflict regions, but also to carry out their basic obligations under the agreement.

But the communiqué did not directly address the human rights abuses in Zimbabwe. Rather, the KPCS noted that "it [had] discussed the situation in the Marange diamond fields of Zimbabwe and took note of a report by the NGO Human Rights Watch documenting human rights abuses in Marange." It did not recommend any follow-up measures.

Groups such as Human Rights Watch complained that the KPCS should have widened its definition of conflict diamonds to include those which are mined in the context of human rights abuses. "The Zimbabwe diamonds [should] definitely qualify as blood diamonds," said a researcher for Human Rights Watch. Others criticized the KPCS itself. "This failure to act has sent a bad message," said a spokesperson for Global Witness. "It says that if you don't follow rules, there will be no serious consequences."

One political analyst speculated that the KPCS did not suspend Zimbabwe because doing so would prevent that country from exporting all rough diamonds, even those mined legitimately, which could, in turn, affect that country's economy. Also, several KPCS participants supported Zimbabwe and asked KPCS to provide more technical assistance to that nation.

Given these reports and other statistical information, a spokesperson for the Kimberley Process International Civil Society Coalition claimed that "between 4% and 5% of the global trade [in diamonds] is either circumventing or defrauding KP channels." But it didn't describe them as conflict diamonds.

Decriminalizing personal drug use across the Western hemisphere?

While nations around the world are still struggling through the recent economic crisis and also addressing major problems such as international terrorism, analysts note that other long-standing issues – such as illegal drug trafficking and personal drug use – continue unabated and threaten to disrupt stability in certain regions. In recent years, several countries in the Western Hemisphere have begun to decriminalize the personal use of illegal drugs where they favor treatment and education programs over incarceration and other forms of punishment. What are some of the reasons behind this shift in approach? Will it be effective? And what obligations do nations have in addressing the personal use of illegal drugs under international law?

Illegal drug trafficking and consumption: A worsening problem?

Experts say that countries in the Western Hemisphere top the world's lists for illegal drug production and personal consumption. For example, Colombia produces 90 percent of the world's cocaine, followed by Peru and Bolivia. The U.S. Central Intelligence Agency reported that, in 2007, drug producers in Colombia used at least 652 square miles of land to cultivate coca leaves. (In comparison, the District of Columbia takes up around 68 square miles.) The top nations for marijuana production are Mexico and Paraguay, according to a 2008 United Nations report. Of the 41,400 metric tons of marijuana produced globally, each country accounted for over 30 percent of total production.

After these illegal drugs have been produced, traffickers ship them to destinations all over the world. According to the CIA, the United States is the world's top consumer of illegal drugs (including cocaine, marijuana, and heroin), accounting for nearly 60 percent of global demand. Brazil, which is a major producer of cocaine, is the second largest consumer of illegal drugs.

Analysts say that drug trafficking is a very profitable business. While there are no precise figures (given the drug trade's illegal and secretive nature), many believe that profits from illegal drug sales exceed $400 *billion* a year. Those involved in the trade are mostly large criminal organizations whose violent battles with competitors and law enforcement authorities have claimed hundreds of thousands of lives. Recent news articles reveal that the violent nature of drug trafficking remains a substantial problem today. For example:

- Since 2006, more than 11,000 people in Mexico – including drug traffickers, police, and civilians – have been killed in that country's drug wars where government forces are trying to clamp down on powerful drug cartels whose influence has reached the highest levels of government, say analysts.
- Over a two-day period in October 2009, American law enforcement officials carried out a crack-down across 19 states against the U.S. operations of a major Mexican drug trafficking organization, La Familia Michoacana. Officials arrested 303 people and confiscated tens of millions in American currency and over 20,000 pounds of illegal drugs.
- Two weeks after Brazil's winning bid for the 2016 Olympic Games, a violent turf battle among drug traffickers in Rio de Janeiro killed 26 people, including several bystanders. Three policemen also died when traffickers shot down their helicopter only a mile away from Maracanã Stadium, which will be the site of the opening ceremonies.
- In November 2009, business leaders in the Mexican city of Ciudad Juárez (near El Paso, Texas) became so concerned about violent turf battles among warring drug cartels in their city (which claimed an average of 10 lives every day) that they petitioned the Security Council to send peacekeeping troops, a request which the United Nations declined.

Different approaches in fighting drug trafficking and personal consumption

Governments around the world have long fought the global drug problem by focusing their efforts on *criminalizing* the production, trafficking, and possession of illegal drugs. Under this approach – which is popularly known as the "war on drugs," an American-coined term – law enforcement authorities punish drug offenders (whether they are large traffickers or personal users) by imprisoning them and imposing heavy fines. They are also trying to decrease the supply of illegal drugs by confiscating and destroying them, and by destroying crops used to make drugs through aerial spraying. According to the Office of National Drug Control Policy, the United States has asked Congress for $15.5 billion to fight the war on drugs in 2011. Approximately 64 percent of these funds will be used for domestic law enforcement measures, interdiction efforts, and foreign aid programs to help other nations fight the drug trade and cartels.

But critics argue that criminalizing drug production and possession has not been effective in fighting the drug problem because, they say, it has largely failed to reduce the actual demand for illegal drugs. "Cracking down on drug supply is mostly useless until we learn to squeeze demand," said Mark Kleiman, a professor at UCLA. In March 2010, Secretary of State Hillary Clinton added: "We know that the demand for drugs drives much of this illicit trade." In its budget request for 2011, the United States will spend around 36 percent of the total funds on the war on drugs for prevention and treatment programs.

Many also note that imprisoning individual users without providing them with treatment for addiction has overwhelmed jail populations. In the view of Robert Pastor, a former presidential advisor, "it seems quite clear that drug policy based primarily on interdiction and enforcement has failed. Therefore, it's natural for people to stand back and ask, 'Is there a better way?'"

One approach, they believe, is to decriminalize the personal use of certain illegal drugs, and devote more resources to treat and prevent drug addiction. Such an approach, say supporters, will allow law enforcement authorities to reduce the demand for drugs while focusing their efforts on fighting the large cartels which are responsible for their production and distribution. In February 2009, the Latin American Commission of Drugs and Democracy – whose members included former leaders from nations heavily involved in the drug trade such as Fernando Henrique Cardoso of Brazil, César Gaviria of Colombia, and Ernesto Zedillo of Mexico – released a report urging the United States to consider decriminalizing certain drug use and to view it as a health matter.

The Commission's report also said that emphasizing a law enforcement approach to fighting the drug trade has threatened democracy in the Western Hemisphere by corrupting "judicial systems, governments, the political system, and especially the police forces." For instance, it noted that many police officers threaten to arrest individual drug users, but would set them free in exchange for money or favors.

In the midst of this debate, several countries have already passed laws which decriminalize personal drug use in favor of treatment and other programs. For example:

***Mexico*:** In August 2009, Mexico – which had, up to that time, largely treated drug use as a law enforcement matter – passed a law decriminalizing the personal use of drugs. Under the law, authorities will not arrest or prosecute a person for possessing less than 500 milligrams of cocaine (eight to 10 lines), five grams of marijuana (about four cigarettes), 40 milligrams of methamphetamines, two grams of opium, or 50 milligrams of heroin, as reported in *The New York Times*. Instead, they will give a warning for the first two offenses. On the third offense, drug users must enter a rehabilitation and treatment program in a specialized center. (Mexico had wanted to pass a similar law in 2006, but did not do so after strong objections from the United States.)

Supporters say that the new law does not support or somehow condone recreational drug use. "This is not legalization [of illicit drugs]. This is regulating the issue," said a representative from the Mexican Attorney General's Office. Legal experts at the Library of Congress note that the new law still prohibits the sale of illegal drugs, and calls on authorities to prosecute individuals for "retail drug trafficking" if they are caught with 1,000 times beyond the maximum amount allowed for personal use. Anything above that amount would be considered "wholesale drug trafficking" where penalties are higher.

***Argentina*:** Days after Mexico decriminalized the personal use of drugs, the Supreme Court of Argentina unanimously ruled that the nation's law criminalizing the personal use of marijuana by adults violated privacy rights under that nation's constitution. Specifically, Article 19 (the privacy clause) of the constitution states: "The private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges." Using marijuana within the confines of your home, argued the court, did not harm or place a third party at risk. It also said that prosecuting individuals for personal drug possession "creates an avalanche of cases targeting consumers without climbing up the ladder of drug trafficking."

Most governments have long fought the global drug problem primarily by criminalizing the production, trafficking, and possession of illegal drugs. Under this approach, law enforcement authorities punish drug offenders by imprisoning them and imposing heavy fines.

But analysts note that the ruling itself did not change the nation's drugs laws, which is the responsibility of the legislature. President Cristina Fernandez said she supported the ruling, and would work with lawmakers to begin the process of decriminalizing the personal use of marijuana. They would have to determine, for instance, the maximum amount of drugs an individual would need to possess for personal use.

***Brazil*:** In 2006, Brazil *depenalized* drug possession for personal use by eliminating jail sentences for individual violators in favor of fines and community service, though such possession still remained a criminal offense. But a San Paulo appeals court in 2008 ruled that possessing drugs for personal use was not a crime.

In reporting the appeal court's decision, the *Drug War Chronicle* said that the law violated several principles in Brazil's constitution, including the "principles of harm (there is no harm to third parties), privacy (it is a personal choice) and equality (possessing alcohol is not a crime)." But as in the case of the decision in Argentina, the court's ruling in Brazil did not automatically change that nation's drug laws. Legislators must begin the process of amending its laws to comply with the court's decision, and also start defining the quantity of drugs which would be considered for personal use.

***Other parts of the world*:** While a large portion of the world has criminalized the personal use of illegal drugs, many nations are trying different approaches in addressing that problem. In China, "the government's official response to drug use is zero tolerance," and authorities may sentence individuals up to at least seven years in prison for drug possession, according to the Drug Policy Alliance Network, an advocacy group. On the other hand, it notes that India still criminalizes the possession and personal use of drugs, but has been amending its laws to allow for "less severe prison sentences for those who prove possession for personal use only."

Contrary to popular belief, most member states of the European Union (or EU) still criminalize the possession and per-

sonal use of illegal drugs, but offenders are not automatically incarcerated, and penalties vary widely among different jurisdictions. Ireland, for instance, imposes a fine for the first two offenses, but can mete out jail sentences on a third conviction. While Spain decriminalized the personal use of marijuana, it still imposes fines, and also calls for treatment and education programs for violators. Italy had once decriminalized the possession and use of marijuana in the 1990s, but observers note that its drug laws change frequently depending on the government in power. In 2004, the EU passed a resolution – called CORDROGUE 59 – which calls on member states to discourage the personal use of marijuana by promoting education, prevention, and treatment efforts.

The Netherlands considers marijuana possession and personal use a misdemeanor, but – under that nation's drug laws – authorities may exercise discretion on whether to prosecute an accused individual, which has led to a widely-held perception around the world that the Netherlands has a "tolerant" policy towards personal drug use. Such a perception has attracted thousands of tourists from nations which more strictly enforces their drug laws. The Netherlands has also seen an increase in the number of so-called "coffee shops" which are actually cafés providing marijuana to customers. In response to these developments, the Dutch government in 2009 introduced what it calls a "national marijuana pass" available only to citizens older than 18, which allows people to visit a coffee shop once a day to purchase a maximum of three grams of marijuana.

***United States*:** Efforts to decriminalize personal drug use in the Western Hemisphere and around the world also reflect a contentious and evolving debate in the United States concerning that same issue despite the government's commitment to the "war on drugs." Under the Controlled Substances Act of 1970, the federal government places a drug into one of five "schedules" based on its potential for abuse and whether it has any accepted medical use, among other factors. The Act places the most dangerous drugs having little recognized medical use in Schedule I. (Marijuana is listed as a Schedule I drug.) At the federal level, possession of Schedule I drugs carry a high level of punishment. For instance, possessing any amount of marijuana carries a one-year prison sentence and a $1,000 fine.

On the other hand, many states have passed their own drugs laws whose penalties vary widely, and which conflict with federal standards. In New York, possessing illegal drugs in some cases is not a criminal offense. A person caught with 25 grams of marijuana or less for a first offense is not imprisoned and may only have pay a $100 fine. But if that person possesses two to eight ounces of marijuana, the state can imprison him for up to one year and impose a $1,000 fine. Yet observers point out that, while the federal government seems to impose stringent penalties on drug possession, the Anti-Drug Abuse Act of 1988 gives the federal government the choice of imposing only a civil fine on those who possess small quantities of illegal drugs.

The United States is also debating whether states can make certain exceptions for the use of illegal drugs. For example, the federal government says that marijuana – in its official view – has no medical use. But 14 states and several cities have been decrim-

inalizing the medicinal use of marijuana. In 1996, California passed a law (called Proposition 215) which removes criminal penalties for the cultivation and possession of marijuana for relieving pain from arthritis, cancer, HIV or AIDS, epilepsy, anxiety, and other conditions.

However, in 2005, the U.S. Supreme Court ruled in *Gonzales v. Raich* that Congress had the power under the Commerce Clause of the Constitution to ban marijuana use even in states where it is legal. Despite this decision and in the face of several more states approving legislation allowing medicinal use of marijuana, the U.S. Attorney General in October 2009 announced that "it will not be a priority to use federal resources to prosecute patients with serious illnesses or their caregivers who are complying with state laws on medical marijuana, but we will not tolerate drug traffickers who hide behind claims of compliance with state law to mask activities that are clearly illegal." In January 2010, New Jersey became the latest state to allow the medicinal use of marijuana for those suffering from severe illnesses such as cancer and AIDS.

Does international law call for the strict criminalization of personal drug use?

While many nations debate whether or not to continue criminalizing the personal use of illegal drugs, many are turning to see how international law addresses this issue. Experts note that several existing treaties regulate the production and use of narcotic drugs.

Single Convention on Narcotic Drugs (or Single Convention): In 1961, UN member nations passed a treaty called the Single Convention, which consolidated several existing drug treaties – some stretching back to 1912, and which covered only cocaine, heroin, and opium – and added new provisions on how nations must address various aspects of the illegal drug problem. Denouncing drug addiction as "a serious evil for the individual," which is "fraught with social and economic danger to mankind," the Single Convention:

- Calls on its signatory nations under Article 4 to produce, distribute, export, import, and possess drugs exclusively for medical and scientific purposes only, and also places drugs into one of four schedules with Schedule IV reserved for drugs having little or no therapeutic benefits.
- Says that nations, under Article 33, "shall not permit the possession of drugs except under legal authority," meaning that a state must pass regulations which allow people to possess certain drugs.
- Calls on nations under Article 36 to adopt measures which will ensure that the production, manufacture, distribution, and possession of drugs contrary to the provisions of the Single Convention "shall be punishable offences," either by "imprisonment or other penalties of deprivation of liberty." Signatory nations have, in turn, passed domestic legislation to comply with these obligations.

There is a long-running and still unresolved debate on whether nations, under Article 36, must criminalize the possession and personal use of illegal drugs. (Observers point out that the Single Convention does not define the term "possession." It also does not specifically say that nations must "criminalize" drug violations, although it strongly alludes to it.) Some believe that possession of illegal drugs encompasses personal use of those drugs. So signatory nations must criminalize the personal use of drugs, they believe. But other groups such as the American National Commission of Marijuana and Drug Abuse argue that "possession" refers to the possession of a drug with the intent to sell or traffic it. So under this interpretation, possession of a certain drug for *personal use only* would not violate the terms of the Single Convention.

Some point out that Article 36 further says "the Parties may provide – either as an alternative to conviction or punishment or in addition to conviction or punishment – that such [drug] abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration," which seems to argue against mandatory criminal sanctions for drug offenders.

Still other observers note that the preamble of the Single Convention states that "the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering, and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes." This, they believe, seems to suggest that nations can make exceptions for personal use of certain illegal drugs in specific cases. One such drug is marijuana, they argue. While many countries have passed laws which allow the medicinal use of marijuana under specific circumstances, the Single Convention lists that drug in Schedule IV (which again is reserved for the most dangerous drugs having no medical value). Nations are still debating whether marijuana should remain in that particular schedule.

Other UN drug conventions: In addition to the Single Convention, the UN negotiated several treaties concerning illicit drugs. For example, in 1971, it passed the *Convention on Psychotropic Substances*, which extended the rules of the Single Convention to stimulants, depressants, and hallucinogens.

Many believe that decriminalizing the personal use of certain illegal drugs while devoting more resources to treat and prevent drug addiction will allow law enforcement authorities to reduce the demand for drugs while focusing their efforts on fighting the large cartels responsible for their production and distribution.

Similar to the provisions found in the Single Convention, the 1971 Convention in Article 22 states that "each Party shall treat as a punishable offence . . . any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention, and shall ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty."

Then in 1988, the UN passed the *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*. Rather than banning the production and use of certain drugs, the 1988 Convention calls on nations to combat drug trafficking through greater cooperative efforts. Article 6, for instance, says that the 1988 Convention shall serve as the legal basis for extradition of drug traffickers even in cases where such treaties are absent between nations. The 1988 Convention also largely repeats provisions from the 1961 Single Convention calling on signatory nations to punish individuals who manufacture, possess, and distribute certain illicit drugs. But, unlike the 1961 Convention, the 1988 Convention in Article 3 specifically states that nations must establish "criminal offenses" for activities contrary to its provisions.

Still, neither of these UN agreements completely resolves the issue of whether nations must criminalize personal drug use without exception. As in the case of Article 36 of the 1961 Convention, these UN treaties don't define the term "possession," and whether personal use of illegal drugs is specifically included in that term. In the meantime, experts believe that nations will largely adhere to these various treaties while enacting policies suited to their own individual needs and circumstances.

Bilateral agreements: In addition to multilateral treaties signed under the auspices of the UN, nations have also negotiated separate agreements, which mostly focused on drug smuggling and not personal drug use. For example, under "Plan Colombia" (initiated in 1998), the United States provided Colombia with counter-narcotic training. In 2007, the United States reached an agreement with Mexico (called the Mérida Initiative, but popularly known as "Plan Mexico") where it would provide hundreds of millions of dollars in funding for Mexico and other nations to purchase surveillance equipment to stop drug trafficking such as helicopters and body scanners. But critics say that these bilateral agreements have not reduced the demand for illegal drugs. After a spike of violence in March 2010 where gunmen (believed to be connected to drug cartels) shot and killed a pregnant American consulate worker in the border city of Juárez, the United States revised the Mérida Initiative to provide more spending on community building programs.

Recent developments in addressing the drug problem

While many nations are beginning to decriminalize their drugs laws, the International Narcotics Control Board recently came out against this trend. In its 2009 annual report, the Board – which is responsible for the implementation of the UN drug treaties – said that it was concerned that the movement to decriminalize the possession of illegal drugs "will undermine national and international efforts to combat the abuse of and illicit trafficking in narcotic drugs," and that it also "poses a threat to the coherence and effectiveness of the international drug control system and sends the wrong message to the general public."

In a separate development, the Security Council in December 2009 debated whether it should view drug trafficking as a threat to international security. According to experts, drug cartels are not the only groups selling illegal drugs. They note that terrorist organizations and rebel groups are involved in trafficking, and use the proceeds from drug sales to buy weapons, recruit members, and finance operations used to topple fragile governments, many of which are supported by UN peacekeeping operations. The *UN News Service* reported that "drug trafficking is fueling brutal insurgencies in Afghanistan, Colombia, and Myanmar . . . and threatening to reverse UN peacekeeping efforts in Afghanistan, Haiti, Guinea-Bissau, Liberia, Sierra Leone, and elsewhere." In particular, the Taliban – which is trying to overthrow Afghanistan's government – has developed an elaborate scheme to tax that country's opium trade, bringing in anywhere between $70 million to $400 million annually, according to various media analysts.

At the conclusion of its debate, the Security Council – which is the primary world body responsible for the maintenance of international peace and security – decided to issue what is called a "presidential statement" (S/PRST/2009/32) where it broadly recommended that UN member nations should cooperate more in fighting drug trafficking at the global, regional, and sub-regional levels, and also encouraged member states to join existing international agreements to fight drug trafficking. The UN Secretary-General separately called for a "more balanced approach in the war on drugs to reduce demand in consuming nations," though he did not mention whether nations should decriminalize the personal use of drugs.

Rather than issuing a resolution on the subject of drug trafficking and international security, the president of the Security Council – which rotates on a monthly basis among the permanent and non-permanent members – explained that a presidential statement emphasizing "the significance of the problem" was a "first step," and that the Council "might consider adopting a resolution later on," according to an account provided by non-profit group ReliefWeb.

There is a long-running and still unresolved debate on whether nations, under certain international treaties such as the Single Convention on Narcotic Drugs, must pass domestic laws criminalizing the possession and personal use of illegal drugs.

Euthanasia, assisted suicide, and international law: Overview and debate

If a person is suffering from an incurable, debilitating, and painful illness, should he have a choice or right to end his life by refusing life support or medication? Or should he be allowed to take immediate steps to end his life promptly by taking, for instance, a deadly combination of drugs? What about cases where a person is not even capable of making such decisions such as those who are in a coma? Should caregivers be allowed, under certain circumstances, to end that person's life? And to what extent should governments regulate these acts?

Euthanasia and assisted suicide remain long-standing and contentious issues. Recent cases in various countries show that the debate surrounding their practices remains in flux. The United Kingdom, for example, recently announced what factors it would take into account in deciding whether to prosecute a person who assisted in another individual's suicide even though its laws make it illegal to do so. In a court case in the state of Connecticut, plaintiffs are trying to overturn a ban on physician-assisted suicide. Other states are also considering such measures. How do different nations address these issues? Are there any international treaties which deal with them? And where does the debate stand today?

The controversy behind euthanasia and assisted suicide

In many countries around the world, including the United States, there is no official or agreed-upon definition for the term euthanasia, which comes from the Greek word *euthanatos* meaning a good or easy death. Observers generally say that euthanasia is the act of killing or allowing the death of "hopelessly sick of injured individuals" using painless methods for reasons of mercy. *Black's Law Dictionary* defines euthanasia as "the act or practice of causing or hastening the death of a person who suffers from an incurable or terminal disease or condition, especially a painful one, for reasons of mercy," though analysts point out that this definition is not legally binding.

Various groups define euthanasia differently, and usually in ways that are slanted towards their particular beliefs. For example, Final Exit – a group which supports euthanasia – defines that term broadly as "help with a good death." Another group that supports euthanasia, the Voluntary Euthanasia Society, defines it as "a good death brought about by a doctor providing drugs or an injection to bring a peaceful end to the dying process." Other groups have referred to euthanasia interchangeably with other terms such as "aid in dying," "mercy killing," and "death with dignity."

On the other hand, the Prolife Alliance, a human rights group opposed to all forms of euthanasia, describes euthanasia as "any action or omission intended to end the life of patient on the grounds that his or her life is not worth living." Opponents have also described euthanasia as manslaughter and even murder.

Patients who decide to carry out euthanasia do so in different ways. Passive euthanasia, for instance, includes various acts such as withholding life-sustaining medication, taking a person off life support such as a respirator, or following the wishes of a person who does not want to be resuscitated – knowing that it will lead to death. Observers say that passive euthanasia seems to be the most socially accepted form of euthanasia and is usually performed on persons in vegetative states or comas. On the other hand, active euthanasia is more controversial and includes acts which will quickly lead to a patient's death such as injecting a deadly combination of controlled substances. (There are no official definitions for passive and active euthanasia. Instead, different groups have described them in various ways.)

Another way patients may carry out euthanasia is by asking another person to assist them. In these acts – popularly known as "assisted suicide" – someone other than the patient (such as family member, friend, or physician) helps the patient actively end his life by helping to administer lethal injections, for example. Assisted suicide not only involves giving direct help, but also providing indirect assistance such as supplying information on ways to commit suicide, helping to obtain certain equipment, or even transporting a patient to a certain facility.

As in the case of euthanasia, there is no agreed-upon definition for assisted suicide. *Black's Law Dictionary* defines that term as "the intentional act of providing a person with the medical means or the medical knowledge to commit suicide." Various groups have referred to assisted suicide interchangeably with euthanasia and even "aid in dying" and "death with dignity."

Arguments for and against euthanasia

What are some of the arguments in support of euthanasia and those who believe that people should have a right to carry out euthanasia without substantial interference from society? Many argue that the decision of whether to carry out euthanasia is a highly personal choice which only an individual can decide for himself, and that other people – such as government officials – are not in a position to decide such matters.

Others cite reasons of mercy and compassion, arguing that it would be unethical to prolong the life of a person who is suffering from incurable pain and other debilitating ailments. Doing

so, they argue, diminishes that person's quality of life by making him completely dependent on others. Proponents have also argued that patients who decide to carry out euthanasia will free up limited resources which can be used to help those who have a better chance of responding to medical treatment.

In contrast, opponents say that legalizing euthanasia or loosening restrictions over such practices will lead to abuse. For example, they worry that some people may push to euthanize a family member for dubious reasons such as gaining faster access to an inheritance. Others believe that those who are particularly vulnerable such as the elderly and terminally ill may turn to euthanasia too hastily to relieve family members of the financial burden of keeping them alive. In March 2010, the state of Washington released a report stating that, of all the patients who had carried out assisted suicide in that state (which became legal in 2008), "10 patients said they were concerned about being a burden on their family and friends, 11 cited pain, and one said finances were an issue," in reporting from *The New York Times*.

Opponents also argue that allowing euthanasia on a wider basis will present complicated and intractable legal questions such as determining in what cases a patient may undertake euthanasia and also deciding whether a particular patient is "competent" to make such a decision. Furthermore, many who oppose euthanasia say that it is morally unacceptable, citing religious objections in many instances. (They argue that a deity – and not humans – should determine questions of life and death.)

The debate surrounding whether people should be able to carry out euthanasia or assist in a suicide (and, if so, under what circumstances) continues today in many parts of the world, with no resolution in sight.

While euthanasia and assisted suicide are controversial topics, legal analysts note that an overwhelming majority of nations in the world has passed laws which generally prohibit those practices, though many countries are now taking a more nuanced approach.

Euthanasia and assisted suicide around the world

While euthanasia and assisted suicide are controversial topics, legal analysts note that an overwhelming majority of nations in the world have passed laws which generally prohibit euthanasia and assisted suicide, though many countries have taken a more nuanced approach. For example:

- India not only prohibits euthanasia and assisted suicide, but also suicide.
- In Nigeria, both euthanasia and physician-assisted suicide are considered murder, according to one legal analyst.
- In 1993, Russia passed a law which prohibits euthanasia, assisted suicide, and physician-assisted suicide.
- On the other hand, Belgium legalized euthanasia in 2002. But, under that country's laws, a patient seeking to end his life must be an adult resident of the country suffering from "constant and unbearable physical or mental suffering," and must make multiple requests approved by at least two doctors.
- While the Netherlands has allowed physician-assisted suicide for decades, it must be carried out under specific guidelines. Assisted suicide carried out without the aid of a physician is illegal.
- In Switzerland, citizens and foreign nationals may carry out assisted suicide with or without the aid of a physician. But the government says that it will prosecute individuals who assist in suicides if they are not motivated by compassion or had self-interested motives.

Recent cases reveal an especially active debate concerning euthanasia and assisted suicide in the United Kingdom. The Suicide Act in 1961 decriminalized suicide (meaning that the government would no longer punish people who tried to kill themselves), but prohibited all forms of euthanasia, though a person may legally refuse medical treatment. Specifically, the 1961 Act, under Section 2(1), makes it illegal for anyone who "aids, abets, counsels or procures the suicide of another" (i.e., assisted suicide). A person convicted of violating the 1961 Act could serve up to 14 years in jail. Analysts say that the purpose of Section 2(1) is to protect vulnerable people who may not be in a position to make an informed decision concerning matters of life and death. As a result, many terminally-ill British nationals have traveled to other countries where it is not a crime to carry out assisted suicide such as Switzerland. A well-known non-profit group in Switzerland called Dignitas claimed that it had helped in the assisted suicide of 100 British residents.

But under British laws, the government can still prosecute its nationals for assisting in a suicide which takes place in another country, though it has not done so automatically. Historically, the decision on whether the government would prosecute such a person has been undertaken on a case-by-case basis using criteria which were not made explicitly available to the public, say analysts. According to media reports, none of the assisted suicide cases in Switzerland involving British residents have resulted in criminal prosecution. Still, given the uncertainty over whether someone will be prosecuted for assisting in a suicide, proponents of euthanasia successfully pressured the government to clarify its laws last year.

Debbie Purdy, a 45-year old British woman with multiple sclerosis – a painful, chronic, and incurable autoimmune disease which affects the central nervous system – decided she wanted to end her life. Purdy made plans to travel to Switzerland where she could visit clinics offering physician-assisted suicide, but – given her deteriorating condition – required the assistance of her husband. But Purdy feared that the UK government would prosecute him for assisting in her suicide.

After the government refused to inform Purdy in advance whether or not it would prosecute her husband for assisting in a

suicide, she filed a lawsuit in Britain's highest court at the time (the House of Lords). She argued that the 1961 Suicide Act violated her right to "a private and family life" because its provisions did not make it clear as to when the government would prosecute people for assisting in a suicide. In July 2009, the House of Lords agreed with Purdy and ordered the government to clarify the 1961 Act.

The Director of Public Prosecutions (or DPP) in September 2009 issued guidelines describing what factors would favor prosecution for assisting in a suicide. They included cases where the victim did not wish to die; had a history of mental illness, or did not have a terminal illness or disability; and where the person providing the assistance had other motives asides from compassion and would stand to benefit from a person's death. On the other hand, the chances for prosecution would decrease if the victim clearly wished to commit suicide on his own initiative; had a terminal illness; and if the person assisting in the suicide was a spouse or close relative who was largely motivated by compassion, among other factors. The government will finalize the guidelines in 2010 after public consultations.

Still, even with this clarification in the 1961 Act, experts point out that the guidelines will not decriminalize euthanasia or assisted suicide, both of which remain illegal in the United Kingdom. They also do not provide individuals with immunity from prosecution when they assist in a suicide outside of the country.

The United Kingdom, which completely prohibits assisted suicide, recently issued guidelines to the public describing what factors would favor or disfavor the prosecution of a person who assisted in a suicide. But experts point out that the guidelines will not decriminalize euthanasia or assisted suicide.

United States: Continuing debate over euthanasia and assisted suicide

In the United States, there is no federal law which explicitly regulates euthanasia or assisted suicide. Instead, individual states have generally overseen these issues within their respective jurisdictions, and most have, in fact, passed laws prohibiting them.

***Particular state laws*:** California, New York, and Texas, for instance, explicitly prohibit euthanasia and assisted suicide in their penal codes, though they don't define these terms. New York law says that "a person is guilty of manslaughter in the second degree when . . . he intentionally causes or aids another person to commit suicide." Under California's penal code, "every person who deliberately aids, or advises, or encourages another to commit suicide is guilty of a felony." In Texas, the law states that "a person commits an offense if, with intent to promote or assist the commission of suicide by another, he aids or attempts to aid the other to commit or attempt to commit suicide." But even in states which outlaw these acts, it is not illegal for patients to refuse medical treatment or ask doctors to withdraw life support under certain circumstances.

In contrast, Oregon and Washington have laws authorizing physician-assisted suicide only (the only two in the nation). In 1994, Oregon became the first state to allow physician-assisted suicide when it passed a ballot initiative called the "Oregon Death with Dignity Act." (It came into force in 1998.) But "the act [did] not legalize lethal injection, mercy killing, or active euthanasia," according to the government of Oregon. Rather, Oregon allows assisted suicide only under explicit circumstances and under the supervision of a physician who is allowed to prescribe lethal doses of medication.

Under the law, a person must meet several criteria. Among others, he must be a resident of Oregon, 18 years of age or older, would have to be terminally ill, have six months or less to live, ask for the suicide assistance twice orally and once in writing, and have no depression or mental illness. His request must be approved by two physicians. The patient must be informed of alternatives to assisted suicide. According to the Oregon Public Health Division, 460 patients since 1998 have carried out assisted suicide in accordance with its laws. All other forms of assisted suicide are illegal, and the government could prosecute offenders for a Class A felony, which carries a 20-year jail sentence.

The state of Washington also passed a similar ballot initiative in 2008 called the "Washington Death with Dignity Act" where patients may ask for the help of a physician only in carrying out assisted suicide under specific circumstances. Over a 10-month period beginning in March 2009, 36 people used the act to commit suicide, according to the state.

Evolving positions on euthanasia and assisted suicide? While most states prohibit euthanasia and assisted suicide, the debate over their use remains in flux. In fact, plaintiffs across the country continue to challenge laws banning those acts. For example:

- Last year in Connecticut, two doctors filed a complaint in September 2009 challenging the state's ban on assisted suicide, arguing that it does not apply to physicians who provide "aid in dying." Currently, the ban on assisted suicide applies to everyone, including doctors.
- In December 2009, in Montana (which generally bans euthanasia and assisted suicide), the state's supreme court ruled in *Baxter v. Montana* that current state law protects from prosecution doctors who help their terminally-ill patients end their lives. But the court did not rule whether "physician-assisted suicide is a right guaranteed under its constitution."
- Massachusetts is also considering a law which would permit physician-assisted suicide (which is now illegal). The state legislature began hearings in February 2010 to consider a "death with dignity" act. Efforts to pass such a law in the late 1990s had failed.

***Supreme Court rulings concerning euthanasia and assisted suicide*:** Has the United States Supreme Court ever ruled in cases concerning euthanasia or assisted suicide? Beginning in the 1990s, the U.S. Supreme Court began to address some aspects of these controversial topics, but it did not determine the legality of those acts in and of themselves. (That is to say, the Supreme Court did not decide once and for all whether the Constitution allows or prohibits euthanasia and assisted suicide.) For instance:

- The Court held that states can pass laws banning euthanasia and assisted suicide. In a 1997 decision (*Vacco v. Quill*), it ruled that a New York law banning assisted suicide did not violate the Constitution. In that particular case, the plaintiffs claimed that withdrawing life support or other lifesaving actions – which was (and still is) legal under New York Law – was not different from assisted suicide, but that the state prosecuted only those involved in assisted suicide. As a result, the ban violated the Equal Protection Clause, they argued. The Supreme Court disagreed, citing what it said were fundamental differences between assisted suicide and the withdrawal of life support.
- Before physician-assisted suicide became legal in the state of Washington in 2008, four doctors challenged the then-existing blanket ban, claiming that people had a right under the Constitution to "commit physician-assisted suicide." Hence, the ban violated the Due Process Clause of the 14th Amendment. In *Washington v. Glucksberg*, the Court ruled (also in 1997) that "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."
- In 2001, the U.S Attorney General claimed that the Controlled Substances Act of 1970 (or CSA, a federal law) gave him the legal authority to ban the use of drugs used in assisted suicides. He had also threatened to revoke the medical licenses of physicians who helped carry out such acts. The state of Oregon (which allowed physician-assisted suicide since 1998) filed suit against the Justice Department. In 2006, in a decision called *Gonzales v. Oregon*, the Court ruled that, when Congress passed the CSA, it did not intend to give legal authority to the Attorney General to ban the use of drugs in physician-assisted suicide.

Euthanasia and international law

Currently, there are no existing international treaties which explicitly address the areas of euthanasia and assisted suicide or how countries must or should regulate their use. Nor have there been any formal attempts to create such an international treaty. Instead, as illustrated in previous sections in this article, nations have largely passed their own laws and regulations concerning euthanasia and assisted suicide, and their respective courts have addressed certain aspects of these acts.

International organizations also have differing views on these issues. The World Health Organization (or WHO) does not have an official stance on euthanasia or assisted suicide. In a publication called *Preventing Suicide: a resource for general physicians*, the WHO simply noted that "in recent years, euthanasia and assisted suicide have become issues that may confront the physician. Active euthanasia is illegal in almost all jurisdictions, and assisted suicide is enmeshed in moral, ethical and philosophical controversy."

Still, people involved in the debate over euthanasia and assisted suicide have cited principles in various treaties – such as the "right to life" and prohibitions against degrading treatment – which, they claim, support their views regarding these contentious areas.

They also note that the European Court of Human Rights (or European Court) had, in 2002, issued what analysts have described as a landmark ruling – in an assisted suicide case called *Pretty v. The United Kingdom* – where it examined several of these principles. In that decision, the European Court ruled that the 1961 Suicide Act in the United Kingdom (which, again, completely banned assisted suicide in that nation) did not violate various provisions in the *Convention for the Protection of Human Rights and Fundamental Freedoms* (often referred to as the European Convention on Human rights or ECHR).

The ECHR, which came into force in 1953, 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. According to analysts, the ECHR is "the only international human rights agreement providing such a high degree of individual protection." This treaty also created the European Court (located in Strasbourg, France) whose main responsibility is to hear claims from individuals who say that their governments had violated certain rights under the ECHR.

Legal observers say that the European Court's ruling in *Pretty* applied only to the facts of that particular case, and did not establish a precedent or represent a development in international law which affected the legal practices surrounding euthanasia and assisted suicide in other nations. The decision did not, for instance, decide – once and for all – whether acts of euthanasia and assisted suicide themselves were either illegal or permissible under international law. (In fact, the European Court deliberately avoided answering such questions in its decisions because, it warned, "judgments issued in individual cases establish precedents, and a decision in this case could not, either in theory or practice, be framed in such a way as to prevent application in later cases.") Also, the European Court did not try to determine whether the 1961 Suicide Act violated provisions in other treaties.

Still, legal experts say that *Pretty v. The United Kingdom* was one of the first to examine assisted suicide in the context of several principles cited in international law.

A landmark decision: The case of *Pretty v. The United Kingdom*

During the 1990s, Diane Pretty of the United Kingdom was dying of an advanced stage of a motor neurone disease which had paralyzed her from the neck down. There was no cure for her condition, and medical experts agreed that Pretty only had a short time to live. Observers noted that, despite Pretty's worsening condition, "her intellect and capacity to make decisions were unimpaired." Pretty decided that she wanted to commit suicide rather than suffer further. (Even courts in the United Kingdom acknowledged that Pretty faced "the prospect of a humiliating and distressing death.") Given her paralysis, her husband would have to assist her in carrying out such an act.

But, as mentioned earlier, Section 2 of the Suicide Act of 1961 completely bans assisted suicide without *any* exceptions, and makes it a crime for an individual to aid, abet, or counsel in another individual's suicide. (Among its many aims, the law is supposed to protect people – such as the terminally ill who are weak and vulnerable – from abuse at the hands of others.) When Pretty had contacted the DPP about her plans, that office refused to guarantee that it wouldn't prosecute Pretty's husband for assisting in her suicide.

Pretty argued that the DPP's refusal to guarantee that her husband would not be prosecuted had violated her rights under ECHR whose provisions the United Kingdom had implemented within its jurisdiction by passing the Human Rights Act 1988. She also argued that the United Kingdom had violated her rights under the ECHR by completely banning and criminalizing assisted suicide. After the House of Lords (which then was the highest court in the United Kingdom) turned down her appeal, Pretty brought her case to the European Court, which issued its decision in 2002. It examined the following issues:

Right to life: Pretty claimed that Section 2 of the 1961 Suicide Act violated Article 2 of the ECHR, which states: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." She argued that this "right to life" not only gave a person a "right to live," but also an actual "right to die" (i.e., "it was for the individual to choose whether or not to go on living," she said). And this right to die includes a right to die with the assistance of another person. To protect this right to die, Pretty argued that the state had to "provide a scheme in domestic law to enable her to exercise that right." (For instance, the United Kingdom would have to allow certain exceptions to its assisted suicide ban.) Instead, the United Kingdom criminalized all acts of assisted suicide.

Supporters and opponents of euthanasia and assisted suicide point out that the phrase "right to life" is found in several other existing international treaties. For example, Article 6(1) of the *International Covenant on Civil and Political Rights* (or ICCPR) states: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." (The ICCPR calls on nations to pass domestic measures protecting many civil and political rights such as the right to peaceful assembly, freedom of association, and to be tried without undue delay, among others).

In the *Universal Declaration of Human Rights* (or Universal Declaration), Article 3 states that "everyone has a right to life, liberty, and security of person." Adopted by the United Nations General Assembly in 1948, the Universal Declaration says that nations shall strive to recognize a wide variety of human rights for individuals, including the right to freedom of thought; equal protection under the law; and the right to have food, clothing, and housing. The *American Convention on Human Rights* in Article 4(1) states: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall arbitrarily be deprived of his life." Adopted in 1969 by nations in Central and South America, the American Convention calls on its signatory nations to recognize and enforce certain rights in their domestic system.

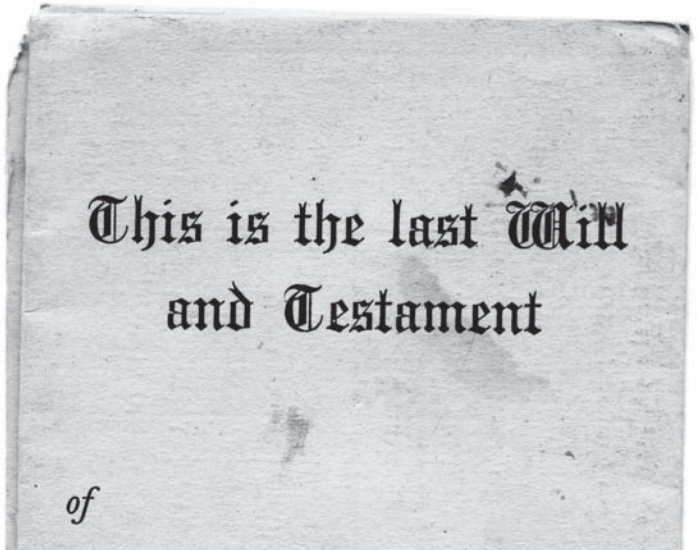
Opponents of euthanasia argue that acts of euthanasia would seem to violate a plain reading of the "right to life" principle in these various treaties, which they say protects life itself from all efforts to end it. On the other hand, supporters of euthanasia believe that the "right to life" refers to living a good "quality" life. So under that reasoning, if a person is suffering from a debilitating illness and cannot live a good quality life, he should then have the right to die. They also believe that some of these treaties implicitly seem to allow nations to end a person's life (for example, by carrying out the death penalty) if there is a legal process to ensure that such an act is not carried out arbitrarily. So, by extension, a legal process which specifically regulated acts of euthanasia would not violate the general principle of a right to life.

Still other legal observers point out that these treaties don't explicitly define the term "right to life," and question whether it is appropriate to cite that term in the euthanasia debate. For example, one analyst pointed out that, while Article 6(1) of the ICCPR does state that "every human being has the inherent right to life," the provisions listed immediately afterward seem to use the term in the context of countries that employ the death penalty.

The term "right to life" in the Universal Declaration has been interpreted in many different ways depending on the context of a situation. For instance, legal scholars point out that, in situations of armed conflict, a country may be held responsible for violating the right to life only if its armed forces deliberately attack and kill certain categories of people such as civilians. Others say that the right to life imposes an obligation on states to help ensure the *survival* of children by providing them with basic needs such as food, clothing, and shelter.

Observers say that there currently is no conclusive and all-encompassing definition for the term "right to life" which can be applied to every imaginable situation. And according to the nonprofit group Human Rights Education Associates, "human rights law is silent" in many controversial areas concerning the right to life, including euthanasia.

How did the European Court rule in *Pretty v. the United Kingdom* concerning the principle of the "right to life"? It determined that the 1961 Act did not violate Article 2 of the ECHR. In its view, that article not only prohibited nations from the "intentional and unlawful taking of human life," but also implied "a positive obligation on the authorities to take preventive operational measures to protect an individual whose life was at risk



from the criminal acts of another individual." Using this reasoning, the court rejected Pretty's argument that she had a right to die, stating, "Article 2 could not, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die." Because there was no right to die in the ECHR, the United Kingdom's law against assisted suicide did not violate Article 2 of that treaty.

Prohibition against inhuman or degrading treatment: Supporters and opponents of euthanasia have also cited prohibitions against torture, inhuman, or degrading treatment in various treaties to advance their viewpoints. For example, Article 7 of the ICCPR states that "no one shall be subjected to inhuman or degrading treatment nor shall anyone be subjected to nonconsensual medical or scientific experimentation."

Some supporters of euthanasia have reasoned that, by prohibiting a person with an incurable and debilitating illness from killing himself with the assistance of another person, the government is subjecting that person to degrading treatment. In response, opponents of euthanasia point out that the governments themselves are not inflicting degrading treatment on those suffering from debilitating illnesses. They also note that many nations provide palliative care, which is generally defined as treatment relieving the symptoms of a terminal illness to improve a patient's quality of life. Because patients are free to seek options such as palliative care, they cannot claim that entities (including a government) are somehow responsible for any claims of degrading treatment.

Observers point out that the ICCPR does not define what exactly constitutes torture, inhuman, or degrading treatment. In 1992, the Office of the High Commissioner for Human Rights issued an interpretation (called General Comment 20) where it examined Article 7 largely in the context of preventing the torture and ill-treatment of people who have been detained, arrested, imprisoned, or are being interrogated. It did not address issues concerning euthanasia or assisted suicide.

In *Pretty v. The United Kingdom*, Pretty argued that the DPP's refusal to rule out prosecutions for assisted suicide violated Article 3 of the European Convention, which states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." Pretty claimed that Article 3 not only prohibited the state from carrying out, for instance, degrading treatment, but that it also had to take measures to protect people from it. (She said that her suffering caused by her disease qualified as "degrading treatment.")

Under Pretty's reasoning, because the United Kingdom had failed to protect her from degrading treatment by prohibiting assisted suicide, it was responsible for it. So to comply with Article 3, the DPP would have to agree not to prosecute her husband if he did assist in her suicide, and also amend its complete ban on assisted suicide.

The European Court ruled that the UK law criminalizing assisted suicide and also the DPP's refusal to rule out a prosecution did not violate Article 3 of the ECHR. Under Article 3, a state must take measures in certain cases to ensure that individuals are not subject to, say, degrading treatment administered intentionally by state agents or private individuals, said the court. In the case of suffering which flows naturally from illnesses, it said that an individual can hold the state responsible for that suffering if the state had detained an individual and then administered treatment which "exacerbated" any suffering, exposing that person to humiliation and debasement. But the European Court noted that this was not the situation in the case of Pretty. The United Kingdom neither detained her nor did the government give Pretty inadequate medical treatment.

Instead, the court said that Pretty had created "a new and extended construction [or interpretation] on the concept of treatment" whereby the government could be held responsible for someone's suffering even when it was not directly responsible for inflicting it. Any interpretation of the ECHR, said the court, must "accord with the fundamental objectives of [that] Convention and its coherence as a system of human rights protection." It noted that Pretty's interpretation would have called on the United Kingdom to remedy this situation by carrying out actions which "intended to terminate life" such as allowing assisted suicide in certain cases. But because Article 2 prohibited a state from the unlawful taking of a person's life and also did not require a state to facilitate a person's death, it would be wrong to interpret Article 3 as allowing such actions, reasoned the court. Therefore, the state was not obligated to make a promise to refuse to prosecute Pretty's husband or changing its laws which will allow assisted suicide.

Currently, there are no existing international treaties which explicitly address the areas of euthanasia and assisted suicide or how countries must or should regulate their use. Nor have there been any formal attempts to create such an international treaty or even guidelines.

Self-determination: Supporters and opponents in the euthanasia debate also refer to the concept of "self-determination" to defend their views. For example, the ICCPR in Article 1 states, in part, that "all peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development." In addition, Article I of the *International Covenant on Economic, Social, and Cultural Rights* (or ICESCR) contains the same exact text.

Some proponents of euthanasia argue that a right to self-determination allows an individual to determine what course of action to take concerning his life, and that this right also forms the foundation of other rights such as the right to privacy. As a result, "the state, in principle, is not entitled to impose on its citizens [those] ethical rules which interfere in their private lives,"

which would include cases where people decide to take their own lives, according to one analyst.

Opponents of euthanasia, on the other hand, respond that self-determination and the corresponding right to private life don't include a right to die. One official said that the right to private life could "cover the manner in which a person conducted her life, not the manner in which she departed from it." He also argued that these various rights are not absolute, saying that the state could interfere with them to protect and secure the rights of others, especially those people (including the seriously ill) who might not be in a position to make informed decisions concerning euthanasia and assisted suicide.

Other experts debate whether the right to self-determination is an individual right which people can assert in a court or other legal setting. They note that Article 1 in both the ICCPR and the ICESCR states that all *peoples* have the right to self-determination. While one analyst said that "it is undisputed that this provision [Article 1] must be construed as containing a positive right . . . of a collective nature – the right holders being peoples rather than individuals as such." But in 1984, the Human Rights Committee at the United Nations (which is responsible for monitoring the implementation of the ICCPR) issued an interpretation of Article 1 where it said: "The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights."

Others question whether the term "right of self-determination" is even applicable in the euthanasia debate. They note that while the right to self-determination is not explicitly defined in either the ICCPR or the ICESCR, Article 1 in both agreements seems to use that term in the context of de-colonization where people living in certain territories push for independence. (Article 1 in both agreements refers to "non-self-governing and trust territories.")

In *Pretty v. the United Kingdom*, Pretty argued that both the DPP's refusal to rule out a prosecution for assisted suicide and the blanket ban on assisted suicide both violated her rights under Article 8(1) of the ECHR, which states, in part, that "everyone has the right to respect for his private and family life." It also says that any interference with these rights on the part of the government must not only be in accordance with the law, but must also be *necessary* to achieve pressing social needs such as preventing disorder and crime, and also protecting public safety, health or morals, and the rights and freedoms of others, among other goals.

Pretty argued that the right to respect for private life included an implicit right to self-determination under which a person has a right to "make decisions about one's body and what happened to it." (The ECHR does not mention the term "self-determination.") Applying this right to her own life, Pretty said that "nothing could be more intimately connected to the manner in which a person conducted her life than the manner and timing of her death." But the United Kingdom had violated this right to self-determination (and, in turn, the right to private life) by banning assisted suicide and by refusing to rule out a prosecution against her husband for assisting in her suicide.

She also argued that the UK government could not justify its interference of these rights. The United Kingdom failed to balance what she claimed was her right to take her own life under the ECHR with that of the community (which, again, had enacted the ban against assisted suicide to protect the weak and vulnerable from abuse). Instead, in her view, the United Kingdom undertook a disproportionate approach by completely banning assisted suicide "regardless of the individual circumstances of [a particular] case." Pretty argued that she was not vulnerable and was able to think clearly enough to make an informed decision about assisted suicide without any outside pressure. She also pointed out that her death was imminent, and that "no one else was affected by her wish for her husband to assist her" in taking her life. Because the United Kingdom could not justify its interference in her decision to take her own life, it violated her rights under Article 8 of the ECHR, argued Pretty.

In its ruling, the European Court did not decide whether there was an explicit right to self-determination in the ECHR. It also did not decide whether the right to respect for private life actually included a right to assisted suicide. Instead, the European Court determined whether the United Kingdom's rationale behind the assisted suicide ban conformed to the requirements under Article 8, which again said that government interference in the people's right to respect for private life must be in accordance with the law and also necessary to achieve pressing social needs.

The European Court decided that the UK blanket ban on assisted suicide did not violate Article 8. It was persuaded that the United Kingdom had to institute such a ban to achieve the pressing social need of protecting the rights of others such as the terminally ill who are weak and vulnerable to abuse. (It noted

that, even with safeguards, "clear risks of abuse [did still] exist" if that country decided to relax the ban or make certain exceptions to it.) Also, the European Court said that the complete ban was not a disproportionate response to protect the terminally ill from abuse. It pointed out that the United Kingdom *did* take into account individual circumstances when deciding whether to prosecute a case of assisted suicide such as whether the person assisting in the suicide had acted mostly out of compassion.

Non-discrimination: The euthanasia debate also frequently cites the concept of "non-discrimination," which is mentioned in several international treaties and documents. For example, the Universal Declaration in Article 2 states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." (According to the different sides of the euthanasia debate, some of these "rights and freedoms" would – in their views – include a supposed "right to life" or, alternatively, a "right to end one's life.") Article 7 in the same document goes on to add that "all are equal before the law and are entitled without any discrimination to equal protection of the law." The ICCPR also mentions the concept of non-discrimination in Article 26.

How does this concept apply in the euthanasia debate? Many countries around the world (including the United Kingdom) have passed laws which make it a crime for people to assist in a suicide, regardless of whether those who want to end their lives are able-bodied or not. (Analysts say that, sometimes, even an able-bodied individual would ask others to assist in ending his life.) So the law seems to apply equally to everyone who is seeking to carry out assisted suicide.

But supporters of euthanasia argue that an able-bodied individual who ultimately decides to take his own life (without assistance) will not face criminal prosecution. (While assisted suicide is illegal in many countries, suicide by one's own hands is not explicitly forbidden because enforcing such a law would be very difficult, if not impossible.) On the other hand, a person who is physically unable to commit suicide – due to, say, a debilitating illness – must seek assistance from another person to do so. But that person could, in turn, face criminal prosecution. As a result, the law is discriminatory because it seems to be treating people in similar circumstances differently.

In the case of *Pretty v. The United Kingdom*, Pretty argued that the blanket ban on assisted suicide violated Article 14 of the ECHR, which states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground . . ." Pretty argued that, even though the ban on assisted suicide seemed to apply equally to everyone in the United Kingdom, it ultimately discriminated against disabled individuals. The law, she pointed out, did not forbid able-bodied people from committing suicide on their own. (Pretty described the act of suicide without assistance as a "right enjoyed by others.") But an incapacitated person was not able to end his life because the only way to do so is through assisted suicide, which is illegal under the law.

The government responded that, contrary to Pretty's description, individuals in the United Kingdom did not have an explicit "right to suicide." Even though the 1961 Suicide Act decriminalized suicide at one's own hands, the United Kingdom still did not – as a matter of policy – condone suicide. In fact, "the policy of the law was firmly against suicide." Also, because the assisted suicide prohibition applied to all individuals equally, it did not discriminate against any particular class of individuals, said officials.

Legal experts say that even if a certain law or policy did lead to discriminatory effects, a government can justify such a policy if there was a reasonable justification or legitimate aim. Pretty argued that the United Kingdom did not have a reasonable justification in treating able-bodied and incapacitated individuals differently. While the government said that the complete ban on assisted suicide was to protect the weak and vulnerable (such as the terminally ill), Pretty pointed out that she was neither vulnerable nor needed protection from others. To end this discrimination, the UK government had to make exceptions in its assisted suicide ban for those incapacitated individuals who were not vulnerable to abuse, she argued.

The European Court ruled that the United Kingdom's ban on assisted suicide did not unfairly discriminate against Pretty, and hence, did not violate Article 14 of the ECHR. The court noted that, while the United Kingdom did seem to treat people who wanted to carry out suicide without assistance differently from others who needed such help, the United Kingdom did, in its view, have "objective and reasonable justification" for not making exceptions to its ban on assisted suicide specifically for incapacitated individuals who did not consider themselves vulnerable to abuse. Doing so could "seriously undermine the protection of life" because there was still the risk that unscrupulous people would abuse such exceptions and exploit terminally-ill individuals.

After the court issued its decision, Pretty dropped her efforts to carry out assisted suicide. A month after the ruling, she died in a hospice near her home.

But even with this ruling, observers note that the debate concerning euthanasia and assisted suicide still continues today. And while many nations continue strictly to ban both acts, policies in other nations are becoming more nuanced.

In 2002, the European Court of Human Rights issued what analysts have described as a landmark ruling where it examined several international law principles used by supporters and opponents in the debate surrounding euthanasia and assisted suicide to support their viewpoints.

Ongoing challenges to religious freedoms worldwide

For thousands of years, religious and other beliefs have played a substantial role in the course of history and the general development of human society. People have, for instance, used these various beliefs as a basis to promote public welfare and to help the less fortunate, among other endeavors. But many others have used and continue to use their beliefs to justify wars, persecution, and discrimination, all of which have caused untold misery and suffering for hundreds of millions of people in the past and even during modern times.

While conflicting religious and personal beliefs have always been and continue to be a source of tension among different peoples, observers note that – in recent years – the media have reported several high profile instances where nations have passed domestic laws which seem to discriminate against and create hostility towards adherents of certain faiths. Switzerland, for instance, recently banned the construction of new prayer towers for mosques. France is currently debating whether it should pass a law which bans women from wearing veils in certain locations. A few years ago, Germany had passed a similar measure.

What are some of the provisions of these domestic laws? Do they discriminate against people of certain religious faiths? Do these domestic laws violate provisions in certain international treaties? Which international treaties specifically address religious and other beliefs? And what obligations do nations have under these agreements?

Continuing conflicts over religious and personal beliefs

People all over the world hold a staggering number of different religious and personal beliefs. Many believe, for instance, in the existence of a single and supreme deity who has set standards of behavior. Others believe in and worship several deities. There are also many people who don't hold any religious beliefs, but, instead, follow certain philosophical views on how to conduct their lives. While there is no official legal definition for "religion" or "belief," the United Nations Human Rights Committee in 1993 said that those terms "are to be broadly construed."

According to recent demographic statistics, the largest religions are Christianity, with 2.1 billion followers; Islam, with 1.3 billion; Hinduism, with 1.4 billion; Buddhism, with 500 million; Sikhism, with 20 million; and Judaism, with 12 to 18 million adherents. Approximately 2.5 percent of the world's population identify themselves as atheist, though experts say it is difficult to determine exact numbers because of a perceived social stigma, among other reasons. A separate 12.7 percent identify themselves as non-religious.

While different religious and personal beliefs have brought people together in tackling certain problems, they have also created long-standing tensions. For example, people continue to argue on the role religion should play in public life and issues. Many try to tolerate these differences in beliefs, but others discriminate against and even attack those who don't share their views. For example:

- According to organizations such as Human Rights Watch, tensions between Christians and Muslims in Nigeria have led to many deadly clashes between the two groups, leading to the deaths of more than 13,500 people in the last decade alone. In January 2010, the media reported that fighting between the two groups had killed over 200 people in the city of Jos, which one report described as "a hotbed of ethnic and religious violence." In March 2010, reprisal attacks outside of Jos led to the deaths of over 500 people, many of whom were women, children, and the elderly.
- Protestors in Malaysia firebombed and vandalized several churches after a court in December 2009 had overturned a previous law which had prohibited Christian groups from referring to their deity using the word "Allah." According to *The New York Times*, "many Muslims here insist that the word belongs exclusively to them and say that its use by other faiths could confuse Muslim worshippers."
- In February 2010, a suicide bomber in Iraq killed over 30 Shiite pilgrims and others on their way to Karbala, which is the location of the holiest Shiite shrine in Iraq. (Shiite Muslims make up 63 percent of Iraq's population while Sunni Muslims constitute 34 percent.) In a separate development, the United Nations Office for the Coordination of Humanitarian Affairs reported in March 2010 that a campaign of threats and intimidation had forced over 4,000 Iraqi Christians to flee their homes in Mosul, Iraq's second largest city. It also noted that 12,000 Christians has left their homes in October 2008.
- In what was described by the media as "one of the most serious outbreaks of sectarian violence in years," Coptic Christians and Muslims in Egypt clashed in the city of Nag Hammadi in January 2010, burning homes and businesses over the course of several days.

The legal basis of freedom of religion: International and regional treaties

Even with such conflicts recurring around the world, analysts point out that many international pronouncements and treaties call on nations to protect freedom of religion and belief.

For instance, in recognizing the importance of respecting different religious and personal beliefs, the United Nations General Assembly in 1948 passed the *Universal Declaration of Human Rights* (or Universal Declaration), which states in Article 18 that "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance," though it doesn't define the term religion. (The Universal Declaration calls on nations to recognize and respect many other important rights.)

However, Article 18 – which is a sentence long – does not mention what exact freedoms are included in the phrase "right to freedom of religion," such as the freedom to establish places of worship and to issue religious materials. Additionally, Article 18 does not say how exactly governments must protect freedom of religion or how to address discrimination based solely on religion. Many analysts also point out that the Universal Declaration is not considered an international treaty, though some argue that its provisions have become customary international law (i.e., these provisions have been carried out by so many nations in such a common and obligatory fashion that it has evolved into binding international law).

On the other hand, the *International Covenant on Civil and Political Rights* (or ICCPR) is a binding international treaty which calls on its more than 140 signatory nations to protect a wide range of civil and political rights. The UN Human Rights Committee (comprised of independent experts) monitors the implementation of the ICCPR by its signatory nations, and also issues authoritative interpretations of treaty provisions called "general comments."

In the area of religious and personal beliefs, Article 18(1) of the ICCPR calls on nations to recognize the right to freedom of religion and the right to manifest one's beliefs. In fact, the wording of this article is nearly identical to its counterpart in the Universal Declaration. But unlike the Universal Declaration, Article 18 of the ICCPR has several more provisions (three more sentences to be exact) concerning freedom of religion and belief. For instance, Article 18(2) says that people must not be subject to coercion which would impair their religious freedoms and beliefs. Although the ICCPR doesn't define the term religion, the UN Human Rights Committee said that "Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief."

Separately, Article 26 of the ICCPR addresses discrimination based on a person's religion or belief. It states that everyone is equal before the law and entitled to equal protection of the law without discrimination, including those made on the basis of religion. (However, it does not provide nations with more specific guidance on how to do so.) Article 27 states that religious minorities shall not be denied the right to profess and practice their own religion.

Despite these improvements over the Universal Declaration, the articles in the ICCPR which addresses religion "have not been elaborated and codified in the same way that more detailed treaties have codified provisions against torture, discrimination against women, and race discrimination," according to the University of Minnesota Human Rights Center. (The international convention prohibiting torture, for instance, deals only with torture, and calls on nations to carry out specific measures to stop that practice.) Various scholars suggest that there is no binding international treaty which deals solely with religious freedom and prohibiting religious discrimination because these topics are so complex and politically charged.

Instead, the United Nations in 1981 passed a non-binding measure called the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (or 1981 Declaration), which provides nations with further guidance on protecting freedom of religion and belief, and also on countering discrimination based on those beliefs. As a general matter, declarations issued by the United Nations – such as the Universal Declaration and even the 1981 Declaration – are largely aspirational statements on how nations should address a certain issue which is not specifically covered by a formal international treaty or agreement. Still, legal scholars have described the 1981 Declaration as "the most important contemporary codification of the principle of freedom of religion and belief. It is a compromise between states after 20 years of complex discussion and debate."

While repeating the first three sentences of Article 18 of the ICCPR, the 1981 Declaration states how governments must specifically stop discrimination based solely on a person's religion or belief. For example, Article 2 prohibits governments, institutions, and private groups and individuals from discriminating against others on the basis of religion. Article 4 calls on states ". . . to make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination."

Unlike the Universal Declaration and the ICCPR, the 1981 Declaration also lists (in Article 6) examples of specific freedoms included in the phrase "freedom of thought, conscience and religion," including freedom to worship and maintain places of worship; to establish and maintain charitable institutions; to write and disseminate religious publications; and to observe days of rest and to celebrate holidays and ceremonies in accordance with one's religion, among many others. (But like its predecessors, the 1981 Declaration does not define the term religion.)

Although it represents an important development in the protection of religious freedoms and beliefs, the 1981 Declaration does not have an enforcement mechanism which compels states to adhere to its provisions. Instead, the UN Commission on Human Rights (now known as the Human Rights Council) appointed an independent expert known as a Special Rapporteur to submit an annual report on the global status of freedom of religion.

In addition to international treaties, several existing regional agreements call on certain nations to respect freedom of religion and protect people from discrimination based on their personal

Religious and other beliefs have played a substantial role in the course of history and the general development of human society. While many use these beliefs as a basis to promote public welfare, others have used and continue to use them to justify wars, persecution, and discrimination.

beliefs. Several of these agreements – none of which defines the terms religious or personal beliefs – simply reiterate provisions from the Universal Declaration and the ICCPR. For instance, Article 9 of the 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms* (or the European Convention) repeats Article 18 from Universal Declaration. In a similar fashion, Article 12 of the 1969 *American Convention on Human Rights* reiterates all four sentences of Article 18 of the ICCPR.

Other regional treaties have adopted provisions protecting religious and personal beliefs analogous to those set out in the Universal Declaration and the ICCPR. The 1982 *African Charter on Human and Peoples' Rights,* for example, guarantees freedom of conscience, profession, and free practice of religion in Article 8. In addition, Article XII of the 1981 *Universal Islamic Declaration on Human Rights* states that "every person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the Law," and that "no one shall hold in contempt or ridicule the religious beliefs of others or incite public hostility against them." Article XIII goes on to say that "every person has the right to freedom of conscience and worship in accordance with his religious beliefs."

Finally, the 1994 *Arab Charter on Human Rights* states in Articles 26 and 27 that "everyone has a guaranteed right to freedom of belief, thought and opinion," and that "no restrictions shall be imposed on the exercise of freedom of belief, thought, and opinion except as provided by law."

To comply with all of these international and regional treaties, many governments have passed domestic laws to protect the freedom of religion and other beliefs. These laws may give people the legal right to adhere to their own religious beliefs without interference and pressure from others, for instance. They may also prohibit people from discriminating against others – at the workplace, in the use of public facilities, and in the administration of public programs – solely on the basis of personal beliefs.

According to the Pew Forum on Religion & Public Life (or Pew Forum), almost 76 percent of all countries call for freedom of religion and thought in their constitutions and laws. The Constitution of Afghanistan, for instance, explicitly protects the religious rights of non-Muslim citizens. It states that "followers of other religions are free to perform their religious rites within the limits of the provisions of law." In the United States, the First Amendment of the U.S. Constitution states, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

To enforce these laws, the Pew Forum notes that almost all countries have designated certain governmental departments or ministries to address matters concerning freedom of religion or belief. In the United States, the Civil Rights Division of the Department of Justice "enforces federal statutes that prohibit discrimination based on religion in education, employment, housing, public accommodations, and access to public facilities."

While these various treaties call on nations to protect the right to freedom of religion and belief, such rights are not absolute. Governments may – under limited circumstances – restrict religious freedom and even discriminate against people on the basis of their religion or personal beliefs. For example, Article 18(3) of the ICCPR states that "freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, morals, or the fundamental rights and freedoms of others." (The 1981 Declaration mentions the same exact restrictions.)

There are several international and regional treaties which call on nations to protect the right to freedom of religion and belief within their respective jurisdictions. But legal experts point out that the protection of religious freedoms around the world has been uneven at best.

In 1994, the UN Human Rights Committee issued an official interpretation of Article 18(3) – in a document called General Comment 22 – where it said that nations should not restrict freedom of religion and beliefs for reasons other than those already listed in Article 18(3). The ICCPR "does not permit any [other] limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice," stated the Human Rights Committee. It also said if a government does impose restrictions on freedom of religion, they "must be directly related and proportionate to the specific need on which they are predicated."

The difficulty in protecting freedom of religion and belief

But even with these treaties and national laws in place, legal experts point out that the protection of religious freedoms around the world has been uneven at best. "Despite the rights to religious freedoms proclaimed in these important international instruments, it is generally accepted that no area of human rights is so distant from a meaningful international consensus as the right to religious diversity," said Prof. Mark Janis, a widely-respected international law professor. "Moreover, there is virtually no effective universal supervision of international rights to religious diversity."

While a majority of countries around the world claim to protect freedom of religion and belief, a recent study revealed a different situation. In December 2009, the Pew Forum issued what it said was the first quantitative study which "reviews an extensive number of sources to measure how governments and private actors infringe on religious belief and practices around the world." The study (called *Global Restrictions on Religion*) analyzed findings from "16 widely cited, publicly available sources of information" – from groups ranging from the U.S. State Department to the Council of the European Union to the Hudson Institute – documenting publicly reported government measures and also

acts carried out by private groups in restricting religious freedom in 198 countries from mid-2006 to mid-2008.

The Pew study revealed that only 27 percent of countries fully respected the religious freedoms and rights found in their constitutions and laws. It also found that one-third of all governments (representing approximately 70 percent of the world's population) have placed high or very high restrictions on religious freedoms. Some nations, for example, purport to allow religious freedom yet prohibit religious conversions in contravention of the Universal Declaration, which states that freedom of religion includes the freedom to change religion or belief. Countries with high or very high government restrictions on freedom of religion include:

- Brunei, where a person must obtain permission from the government to convert from Islam to another faith;
- Greece, where the government allows only "Orthodox Christian, Jewish and Muslim organizations to own, bequeath and inherit property as well as to have an official legal identity as a religion;
- China, which has placed high restrictions on Buddhists in Tibet as well as implemented strict controls over the Muslim Uighur group; and
- Saudi Arabia, where a strict interpretation of Islamic law calls for the death penalty for individuals who convert from Islam to another religion.

The Pew study also examined cases where private actors and organizations in various countries had undertaken actions which significantly restricted religious freedom. For example, various religious groups in nations such as Indonesia, Nigeria, and Vietnam have targeted and attacked each other's places of worship. These restrictions on religious freedom do not occur only in developing countries. In the United States, crimes of religious hatred have been reported in almost every state and against many different religious groups, including Catholics, Protestants, Mormons, Muslims, and Jews, according to the Pew study. In fact, the Federal Bureau of Investigation reported that crimes against members of religious groups in the United States increased in 2008. Law enforcement authorities have also reported many cases of arson against churches in Alabama, Texas, and Utah in the past several months.

Controversies concerning religious freedom around the world

Recently, the media publicized several cases where governments have passed domestic laws which critics say seem to discriminate against and create hostility towards adherents of certain religions, and which may violate provisions in international law. What are some of the provisions of these domestic laws? Do they discriminate against people of certain religious faiths? And do they violate obligations under certain international treaties?

***Limited ban on veils in Germany*:** Since the beginning of the war on terror, observers point out that Muslims have been the target of scorn in many countries around the world, and that activities carried out by those of the Islamic faith – such as charitable fundraising efforts – have come under close scrutiny. In another development, many nations have either passed or are considering laws which ban people from wearing veils, which are largely associated with Islam.

Analysts say that the Koran – an extensive compilation of writings which Muslims consider to be the literal word of Allah – instructs both men and women to dress modestly, though it does not explicitly require women to wear veils or other face and body coverings. Still, many do so as an outward expression of their religious faith. Under certain interpretations of the Koran, some believe that women simply have to wear modest clothing, making the veil in any form unnecessary. Still others insist that women should cover their entire bodies except their faces, hands, and feet when in the presence of men to whom they are not related or married. Observers say that there is no set standard as to whether a Muslim must wear a veil, and that doing so varies from country to country and from woman to woman.

One of the most commonly worn veils is the *hijab* (from the Arabic word for "veil"), which covers the head and neck, but leaves the entire face clear. On the other hand, the *niqab* (or "full veil") covers the entire body, and leaves only the area around the eyes unconcealed. The *burka* is the most concealing garment. It covers the entire body and even eyes. Women wearing the burka can only see through an opening covered by a mesh screen. The burka became familiar in the eyes of the world when the Taliban ruled Afghanistan and forced women to wear that garment in public.

Observers say that, in the years after the 2001 terrorist attacks in New York and Washington, D.C, many people became suspicious of Muslims, including women wearing veils simply because that garment of clothing is one of the most recognizable outward expressions of the Islamic faith. Over the years, human rights groups have reported that many nations began to pass or consider regulations on wearing veils in public. One nation which had passed these kinds of laws is Germany.

In Germany, each of its 16 separate states (and not the federal government) enacts policies regulating the use of religious symbols in their respective schools, according to groups such as Human Rights Watch. In the past several years, eight German states have enacted legislation and policies prohibiting public school teachers from wearing visible religious symbols and clothing in schools only. While these laws do not specifically mention the word "veil," observers presume that they include that particular article of clothing.

But two of these eight states extended the ban on visible religious symbols and clothing to include civil servants. For example, the state of Berlin passed a law in 2005 which "bars all public school teachers, police officers, judges, court officials, prison guards, prosecutors, and civil servants working in the justice system from wearing visible religious or ideological symbols or

garments," said Human Rights Watch. People who do not comply with these laws could lose their jobs, among other penalties. However, the majority of these eight states make exceptions for Western cultural symbols such as small crosses, which are associated with the Christian faith.

Proponents argue that such laws allow German localities to maintain their neutrality in religious matters, and to blunt claims that they are favoring a particular religion over others. Others say that restricting the wearing of veils protects the rights and freedoms of Muslim women who choose not to cover their heads. Many have also argued that wearing veils hinders integration of Muslim women into German society.

Critics, on the other hand, assert that the partial ban on veils violates international law. First, they argue that these laws restrict freedom of religion. Article 18 of the ICCPR gives a person the right to manifest her religion "in worship, observance, practice, and teaching." In General Comment 22(4), the UN Human Rights Committee explains that this freedom to manifest one's religion and beliefs "encompasses a broad range of acts," and "may not include only ceremonial acts, but also such customs as . . . the wearing of distinctive clothing or headcoverings . . ." The Human Rights Committee then warns in General Comment 28(13) that passing regulations which hinder women from wearing certain religious garments in public could violate freedoms guaranteed in the ICCPR if those regulations "are not in keeping with their religion or their right of self-expression."

Critics also point out that under Article 18(2) of the ICCPR, a person must not be subject to coercion in adopting the religion of her choice. Forcing women in Germany to choose between expressing their religious faith or keeping their jobs, argue critics, is a form of coercion.

Second, detractors say that the limited ban on veils unlawfully discriminates against Muslim women. They contend that, in practice and in application, the German laws seem to target only Muslim women wearing veils, but make exceptions for the wearing of Christian religious symbols. Both the ICCPR (in Article 26) and the 1981 Declaration (in Article 2) prohibit discrimination based solely on religion unless there is a compelling reason to do so such as protecting public safety. Critics note that when Germany passed restrictions on the wearing of religious garments, proponents usually did not cite compelling reason such as protecting public safety. Observers note that the ban on veils in Germany remains in effect.

***A proposal to ban the full veil in France*:** In 1905, France passed a law which established the separation of church and state under the principle of *laïcité*. It prohibits the state from establishing an official religion or endorsing any religion, among other requirements. In 2004, France passed a law which banned people from wearing the hijab and other religious attire (including large Christian crosses and Jewish skullcaps) in public schools, arguing that it was in accordance with the principles of laïcité. Still, under the law, people would be able to wear such garments outside of school.

Critics have argued that the 2004 law violated Article 9 of the European Convention which states that everyone has a right "to manifest his religion or belief, in worship, teaching, practice and observance." However, an investigative committee set up by then-President Jacques Chirac to examine the wearing of religious attire in public schools concluded otherwise. It stated that "the European Court in Strasbourg protects laïcité when it is a fundamental value of the State." The Commission then concluded that the European Court would be unlikely to rule against the 2004 law.

Another controversy concerning religion appeared just last year. During an address to Parliament in June 2009, French President Nicolas Sarkozy voiced concern over what he claimed was an increasing number of Muslim women in France wearing veils coving their faces, which he referred to as the burka. "The problem of the burka is not a religious problem," he said. "It is a problem of liberty and the dignity of women. It is a sign of servitude and degradation." (France is home to 5 million Muslims, the largest population in Western Europe.) But some French-Muslims questioned the accuracy of using the term "burka" in describing the veils worn by Muslim women in France.

"What they're talking about is the niqab, but I think choosing to use burka instead is not an accident," contended a Muslim scholar. "They chose a word that is associated with Afghanistan, and that spreads a negative, scary image." President Sarkozy then voiced support for an initiative, proposed by 60 French legislators, to create a parliamentary committee to study the full veil as well as methods to combat its spread.

In January 2010, the Parliamentary Commission to Study the Wearing of the Full Veil in France (or Veil Committee) recommended that the state pass a law banning the wearing of veils in all schools, hospitals, government offices, and on public transportation. (But not all commission members agreed that France should pass such a law.) According to reporting from the Library of Congress, the Commission concluded that ". . . the wearing of the full veil [i.e. the niqab] infringes upon the three principles that are included in the motto of the Republic: liberty, equality, and fraternity." For example, in the area of liberty, the Commission concluded that "the full veil is the symbol of subservience, the ambulatory expression of a denial of liberty that touches a specific category of the population: women."

The proposed ban would apply to all women and not just public servants. Women who did not remove their veils in public facilities would not be fined or imprisoned. Instead, the state

In recent months, several nations have passed domestic laws which seem to discriminate against and create hostility towards adherents of certain faiths. Switzerland, for instance, recently banned the construction of new prayer towers for mosques. France is debating whether it should ban women from wearing veils.

would deny them access to the social services they were seeking. For example, women wearing the niqab would not to be able to collect state benefits or take public transportation. The Commission also recommended that France should not issue residence documents or bestow French citizenship "to individuals who practice their religion in a way incompatible with the values of the Republic."

Supporters of the proposed ban say that it will not only uphold France's secular values, but also uphold gender equality by giving women the choice not to wear the veil. Some have claimed that the wearing of the niqab is a "gateway to radical Islam." Others cite security concerns, saying that public servants need to identify individuals in certain circumstance such as when they enter airport check points or pick up children from school. A recent opinion poll revealed that at least half of French people support the ban, which would affect the estimated 1,900 women who actually wear the niqab in France, according to a 2009 study carried out by the Interior Ministry. (It also found that no one in France wore the burka.)

But critics say that the ban would violate international law. Similar to arguments made in the case of Germany, they argue that such a ban would violate Article 18 of the ICCPR, which says that people have the right to manifest their religious beliefs. (Wearing distinctive religious garments would be one way to manifest these beliefs, argue critics.) The proposed ban in France could – under Article 26 – also violate prohibitions against discrimination on religious grounds because it specifically targets the niqab only while excluding other religious garments. Furthermore, critics believe that the ban violates Article 9 of the European Convention which says that everyone has a right "to manifest his religion or belief, in worship, teaching, practice and observance." (But others note that treaties such as the ICCPR and the European Convention allow authorities to restrict religious freedoms in the interests of public safety, for instance.)

In responding to officials who say that the proposed law will promote women's rights, Human Rights Watch says that prohibiting those who wish to wear the face veil in public would constitute the same violation of rights as those countries which force women to wear veils. "Muslim women should have the right to move around dressed as they choose, to make decisions about their lives and religion, whether we understand or support those choices or not," it said. Others note that the Catholic Church in France came out against a ban on full veils. A bishop said: "If we want Christian minorities in Muslim majority countries to enjoy all their rights, we should in our country respect the rights of all believers to practice their faith."

Analysts say that the French Parliament will decide whether to institute a veil ban after regional elections in March 2010.

***No new minarets in Switzerland*:** According to the Pew Forum, Switzerland has historically enjoyed low government restrictions on freedom of religion. For instance, Article 15 of the Federal Constitution of the Swiss Federation states that "the freedom of religion and conscience is guaranteed," and that "everyone has the right to choose freely their religion or their philosophical convictions, and to profess them alone or in community with others."

According to a 2000 census, Roman Catholics currently make up the largest religious denomination in Switzerland at over 40 percent. Protestant groups represent the second largest at 33 percent. Around 11 percent of the population identified themselves as having no religion while four to five percent (or approximately 340,000 people) are Muslims. Analysts say that, in 2009, there were around 200 mosques in Switzerland, and also 4 minarets, which are towers on the sides of mosques used to put out the Islamic call to prayer.

In November 2009, 57.7 percent of people voting in a referendum successfully approved a measure (put forward by the Swiss People's Party, a nationalist group) amending the Swiss Constitution to forbid the building of any new minarets, despite opposition from the Swiss government. Article 72 of the Swiss Federal Constitution now states that "the building of minarets is prohibited." The new law neither calls for the demolition of existing minarets nor does it prohibit the construction of new mosques. It also does not place any limits on the construction of other religious structures. According to the Swiss Broadcasting Corporation, "if you're a Sikh, Hindu, or Buddhist in Switzerland and want to build a temple, no problem; if you're a Muslim and want to put up a minaret, you'd better start praying."

Supporters of the ban claim that minarets are symbols of Islamic fundamentalism, which they say is unwelcome in Switzerland. Other supporters said that the ban would not violate freedom of religion because, in their views, the minaret is more than a religious symbol. "We've got nothing against prayer rooms or mosques for the Muslims," said a representative of the Swiss People's Party. "But a minaret is different. It's got nothing to do with religion; it's a symbol of political power."

Critics of the ban on new minarets say that it violates international law by infringing on the right to freedom of religion guaranteed in treaties such as the ICCPR. One such freedom is the right to manifest one's religion, which, they argue, includes the building of a minaret.

Others such as Hafid Ouardiri – a Swiss Muslim who filed a complaint at the European Court of Human Rights – argued that the ban on the construction of minarets violated several provisions of the European Convention. For example, Article 14 states that "the enjoyment of the rights and freedoms set forth in this Convention [such as the right to freedom of religion] shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. " By banning the construction of minarets only and not other religious structures, critics argue that the law discriminates solely on the basis of religion without any compelling justification. In addition, two lawsuits have been filed in federal court in Switzerland to challenge the ban's legality.

Navi Pillay, the U.N. High Commissioner for Human Rights, condemned the ban, calling it ". . . an undue restriction of the freedom to manifest one's religion" as well as ". . . clear discrimination against members of the Muslim community in Switzerland." Ali Treki, the President of the UN General Assembly, also expressed concern over the ban. Still, the ban remains in effect. Many observers worry that the Swiss referendum will embolden other political parties and even governments to begin their own initiatives to restrict freedom of religion and personal beliefs.

International Law News Roundup

COMPARATIVE LAW

A global sex offender registry?

Horrific stories of predators who sexually assault children appear all too often in news articles across the country. One case which made national headlines last year involved Phillip Garrido, a registered sex offender in California whom police accused of kidnapping then 11-year old Jaycee Dugard, holding her hostage for 18 years in his backyard, and fathering her two children. Many countries in recent years have undertaken more efforts to monitor the activities of convicted sex offenders. Just last year, Congress began considering a proposed law which some hope will prevent sex offenders from committing new abuses. But how effective are these efforts?

A proposed International Megan's Law would require a sex offender to notify the government of his intent to travel abroad at least 21 days before his departure date.

In March 2009, Congressman Chris Smith (R-NJ) – along with 14 co-sponsors – introduced a bill called "International Megan's Law" (H.R. 1623), which, if passed by Congress, will allow U.S. law enforcement authorities to identify and prevent child sex offenders in the United States from traveling abroad. At the end of April 2009, Congress referred the proposed bill to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law for hearings.

Many different countries have developed or are in the process of developing sex offender registries in an effort to warn communities about such individuals in their neighborhoods. For example, the sex offender registry in the United Kingdom is not open to the public, but does allow parents to ask for a check on individuals who have unsupervised access to their children. Other European countries, such as Austria and France, also have sex offender registries, though they are not open to the public.

In the United States, federal law controls the registration of sex offenders. Enacted by Congress in 1994, the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act (or Wetterling Act) requires all states to create and maintain sex offender registries using minimum standards set by the Federal government such as ensuring that registries are accurate, distributing registry information to law enforcement authorities, as well as actually registering those who have committed sex-based offenses. According to the National Center for Missing and Exploited Children, there are approximately 674,000 registered sex offenders across the United States.

But the Wetterling Act did not automatically require states to notify communities about the presence of sex offenders living in their neighborhoods. Whether to do so was left to the discretion of individual states. After a repeat child sex offender in New Jersey had raped and killed a seven-year-old neighbor named Megan Kanka, Congress in 1996 passed "Megan's Law," which amended the Wetterling Act by requiring states to release a sex offender's registration information to the public when it is necessary for safety reasons. Many states now have their sex offender registries available online. For example, the state of New York maintains a searchable registry which includes the name of a sex offender, his or her photo, a physical description, including identifying marks or scars, date of birth, and home address, among other information.

Observers note that there are enormous disparities among states on who must register as a sex offender. In most states, anyone found guilty of sex crimes such as rape, sexual assault, or incest must register as a sex offender. Men who have been caught visiting prostitutes must register in some states while other jurisdictions include the identities of teenagers who had engaged in consensual sex with other teenagers. In at least 13 states, people who are caught urinating in public must register as sex offenders.

There are also significant disparities among states in monitoring sex offenders. Some states require sex offenders to mail an annual postcard to authorities with their current address. In others such as Illinois, special monitors follow sex offenders who are at most risk of committing sex crimes again. And in 17 states, sex offenders must register for life.

Advocates of sex offender registries argue that these notification systems provide important information to the public and allow them to stay vigilant in the presence of known offenders. They also contend that making registries public will deter sex offenders from committing further crimes. On the other hand, opponents say that these registries may force sex offenders to live in rural areas "where crimes can go unnoticed." In addition, they argue that not everyone on the registry poses the same threat, and that grouping all offenders – including those who were caught urinating in public – into one registry seems like a disproportionate response. Moreover, some critics say there is no solid proof that the existence of registries actually discourages sex offenders from committing new crimes. In November 2009, for instance, police in Ohio arrested a registered sex offender who is accused of killing at least six people whose bodies were found in and around his residence.

Currently, there is no single national sex offender registry in the United States. Though Congress has called for the creation of a single national registry when it passed the Adam Walsh Child Protection and Safety Act of 2006, states have delayed its implementation by citing cost concerns and legal difficulties. As a result, Congress has extended the deadline for states to submit information on their registered sex offenders to July 2010. In the meantime, the U.S. Department of Justice maintains an online homepage where visitors can use a program which pulls information from individual state registries to locate sex offenders.

With more restrictions being placed on sex offenders in the United States and some European countries, recent media sto-

ries have reported that American sex offenders are traveling abroad as tourists to developing foreign countries such as Cambodia to prey on children. These stories are not isolated accounts. Experts estimate that 25 percent of all sex tourists worldwide are from the United States, and that the most popular sex tourism destinations for Americans are Cambodia, Costa Rica, and Thailand. In Costa Rica, 80 percent of all sex tourists are American, according to a report issued by Youth Advocate Program International.

Child sex tourists go overseas to commit sexual offenses because of perceived anonymity, say some experts. That is to say, because no one in a foreign country will likely know anything about a sex offender's criminal background, he will be able to carry out his illicit acts without drawing attention. Others are under the mistaken belief that their American citizenship gives them immunity from prosecution for breaking local laws. Many also believe that law enforcement personnel in less developed countries are corrupt or incompetent.

In order to combat American sex offenders engaging in predatory acts overseas, Congress in 2003 passed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (or PROTECT Act), which allows the United States to prosecute American citizens who had committed illicit sexual acts in other countries. It states that "any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both."

At the international level, there is no formal system in place for governments to exchange information on sexual predators who travel internationally. In some cases, foreign governments have contacted U.S. authorities to inform them about sex offenders who will visit the United States, though this has been done on an ad hoc basis, according to reporting in *TIME* magazine. "We need far better collaboration between countries to prevent sexual exploitation of children," according to Giorgio Berardi of ECPAT International, a network of organizations working to stop the sexual abuse of children. More frequently, though, local nongovernmental organizations in destination countries – such as Action Pour Les Enfants in Cambodia – have contacted officials in the United States to encourage the prosecution of U.S. child sex tourists under the PROTECT Act when they return to the United States.

There is also no international treaty which specifically addresses sex offender registries or which explicitly calls on nations to undertake measures to protect children from sex offenders. However, some believe that a long-standing international treaty called the *United Nations Convention on the Rights of the Child* strongly implies that nations should carry out measures to safeguard children from sexual predators. Specifically, Article 10 of the Optional Protocol to the Convention on the Rights of the Child says that "States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional, and bilateral arrangements for the prevention, detection, investigation, prosecution, and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography, and child sex tourism."

Congressman Smith invoked the child convention when he introduced International Megan's Law, which, in its current form, would require a sex offender to notify the government of his intent to travel abroad at least 21 days before the departure date. Failing to do so could result in fines and a prison sentence. The United States must also give authority to the Secretary of State to temporarily rescind the travel documents (such as passports) of these individuals at her discretion.

In addition, American authorities must encourage other countries to establish a sex offender travel notification system which will send out alerts when a sex offender intends to travel to the United States. Moreover, U.S. diplomatic missions in foreign countries would be required to establish and maintain registries of U.S. sex offenders who temporarily or permanently reside in each country.

However, International Megan's Law has several limitations, say analysts. For example, while International Megan's Law places more obligations on American law enforcement authorities, analysts say that it cannot force other countries to inform the United States when a sex offender from their jurisdiction intends to travel or has departed to the United States. It also does not protect foreign children from foreign sex offenders.

Others point out that the passage of International Megan's Law would neither create an actual global sex offender registry nor a new international treaty. Just as it has been difficult to create a single national sex offender registry in the United States, creating a global sex offender registry for hundreds of countries and territories would be difficult for similar reasons.

Furthermore, International Megan's Law does not list the circumstances under which the Secretary of State may rescind a U.S. sex offender's travel documents. (In fact, analysts say that the proposed bill contains many vague terms and doesn't provide more details concerning specific provisions.) Some legal analysts say that restricting the international travel rights of U.S. citizens, even if they are registered sex offenders, could raise constitutional objections.

While International Megan's Law could further curtail sexual offenses against children by American citizens, it will not provide a comprehensive system for protecting children from sexual predators at a global level.

EUROPEAN UNION LAW

Finally, a better, stronger, and faster union?

After years of delays and setbacks, the 27 member nations of the European Union (or EU) had finally ratified a contentious agreement – called the *Treaty of Lisbon* – in November 2009 which will allow the world's largest economic and political union to present itself to the world as a more agile and powerful entity in both internal and global affairs, say supporters. But others believe that such claims are overblown, arguing that the national and foreign interests of individual EU members will water down any future initiatives.

The Treaty of Lisbon will *not* replace the existing EU member nations with a single "United States of Europe" overseen by a monolithic government, and operating under a new set of laws

and regulations governing close to 500 million people (compared to 307 million in the United States) in an area extending from the peat bogs of Ireland to the black sand beaches of Greece.

Rather, the treaty will streamline the existing operations of the EU which, in the words of one commentator, had become increasingly "creaky and cumbersome," especially after it had admitted 12 new member states since 2004, each with its own political system, economic needs, and national priorities. With so many different and competing interests within the EU, many officials began to push for a more efficient decision-making process.

As its name implies, the EU is an economic and political union of independent and sovereign states bound together by a series of complex international treaties, many of which stretch back several decades. To increase the economic competitiveness of Europe and also to prevent future conflicts, these treaties created common institutions – such as the European Council (which is composed of the heads of EU member states, and sets the political agenda), the European Commission (which proposes and writes EU-wide legislation), and the European Parliament (whose members are elected by European citizens) – to manage *certain* economic and political areas of mutual concern such as trade, finance, environmental protection, and agricultural policy.

For instance, under EU rules, all member states had to implement domestic laws which eventually led to uniform tariff and market rules across Europe. (According to the Central Intelligence Agency, the EU in 2008 had a GDP of over $18 trillion compared with $14 trillion for the United States.) While EU nations cooperate in many areas of governance, each member still largely retains its sovereignty in areas such as security and defense.

But the EU needed to streamline its operations further so that its members could make decisions on more difficult issues where reaching a consensus would be highly unlikely. (Under past rules, the EU was unable to pass legislation in many different areas unless every single member nation had agreed to do so, say analysts.) Supporters of the Treaty of Lisbon – which came into force in December 2009, and is now legally binding on all EU member states – say that its provisions accomplished this goal:

- The treaty introduces a "double qualified majority voting" system whereby the EU will adopt proposed legislation – in 50 major policy areas (including terrorism, crime, immigration, and justice issues) – if it receives support from at least 55 percent of all EU member nations (15 out of 27 nations) representing a minimum of 65 percent of the EU's population. (But in areas such as tax, defense, and social security, a proposed measure must receive unanimous support.)
- To address the concerns of smaller EU states (who fear that larger members such as Britain, France, Germany, and Italy will be able to push through legislation by virtue of their larger populations and influence), the treaty phases in the new voting system from 2014 to 2017.
- Several EU nations, including Ireland and the United Kingdom, will be able to opt out of EU requirements concerning immigration, asylum, and justice. Poland will opt out of certain provisions concerning family issues in the *Charter of Fundamental Rights of the European Union,* which is comparable to a Bill of Rights for the EU, but whose text is not included in the Treaty of Lisbon itself. (One commentator said that the treaty is "riddled with opt-outs for countries skeptical of more EU integration.")
- Member nations will also have the right, under Article 15(b), "to group together to block EU laws they consider unnecessary or better decided at the national level," but only if such a group represents at least one-third of total EU membership. They will also have the right to secede from the EU under Article 49(a). Previous EU treaties did not specify how a member state would be able to leave the union, said one analyst.

The Treaty of Lisbon is actually a reincarnation of another reform treaty called the *Treaty establishing a Constitution for Europe.* But after the Constitution had failed to find broad support, the EU in December 2007 simply amended two existing treaties (the *Treaty on European Union* and the *Treaty establishing the European Community*), and referred to this completed work as the Treaty of Lisbon.

A recently ratified treaty will not replace the existing EU member nations with a single "United States of Europe" overseen by a monolithic government governing close to 500 million people.

The Treaty of Lisbon also made changes to the jurisdiction of the former "Court of Justice of the European Communities," which is now known as the "Court of Justice of the European Union" (or simply the Court of Justice). The Court of Justice (located in Luxembourg) will not replace individual courts in every EU member state. Instead, it will continue many of its original functions. For example, to reduce the likelihood that different national courts will give different interpretations of EU laws and regulations, they must ask the Court of Justice for a "preliminary ruling" on a particular issue. The Court of Justice will continue to review the legality of laws passed by EU institutions and also decide whether a country is in compliance with particular regulations, among other duties.

But unlike past practices, the Treaty of Lisbon will expand the jurisdiction of the Court of Justice by abolishing what experts have described as the "pillar system" where the EU divided different policy areas into one of three pillars, and then created specific rules on how different EU institutions can shape policy and implementation in those particular areas. The first pillar (called European Community or EC) contained issues including competition law, education, healthcare, and social policy, among many others. The second pillar dealt with "Common Foreign & Security Policy" while the third handled "Police & Judicial Cooperation in Criminal Matters."

Under the pillar system, the Court of Justice had limited jurisdiction on how it handled various issues. Its preliminary rulings concerning, for example, second pillar issues were not binding on EU member states. Also, only certain national courts (usually the

highest level courts) had the ability to ask the European Court for a preliminary ruling.

The Treaty of Lisbon abolishes this pillar system. Preliminary rulings in many different areas will now be legally binding on EU member states. Also, any national court or tribunal will be able to ask the Court of Justice for a preliminary ruling on many issues. Still, officials note that the Treaty of Lisbon will continue to limit the Court of Justice's jurisdiction in areas such as foreign and security policy. While many analysts say that this change will help to streamline decision-making in the EU, they note that the European Court of Justice will not have full jurisdiction until 2014.

In addition to streamlining EU operations, the Treaty of Lisbon created a new position called "President of the EU Council" (or simply EU President) whom many hope will speak on behalf of the EU in a single voice, and also take aggressive and high-profile stances on internal and even global affairs. (The EU previously had a rotating presidency where one *member government* had set the agenda for the organization. But its term lasted for six months only, which didn't provide enough time to deal substantively with important matters, say experts. On the other hand, the current EU President serves a term of 2-½ years.) But other nations pushed for a president who would work behind the scenes on internal EU matters in the role of, say, a referee.

After several weeks of informal negotiations, EU member governments in November 2009 unanimously chose the virtually unknown Herman Van Rompuy (the prime minister of Belgium) as the EU's first president. (This position is *not* chosen through a popular election.) The European media generally described Van Rompuy as a "compromise" candidate whose selection was "the least objectionable" to all EU member states. Many analysts say that the EU President had to "reflect a political, geographical, and ideological mix among large and small nations."

Critics who wanted a strong EU President had much harsher words, describing Van Rompuy as a "nobody." Others said that he reflected the EU's "lack of ambition, of a willingness to punch below its weight, and of a kind of lack of confidence." But observers pointed out that the Treaty of Lisbon already seems to limit the power of the EU President. Article 9(b)(6) lists vague duties such as chairing EU Council meetings and facilitating "cohesion and consensus within the European Council."

The EU member states also unanimously selected Baroness Catherine Ashton of Britain (who served as EU trade commissioner) to fill another newly-created position called the "High Representative for the Union in Foreign Affairs and Security Policy," which is informally known as the EU foreign minister. (The High Representative will not replace the various foreign ministries of individual EU states which will still conduct their foreign relations in areas which the Treaty of Lisbon does *not* address. Previously, the EU also had a High Representative for Common Foreign and Security Policy.)

Many are hoping that the new High Representative will take a much more forceful role in uniting the various foreign policy interests of the EU's individual states and present a single united front. Over the last decade, the EU member states had projected

an image of indecisiveness as they squabbled over important issues. One commentator pointed out that members had debated acrimoniously over whether and how to stop Serbian-backed paramilitaries from attacking separatists in Kosovo in 1998, participate in the U.S.-led invitation of Iraq in 2003, and whether to increase their current involvement in Afghanistan against the Taliban, among many other contentious issues. (Either the United States or NATO had eventually taken the lead in these situations.)

As in the case of Van Rompuy, many in Europe complained that the selection of Ashton (who is also not well known across Europe) was a result of compromises reached by EU member states. But given their diversity of viewpoints, it was unrealistic to believe that the position of High Representative would be filled by a person who would take unwavering positions on controversial issues, say analysts. In addition, several individual national leaders had actually pushed for a low-profile candidate, believing that they themselves should continue taking the lead during regional and international crises without interference from a High Representative, say observers.

Others note that the Treaty of Lisbon also seems to limit the duties and profile of the High Representative as it does for the EU President. Article 13(b) vaguely says that the High Representative will represent the EU in "matters relating to the common foreign and security policy," and will also "shall express the Union's position in international organizations and at international conferences." But because the High Representative will control the EU's foreign aid budget, analysts say that the position will have some clout.

IMMIGRATION LAW

DNA testing for UK asylum seekers?

Last year, the United Kingdom began a new pilot program using DNA testing to verify the nationality of foreigners seeking asylum. While supporters say that the use of DNA testing is not new in immigration cases, opponents questioned the reliability of such tests. Has this kind of testing played a significant role in the approval or denial of asylum applications? What does the test involve exactly? And what other concerns have critics voiced in their opposition to the DNA test?

According to the Office of the United Nations High Commissioner for Refugees, tens of thousands of people flee their nations every year to escape poverty, conflict, and even the effects of natural disasters. But many destination countries – for various economic and political reasons – usually prevent such people from settling permanently within their jurisdictions, and have even stopped them from coming ashore.

On the other hand, many nations regularly admit thousands of individuals who are fleeing persecution in their home countries. Such individuals are generally known as refugees under the 1951 *United Nations Convention Relating to the Status of Refugees* (or Refugee Convention), which defines that term as a person who has fled his home country and is unable to return because of persecution based on his race, religion, nationality, political opinion, or membership in a particular social group. To be admitted into a country as a refugee, a person must generally prove that his claims of persecution are "well-founded." However, the Refugee Convention defines neither "persecution" nor "well-founded." Legal observers say that the Refugee Convention merely serves as a foundation for the creation and administration of refugee and immigration law at the national level of a signatory country.

A person must generally apply for permission to enter another country as a refugee while he is still outside that country so that immigration authorities can assess and verify claims of persecution. But many people who claim persecution don't wait for prior authorization to enter a country and simply show up at its border station, airport, or coastal areas such as ports and beaches. To stop deportation proceedings against them, these individuals usually request "asylum," which then allows them to stay in the country temporarily. But as in the case of potential refugees, asylum seekers must prove that they had faced persecution.

Once a country grants asylum to a certain individual, he or she does not automatically become a citizen of that country, but rather begins a path to permanent residency and eventual citizenship. Still, the Refugee Convention stipulates that if, in later years, the source of persecution no longer exists, then a person should no longer be classified as a refugee.

In the case of the United Kingdom, asylum seekers must prove their claims of persecution to immigration authorities. They must also show that they are actually citizens or residents of the country they had fled. Officials may, for example, review the asylum seeker's identification documents such as passports, and also administer language tests. If the government ultimately decides to deny a person's request for asylum, he may (under British law) appeal the decision.

Experts say that many people have made and continue to make false claims about persecution and even their nationalities when seeking asylum. According to a report from British intelligence, significant numbers of asylum applicants lie specifically about their nationalities to support their asylum claims. In 2008, for instance, 25,930 individuals had applied for asylum in the UK. But immigration authorities approved the applications of 3,725 (or 19 percent of) asylum seekers.

Last year, the UK Border Agency – which is responsible for the implementation and administration of the nation's immigration laws – began to implement what it called the Human Provenance pilot project, which uses DNA testing specifically to verify an asylum seeker's claim of nationality. During the test, officials take soft tissue samples from the applicant (i.e., hair and fingernail clippings), and then "look for ratios of certain isotopes in [these samples] that could be matched to ratios in the environment where a person was born or grew up," according to *Science* magazine. The Border Agency said that requests for these soft tissue samples are not mandatory. "All samples will be provided voluntarily" by the asylum applicant, it said.

The Border Agency said that the project would focus initially on adult asylum applicants who have claimed Somali nationality, but whose language test results raise doubts over such claims. Currently, many Christian and ethnic minorities are

fleeing Somalia due to persecution, say analysts So by using DNA testing, scientists would presumably be able to confirm an applicant's Somali nationality by comparing isotopes from his hair and fingernail samples to those found in Somalia's environment. Authorities believe that many applicants who claim Somali nationality are actually from neighboring countries such as Kenya. They say that "fraudulent nationality swapping" is "rife throughout Africa." If the DNA pilot project is successful, officials say that they would use such testing to confirm other nationalities.

Using DNA testing to confirm the nationalities of asylum seekers, British officials will compare the isotopes found in soft tissue samples taken from applicants and match them with those found in their home nations.

British immigration authorities justified the Human Provenance pilot project by arguing that DNA testing in the immigration process is not new. Countries such as the United States, they point out, use DNA fingerprinting to determine whether family members applying for asylum are biologically related, for instance. They also point out that British authorities had used DNA testing in 2001 to identify the origins of a murder victim whose torso was found in the Thames River. Scientists had extracted isotopes from the victim's bones and then matched them to isotope samples found in a small area in West Africa.

Critics, however, have argued that there are major scientific differences between using bone samples and soft tissue samples in identifying the nationality of a person. Because bones and teeth form slowly and more deeply incorporate unique elements found in a person's surroundings, a DNA analysis of these particular samples will allow scientists to identify more accurately the geographic location where a person had spent a significant amount of time, and, hence, his probable nationality, according to *Science.* (Yet others point out that experts have still not assessed the accuracy of the bone analysis technique undertaken in the Thames River torso case by submitting the findings to a peer-reviewed publication, for example.)

On the other hand, scientists say that soft tissues such as hair and fingernails (which are used in the Human Provenance project) constantly replace themselves, and that they also quickly absorb elements from a person's immediate surroundings. As a result, the elements found in these soft tissues would only reflect, say, the past year of a person's life and immediate environmental surroundings and not where he may have spent a significant amount of time such as a country where he grew up and from which he had recently fled because of persecution.

As an illustration, while a DNA bone analysis of an actual Somali citizen – who grew up and resided in that country for most of his life – will likely show that he truly was a resident of Somalia, a hair and fingernail analysis could instead reflect the year he had spent in neighboring Kenya, the country to which he fled to escape persecution in Somalia. But the Human Provenance Project will mistakenly say that he is a national of Kenya.

Another critic of the Human Provenance pilot project, Sir Alec Jeffreys (who people say is the pioneer of human DNA fingerprinting), also disputes the use of DNA in determining a person's nationality. "The Borders Agency is clearly making huge and unwarranted assumptions about population structure in Africa . . . assigning a person to a population does not establish nationality – [because] people move!" he said. That is to say, while a person may have grown up in a certain country for most of his life (and his hard tissues may contain isotopes from his native surroundings), he could have recently moved to another country and changed his citizenship, which would not be reflected in any DNA testing.

Others question the supposedly voluntary nature of obtaining DNA samples from asylum applicants. They worry that immigration authorities will interpret an applicant's refusal to provide soft tissue samples as an attempt to conceal information. Some have pointed out that the Human Provenance pilot project didn't seem to have any provision which would allow asylum seekers to challenge the results of the test or appeal to higher authorities. Many also say that the project did not indicate who exactly would carry out the DNA testing. They worry that the governments would use private laboratories without vetting their reliability first.

The UK Border Agency stated in an announcement that it would begin DNA testing on September 14, 2009, and would run the program for 10 months. However, the agency stopped carrying out these tests on October 12, 2009. It did not provide a reason for doing so or make any comments on whether it would resume testing in the future, say British news sources. Some speculate that the strong criticism may have played a role. Observers also aren't sure if the government had actually completed DNA testing of applicants and whether such testing had led to the approval or denial of specific asylum claims.

IMMIGRATION LAW

Can victims of domestic violence seek asylum?

Every year, tens of thousands of foreigners arrive in the United States and apply for asylum, saying that their governments or others had persecuted them in their home countries. Many claim, for instance, that their governments had specifically targeted them because of their race or nationality. Others face persecution for belonging to a particular social group. Legal analysts say that the United States is currently in the process of finalizing regulations which could allow people to seek asylum on the basis of membership in a newly-recognized social group – victims of domestic violence.

In recent years, two asylum cases where the applicants are victims of domestic violence have attracted considerable attention in immigration law circles. In the case of *Matter of R.A.,* a Guatemalan woman, Rody Alvarado, suffered abuse at the hands of her husband whom she married when she was 16 years old. She fled to the United States in 1995 and claimed asylum by arguing that she was part of a persecuted social group – women who regularly

experienced harsh domestic violence. In the other case, *Matter of L.R.*, a Mexican woman who had been severely abused by her common-law husband since she was a teenager fled to the United States in 2004, and also filed for asylum on the basis of being a woman who faced domestic violence.

A foreigner who says that she is fleeing persecution may enter the United States as a refugee. Under the U.S. Immigration and Nationality Act (or INA), refugees are individuals who are unwilling or unable to return to their home countries because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. A person who applies for refugee status usually does so while she is outside of the United States. After U.S. authorities verify claims of persecution, they give the applicant authorization to enter and resettle in the United States. Contrary to popular belief, refugees do not include people who have left their home countries primarily to escape natural disasters, for instance.

On the other hand, there are thousands of individuals who don't have any prior authorization to enter the United States, but have still somehow managed to arrive at a U.S. port, airport, border station, and even beaches and other coastal areas – all in an effort to escape persecution. Immigration officials say that unless a person who arrives in the United States has a legal basis to remain in the country (such as having a proper visa), the government may begin deportation proceedings to remove him from the country. But that individual can stop this process by applying for "asylum," which the U.S. Bureau of Citizenship and Immigration Services defines as "a form of protection from removal to a country of feared persecution that allows an eligible refugee to remain in the United States and eventually to become a lawful permanent resident."

These asylum-seekers must establish that they are refugees as defined under the INA who genuinely faced persecution in their home countries. In addition, they must meet other requirements. For example, under U.S. asylum law (which is found in the INA, and also in Title 8, § 208 of the Code of Federal Regulations), asylum-seekers – who may come from any country – must apply for asylum within one year of their entry into the United States. Also, applicants who had persecuted others, engaged in serious crimes, or have "firmly resettled in another country before reaching the United States," among other factors, could be denied asylum.

The 1951 *United Nations Convention Relating to the Status of Refugees,* which was created specifically to protect European refugees after World War II, serves as the legal foundation for American asylum law. The Convention's 1967 Protocol expanded its scope to protect refugees *worldwide*. The United States joined the Protocol in 1968 and implemented its provisions by passing the Refugee Act of 1980. In 2008, almost 50,000 people sought asylum in the United States, which, in turn, granted asylum to 46 percent of all applicants. According to the Office of the United Nations High Commissioner for Refugees (or UNHCR), the United States was the main destination for the world's refugees in 2009.

Analysts say that while many people legitimately apply for asylum, others don't. There are, for example, people who apply for asylum not because of persecution, but because they want to live in the United States and want to avoid a lengthy, rigorous, and uncertain immigration process to enter the country.

Persecution based on one's political opinion is the most common basis for seeking asylum. But an asylum seeker must do more than say that he was swept up in political unrest in his home country, say experts. Instead, the asylum seeker must show, for example, that the government knew he specifically disagreed with it politically. "Holding political opinions different from those of the Government is not in itself a ground for claiming refugee status," according to UNHCR. Holding those opinions must "have come to the notice of the authorities or are attributed by them to the applicant."

Many people also file for asylum on claims of religious persecution. But, as in the case of political persecution, a person must show that persecutors had targeted him specifically. Others seek asylum on the basis of persecution based on race or nationality, though such claims are not common, say legal analysts. In order be granted asylum due to racial or national persecution, the asylum-seeker has the difficult task of proving that persecutors had specifically targeted him, or that the government engaged in this persecution, encouraged it, or was unwilling to provide protection from it.

People also seek asylum on the basis of being part of a particular social group which faced persecution. In the 1985 case *Matter of Acosta*, the Board of Immigration Appeals (or BIA) defined social group as people who share a "common, immutable characteristic." It could include characteristics which are an innate part of their existence (such as gender, sex, and color), and which a group "either cannot change or should not be required to change because it is fundamental to their individual identities or consciences," said the BIA. Members of a social group may also have common experiences, including military service or land ownership. In 2007, the BIA added another criterion, saying that a social group must be "socially visible." For example, it must be "readily identifiable in society," and can be "defined with sufficient particularity to delimit its membership."

In the case *Matter of Kasinga*, for example, the BIA held that the asylum applicant had a well-founded fear of persecution based on "her membership in a particular social group consisting of young women of the Tchamba-Kunsuntu tribe in Togo who have not had [female genital mutilation] as practiced by that tribe, and who oppose the practice." In *Matter of H-*, the BIA determined that members of the Marehan subclan of Somalia who shared ties of kinship and linguistic commonalities constituted a "particular social group" facing persecution.

Even with such criteria, determining what constitutes a social group can be very difficult. In fact, the BIA clarified that "the particular kind of group characteristic that will qualify [for asylum] remains to be determined on a case-by-case basis." (Even the UNHCR said that "mere membership in a particular social group will not normally be enough to substantiate a claim to refugee status.") As a result, analysts note that seeking asylum on account of membership in a particular group is "the most litigated basis for asylum" in the United States.

In recent years, human rights advocates – using the two previ-

ously mentioned cases involving Latin American women – have pushed immigration authorities to recognize women who are victims of domestic abuse as belonging to a particular social group facing persecution for asylum purposes.

In the first case, Rody Alvarado, at the age of 16, married her husband. When she became pregnant, Alvarado said that her husband tried to stop the pregnancy by beating her, kicking her, and dislocating her jaw.

She also alleged that her husband continued the abuse for over a decade by breaking mirrors using her head and dragging her down the street by her hair, among other violent acts. She fled to the United States in 1995, and, in the following year, an immigration court judge granted her asylum.

While Alvarado's asylum filings are confidential, legal observers assume that she filed for asylum by claiming that she belonged to a social group facing persecution, specifically "married women in Guatemala who are unable to leave the relationship," according to the Center for Gender and Refugee Studies at UC Hastings College of the Law. But the federal government appealed the asylum decision.

In 1999, the BIA overturned the decision of the immigration judge and denied Alvarado's asylum claim. Commentators say that because immigration filings and decisions are largely confidential, they weren't exactly sure of the rationale behind BIA's decision. Alvarado and her lawyer appealed the BIA's decision. Observers say that her case for asylum launched a debate on whether women who suffered domestic abuse belong to a "particular social group" for asylum law purposes.

To obtain asylum in the United States, victims of domestic violence would have to show that abusers had treated them as property, and also demonstrate that abuse is widely tolerated in their home countries.

Advocates on behalf of Ms. Alvarado (such as the Hastings Center) said that her social group had immutable characteristics and also "fulfilled the new social visibility and particularity requirements" outlined by BIA in previous years. They noted that over 3,800 women and girls had been killed in Guatemala since 2000, and that over 27,000 women had been sexually harassed in 2007. Critics also noted that the government and its various institutions did not stop these acts of "femicide" because society did not view them as unusual. Until recently, that nation did not even have any laws which prohibited sexual harassment. And only in 2008 did the Congress of Guatemala pass a law which punished femicide with long prison sentences.

In early 2001, then-Attorney General Janet Reno overturned the BIA's decision, but did not grant Alvarado asylum. The Department of Homeland Security (or DHS) in 2004 began to argue in favor of asylum for Alvarado, and, in a 2004 brief, "conceded that Ms. Alvarado had established all the necessary elements for asylum and argued that she qualified for protection as a member of a particular social group." In 2008, then-Attorney

General Michael Mukasey sent her case back to immigration court, encouraging the issuance of "a precedent decision establishing a uniform standard nationwide" for victims of domestic violence in asylum applications. The U.S. Department of Justice Executive Office for Immigration Review (EOIR) in October 2009 stated that Alvarado was eligible for asylum, simply stating that Alvarado "is eligible for asylum and merits a grant of asylum as a matter of discretion."

An immigration judge in December 2009 granted asylum to Alvarado. In his decision, the judge stated "inasmuch as there is no binding authority on the legal issues raised in this case, I conclude that I can conscientiously accept what is essentially the agreement of the parties [to grant asylum]." But the decision did not provide any further details on how the government decides to grant asylum in cases of domestic violence.

In the more recent case, a Mexican woman known only as L.R. fled to the United States in 2004 and filed for asylum, mostly likely on the basis of membership in a persecuted social group consisting of "Mexican women in an abusive relationship who are unable to leave," according to legal analysts. L.R. claimed that her common-law husband had abused her by frequently putting a gun or machete to her head, and also forced her to have sex with him. After she became pregnant, the husband tried to kill L.R. by pouring kerosene on and then setting her bed ablaze while she was sleeping on it.

In 2006, an immigration judge denied her asylum claim, presumably because she failed to demonstrate that she was a member of a persecuted social group within the meaning of criteria set by the INA. (As in the case of asylum claims, the judge's decision was not made public). L.R. and her lawyers appealed the denial.

In an April 2009 supplemental brief, DHS proposed a set of criteria which would allow victims of domestic violence to seek asylum in the United States. In addition to satisfying existing criteria for asylum claims, abused women would have to show that their abusers had treated them as inferior persons, akin to property. They must also demonstrate that domestic abuse was widely tolerated in their home countries, and that it was not possible for them to obtain protection from local institutions or by moving to other locations within their countries. DHS then recommended that L.R.'s case be sent back to immigration courts for further review, which is ongoing today.

Legal analysts are not sure why DHS had, at that time, proposed its additional criteria. For instance, there had been no new or substantial development in immigration or international law which would have compelled DHS to propose such criteria, they note. Political analysts speculate that the new Obama administration was simply more sympathetic to the plight of foreign women facing severe domestic abuse. The previous Bush administration had argued, as recently as 2008, that "battered women could not meet the standards of American asylum law," according to *The New York Times.*

In the meantime, a DHS spokesman said that the agency will "continue to view domestic violence as a possible basis for asylum," and is currently in the process of writing regulations to assess such claims.

INTERNATIONAL ENVIRONMENTAL LAW

A new approach in tackling illegal fishing

The United Nations approved the text of a new treaty which supporters say will deter "illegal, unreported, and unregulated" (or IUU) fishing by closing ports to ships engaged in these illegal activities and preventing them from selling their catches on world markets. While a UN spokesperson described the approval as a "milestone achievement" which will benefit developing countries and also help sustain fisheries, observers worry that perceived shortcomings could undermine the treaty's effectiveness.

According to the UN Food and Agriculture Organization (or FAO), the world relies heavily on fishing. Over one billion people depend on fish and fish products as their main sources of protein, says conservation group Oceana. Fishing also directly employs 38 million fishermen around the world – who in 2000 caught 86 million tons of fish – and an additional 200 million people who work in some industry related to fishing. Analysts estimate that global fishing revenues exceed $100 billion every year. China currently accounts for one-third of all catches of fish, more than any other country in the world.

Many experts say that IUU fishing is a widespread and long-standing problem. For example, ships engaged in illegal fishing "catch protected and endangered species of fish, use outlawed types of fishing gear, and disregard catch quotas," all of which violate national and international regulations and threaten the long-term sustainability of fish stocks, says the FAO. UK Fisheries Minister Bred Bradshaw said that illegal fishing is ". . . driven by sophisticated criminal gangs who don't care what or who they damage in the pursuit of easy cash."

Vessels engaged in unreported fishing don't give authorities an accurate count of fish they had caught. And unregulated fishing involves ships which don't fly any flags and whose crews disregard fishing regulations. (Under international law, seafaring vessels must generally register and fly the flag of a certain state. They must also obey the laws of that state such as those which regulate fishing activities, says the FAO.) Because these ships are flagless, they "often escape prosecution for their illegal acts," said the Western and Central Pacific Fisheries Commission. Unregulated fishing also involves ships which fly flags of nations which don't adhere to global fishing agreements and conservation measures. Such flags are generally known as "flags of convenience." Flagless ships and those flying flags of convenience gain an unfair advantage because they are able to catch more fish than vessels which fly the flags of nations that regularly enforce domestic and international fishing regulations, say officials.

When authorities apprehend IUU vessels operating in their coastal waters, they often impose fines and bonds which are too low to act as a deterrent, say conservationists. In addition, efforts to blacklist IUU vessels have not been successful. According to a study by the Pew Environmental Group carried out from 2004 to 2009, regional fishing authorities had a black list of 176 IUU vessels, but only 55 appeared on port records. Others note that many governments don't regularly exchange information on blacklisted vessels with other nations.

Experts say that IUU fishing disproportionately affects developing nations, many of which rely on fishing. IUU vessels catch anywhere between 20 to 30 percent of all fish in the world, say the FAO and various environmental groups. Most of these vessels fly flags of convenience, which number around 1,300 vessels today. As these vessels catch more and more fish, they leave less fish for legitimate fishermen who, in turn, see a decline in their incomes. One study found that legitimate fishermen around the world lose around $9 billion a year in income to IUU fishing. Fishermen in sub-Saharan Africa (one of the world's poorest areas) lose about $1 billion a year, according to non-profit group Stop Illegal Fishing. Governments also lose revenues because IUU fishermen usually don't pay taxes, licensing fees, and landing fees. Some scholars estimate that total losses from IUU fish range from $10 to $23.5 billion a year.

IUU fishing also hurts the environment. According to the FAO, IUU vessels are overfishing about 19 percent of major commercial fish stocks, which can, in turn, lead to damage in sensitive ecosystems. Experts note that IUU vessels are now catching half of all blue fin tuna, and that, as a result of IUU fishing, particular species of fish could be listed as endangered in the future. And if IUU fishing depletes more fish stocks, it could mean less food for many countries around the world.

For the first time, signatory nations of a new treaty must carry out minimum levels of inspections of fishing vessels entering their ports, and prevent them from unloading and selling illegal catches of fish.

Nations generally regulate their own fishing industries. But because laws differ from one country to the next, IUU vessels have navigated to jurisdictions with weaker standards and lax enforcement.

Still, over the past several decades, the world community has tried to address IUU fishing. For example, the 1982 *Convention on the Law of the Sea* attempted to address a wide variety of issues concerning the use of the world's oceans. Although the Convention addressed the use and sustainability of natural resources, it did not specifically address IUU fishing. (It wasn't until October 1997 when experts created the term "IUU" during a meeting of the Commission for the Conservation of Antarctic Marine Living Resources.)

Other agreements include the FAO's *Code of Conduct for Responsible Fisheries* in 1995 (a voluntary set of best practices for the development, management, and operation of fisheries around the world), the UN *Fish Stocks Agreement* of 1995 (which concentrated on conservation and management of certain fish stocks), the FAO *International Plan of Action for the Management of Fishing Capacity* (which sets out voluntary measures to monitor and improve fishing capacity), and the 2003 FAO *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (under which a state must ensure that vessels flying its flag do not engage in activities which could threaten international conservation measures, and is also required to maintain records of vessels that are allowed to fly its flag, among many other duties).

But analysts have questioned the effectiveness of these agreements. They note that most are voluntary, address only individual components of IUU fishing, and don't specifically require that ports prevent IUU vessels from unloading their catches and selling them to various markets.

To address these shortcomings, the FAO in November 2009 approved the text of a legally-binding treaty – called the *Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing* – which, for the first time, specifically targets IUU fishing. (Over 90 countries completed negotiations for the text in September 2009, and it will become legally-binding once it is ratified by 25 states.)

Under the agreement, signatory nations must carry out minimum levels of inspections of fishing vessels entering their ports, and prevent them from unloading and selling their catches if authorities believe that these vessels had engaged in IUU fishing. By preventing these vessels from selling their illegal catches quickly, supporters hope that the agreement will discourage IUU fishing. "This treaty represents a real, palpable advance in the ongoing effort to stamp [out IUU fishing]," said Ichiro Nomura of the FAO. Specifically, under the agreement, nations must:

- Inform fishing vessels to request advance permission to land in their ports, and also transmit information on their activities and catches ahead of time;
- Carry out inspections of these vessels – under a set standard devised by the agreement – once they arrive at port, which include reviewing ship records, surveying fishing gear, and examining catches;
- Deny entry of vessels which have engaged in IUU fishing, and send information on these vessels to other ports using newly-created information networks; and
- Ensure that their ports have the resources and equipment to conduct the inspections, and also assist developing nations (who may have fewer resources) to meet these obligations.

Some observers are already questioning whether the treaty will curb IUU fishing. For example, they note that the effectiveness of any international treaty depends on the willingness of its signatory nations to carry out their obligations. "The treaty's effectiveness relies on broad ratification, successful implementation, and the willingness of nations to share enforcement information," said Stefano Flothmann, head of the Ocean Governance Reform Program at the Pew Environmental Group, a Washington-based think tank. Analysts hope that the provision which calls on nations to assist developing countries carry out their obligations will make success more likely.

Others point out that the agreement does not address IUU vessels flying flags of convenience. (Again, most IUU vessels fly these flags.) The term itself does not appear in the treaty text at all. The agreement also does not require countries to apply the new inspection procedures to their own vessels, although analysts say they are free to do so.

Progress at Copenhagen climate change conference?

After becoming mired in contentious discussions, delegates to a UN meeting in Copenhagen released a non-binding statement in December 2009 on how nations should address climate change after the expiration of the *Kyoto Protocol.* While some developing countries called for voluntary reductions in greenhouse gas emissions along with binding aid pledges to poorer nations, developed nations demanded that everyone adhere to specific and verifiable emission targets. What measures have the world community undertaken to address climate change? How will nations now address that problem under the accord reached at Copenhagen?

Analysts say that there seems to be a scientific and public consensus that emission of gases and pollutants – such as carbon dioxide and methane – from human activity has been largely responsible for changes in the world's climate. These gases, they say, trap heat in the atmosphere, which, in turn, causes temperatures to rise around the world in a so-called "greenhouse effect." Without a sustained and coordinated international effort to reduce the emissions of these gases, temperatures could further rise in the next decade and lead to catastrophic natural disasters such as flooding caused by rising ocean levels, stronger hurricanes, and expanding deserts, say experts.

In February 2007, the Intergovernmental Panel on Climate Change (or IPCC) – which is an international network of hundreds of climate scientists operating under the aegis of the United Nations – released a 3,000 page assessment concluding (with 90 percent certainty) that human activity has been the main cause of global warming since 1950.

Skeptics, on the other hand, argue that there is no conclusive proof that emissions from cars and factories, among other man-made sources, are the main contributors to climate change, and that, even if these claims were true, its consequences have been exaggerated by environmentalists. They note, for instance, that the 2007 IPCC assessment had backtracked on many previous – and dire – claims, which led the UN Secretary-General in March 2010 to appoint independent scientists to review the report. Others point out that, in December 2009, computer hackers had gained access to and released hundreds of e-mail messages from a major research university which seemed to reveal efforts by climate scientists to prevent the publication and dissemination of information contrary to claims of global warming. Still others believe that global temperatures are rising naturally, and that, therefore, there is no need to regulate emissions.

Efforts to control the effects of global warming culminated in an international treaty called the *Kyoto Protocol* (or Protocol) in 1997 whose main purpose is to *stabilize* the concentration of emissions already in the atmosphere by requiring States parties to reduce total emissions of industrial gases (between the years 2008 and 2012) to five percent below 1990 levels through a variety of measures.

They include burning less fossil fuel, using more fuel-efficient technologies, promoting alternative energy sources, planting more trees and forests (which absorb carbon dioxide), and using market-based approaches such as carbon trading whereby governments sell to various industries limited numbers of permits which "cap" (or set limits on) their emissions during a certain year. If a particular company wanted to exceed that limit, it must buy unused credits from other companies through a carbon exchange, for instance. Experts note that the legally binding target applies only to the 39 industrialized nations which had ratified the Protocol, and are set according to the amount of gases emitted by a certain nation. (So countries producing large quantities of emissions have to reduce them by greater amounts.)

On the other hand, the Protocol does not require any of its 119 developing countries (including Brazil, India, and China, which now emits more greenhouse gases than any other country in the world) to reduce their emissions. During negotiations, developing countries had argued that, historically, they had released much lower emissions than their industrialized counterparts. These nations also worried that lowering their emissions would hurt their economic development.

Recently, many industrialized nations announced their plans to reduce emissions under the Protocol. In December 2008, the European Union passed a package of energy and climate measures called the "20-20-20 targets" where its member nations would reduce their greenhouse gas emissions by 20 percent from 1990 levels, reduce its energy use by 20 percent, and increase the use of renewable energy sources by 20 percent – all by the year 2020. In September 2009, Japan pledged to cut the emission of greenhouse gases by 25 percent by 2020 through a variety of domestic initiatives such as the creation of carbon trading system and by using renewable energy sources, among other measures.

The United States – which is now the second largest emitter of greenhouse gases – did sign the Protocol, but did not ratify it. The Bush administration had cited the continuing debate on whether human activity was changing the planet's climate. It also did not want to give up its competitive advantage to developing countries, none of whom had to reduce their own emissions. But under the Obama administration, the United States announced several initiatives independent of the Protocol to reduce greenhouse gas emissions "by about 17 percent to 20 percent below 2005 levels by 2020."

The House of Representatives, for example, in June 2009 passed legislation which would cut greenhouse gas emissions through a variety of measures, including the use of carbon trading and more efficient energy use. (Other lawmakers unsuccessfully demanded greater funding for nuclear power and oil and gas exploration.) But the Senate currently does not have any plans to bring up its own emissions bill in the near future, and efforts to address climate change in that legislative body – which, under the U.S. Constitution, approves international treaties with a two-thirds vote – remain at a standstill. Even today, Congress continues to debate how and to what extent the nation should reduce its emissions.

In addition, the Environmental Protection Agency (or EPA) announced in September 2009 that it would issue new regulations requiring companies producing more than 25,000 tons of carbon a year to report their emissions. That agency also announced in October 2009 that it would begin the process of creating new rules for regulating the emission of greenhouse

gases from new motor vehicles. (In April 2007, the United States Supreme Court in a 5-4 ruling decided that the EPA has the legal authority under the Clean Air Act to regulate the emission of greenhouse gases such as carbon dioxide emitted by new motor vehicles.) But without more concrete progress in the United States, other nations have refused to make their own binding commitments to reduce emissions.

Developing nations, after facing increased public pressure to address climate change, also recently announced several voluntary initiatives. (The U.S. negotiator for climate change, Todd Stern, claimed that developing countries would be responsible for two-thirds of global emissions by 2030.) China, for instance, said that it would try to reduce its emissions by 40 percent below 2005 levels by 2020, India proposed reductions by 25 percent, and Brazil offered cuts up to 39 percent by reducing the deforestation of the Amazon rain forest.

While the Copenhagen climate conference did not require nations to commit to binding emission reduction targets, it does call on them to provide $30 billion to help poorer nations adapt to the effects of climate change.

Despite all of these efforts, several factors have undermined the effectiveness of the Protocol, say experts. They note, for example, that the signers of the Protocol (which expires in 2012) don't have sufficient time to make meaningful reductions in their emissions. Although negotiations for the Protocol concluded in 1997, it came into force only in 2005 because not enough nations had ratified that agreement before that time. Observers also note that many current signatories are failing to meet their reduction targets.

In December 2009, delegates from 193 nations attended a conference in Copenhagen (held under the auspices of the United Nations Framework Convention on Climate Change) where they hoped to set a specific deadline on reaching a new climate agreement, and also make some progress in bridging differences between developed and developing nations in addressing various aspects of climate change. (These differences were so wide that many nations had concluded months ahead of time that it would be impossible to craft a new climate agreement by the end of the conference, according to press reports.)

Delegates debated, for instance, whether nations would meet binding emission targets. While industrialized countries called on *all* nations – and not just developed ones – to set specific and verifiable targets in reducing greenhouse gas emissions, some developing countries – including Brazil, China, and India – continued to oppose hard targets, especially since the United States Congress had not yet passed any comprehensive climate change legislation. Instead, they continued to call for voluntary emission cuts. But other developing countries called on all countries to make binding and substantial reductions.

Officials also debated how and to what extent industrialized nations should help their poorer counterparts adapt to the consequences of climate change. (Experts believe that global warming will increase sea levels, and lead to the flooding of island nations and coastal states. They also believe that other parts of the world will face heat waves and expanding deserts.) Developing countries argued that industrialized nations must provide them with tens of billions of dollars every year to move population areas to more secure ground, strengthen coastal barriers to contain rising waters, and expand electrical grids in response to possible heat waves, among other measures. They must also provide greater access and financing to cleaner – but more expensive – energy technology which produces less emissions. (Analysts point out that developing countries largely depend on cheap fossil fuels, which produce the most emissions, for their energy needs.)

The conference "came to a somewhat murky end," said one analyst, when delegates issued a "Copenhagen Accord," a non-binding political *statement* on how nations should address climate change in the near future, but which has "no legal force, is vague on crucial details, and will require further rounds of diplomatic bargaining," in the words of another observer. Specifically, the accord:

- ***Does not call for specific cuts in emissions*:** While the accord does call for "deep cuts" in emissions "so as to hold the increase in global temperatures below 2 degrees Celsius," it does not require nations to commit to new and binding targets. Rather, they must submit to the United Nations (by January 31, 2010) their previously-stated plans to reduce emissions by 2020 – all of which, under the accord, will be subject to verification "in accordance with existing and any further guidelines." One analyst said that "it [would be] the first time that major developing countries . . . [would] put on paper their plans for slowing production of carbon dioxide . . ."
- ***Broadly calls for funding for developing nations to address climate change*:** Developed countries, under the accord, should provide developing countries with "new and additional resources" of up to $30 billion, from 2010 to 2012, to help them adapt to the effects of climate change and also to undertake measures to reduce their own emissions. (These "resources" could include a mix of investments, technology transfers, and direct monetary contributions.) Developed countries should also set a goal of increasing this funding to $100 billion a year by 2020, which, according to the accord, will come from "a wide variety of sources, public and private, bilateral and multilateral, including alternative sources of finance. But observers note that these monetary targets are simply goals and are not legally binding.
  - Officials are also debating the exact ways in which developed countries will provide funding (such as through multilateral institutions like the World Bank), and also on the extent to which developing countries will monitor the use of these funds. They are hoping that a newly created UN body called the Advisory Group on Climate Change Financing will, by December 2010, devise a plan to resolve these issues.
  - Still, the EU announced that it would provide developing nations with $10.6 billion over the next three years while the United States pledged to raise $100 billion, though many analysts question whether these funds are from "existing aid commitments" or whether they represent additional funding beyond those commitments.
- ***Does not commit nations to a new climate agreement***: It also does not call on nations to continue efforts to negotiate

The 2010 Otto L. Walter Lecture

April 7, 2010

The World Trade Organization After the Global Financial Crisis

Merit E. Janow
Former member, WTO Appellate Body; and Professor, School of International and Public Affairs, Columbia University

As the World Trade Organization tries to push forward its latest round of global trade negotiations, it faces many challenges – from a world economy battered by a financial crisis, to a public wary of efforts to reduce trade barriers, to policymakers who question the effectiveness of the WTO and its system for settling trade disputes among member governments. How have nations responded to the recent financial crisis, and what are its implications for the world trading framework created by the WTO? What key legal challenges do the WTO and its dispute settlement system face in the years to come?

Prof. Janow of Columbia University – who served as the first woman judge ever on the WTO's Appellate Body, which is the most powerful global court of final appeal in international trade disputes – will discuss these and other questions.

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a new climate agreement under a specific deadline. Instead, nations are supposed to assess, by 2015, whether they have reached the goals set under the accord.

- ***Acknowledges the role of halting deforestation in reducing emissions***: Unlike the Protocol, the accord explicitly recognizes "the crucial role of reducing emission from deforestation and forest degradation." Although the accord says that nations should provide "positive incentives" to nations which reduce deforestation activities, it does not say explicitly whether countries undertaking such activities will receive actual credits counting towards their emission targets.

While a few environmental groups said that the Copenhagen Accord (which the delegates did not formally adopt) represented a few small steps towards a new climate agreement, many developing nations had expressed disappointment with the slow pace of progress, and worry that the effects of global warming could quickly outpace efforts to contain them. They argue that developed countries must make drastic cuts in their emissions, provide much more funding to adapt to climate change, and agree to limit the rise in global temperatures to 3.6 degrees Fahrenheit.

The disappointing results of the UN-run Copenhagen Conference had also set off speculation that the largest emitters of greenhouse gases will rely less on the United Nations to address climate change. Various officials had described the conference as a "great failure," "badly run and organized," "at best flawed and at worst chaotic," and beset by so much political posturing by blocs of smaller nations that reaching consensus among all 193 nations for an agreement had become, in the words of one observer, "unworkable."

Instead, some experts believe that the most influential nations will meet outside of UN auspices to negotiate a climate agreement. They point out, for instance, that the United States, Brazil, China, India, and South Africa had largely crafted the Copenhagen Accord. "Never again should we let a global deal to move towards a greener future be held ransom by only a handful of nations," said Prime Minister Gordon Brown of the United Kingdom. In March 2010, Gro Harlem Brundtland, the UN Special Envoy for Climate Change, confirmed that "you will have more of a double track system" in addressing climate change.

But others argue that the involvement of only the largest countries is already creating resentment among developing countries. One media article noted that, of the 193 nations which attended the conference, only 63 have "associated" themselves with the final accord, meaning that they supported its aims and goals.

As of February 2010, 55 nations (who are responsible for 78 percent of all greenhouse gas emissions, and include China, the European Union, India, Japan, Russia, and the United States) had submitted plans on how and to what extent they would reduce their emissions, though analysts point out that these various targets are not binding. But experts also say that these proposed cuts taken collectively will neither stabilize the amount of existing emissions nor limit the rise in temperatures below 3.6 degrees Fahrenheit.

Delegates must also still address many difficult and unresolved issues in the Copenhagen Accord before the next UN climate conference in Cancun, Mexico, from November 29 through Decem-

ber 10, 2010, where they hope to have another chance to craft an actual agreement to succeed the Protocol. Developed nations, for instance, must decide how and in what form they will provide $30 billion in climate financing to poorer countries. In addition, they must decide exactly how the UN will measure and verify emission cuts proposed by individual nations.

INTERNATIONAL HUMAN RIGHTS

Is spanking illegal under international law?

There is a continuing debate around the world on whether parents and caretakers should carry out corporal punishment on children. Last September in a Wal-Mart store In Georgia, police arrested and charged a man with felony cruelty after he had slapped a crying toddler who was not related to him. While many people were not surprised over the man's arrest, others wondered whether the police would have done the same thing if the person slapping the child had been a parent. "One person was charged with felony cruelty," said one observer. "But a parent carrying out the same act would describe it as child discipline."

Observers note that societal attitudes in many countries toward corporal punishment of children have been evolving over the last few decades. Many countries have gradually expanded restrictions on the use of corporal punishment, though others have not. How do various nations address corporal punishment of children? Are there any international treaties which address this issue? What is the status of this debate?

According to various groups, corporal punishment is the deliberate use of physical force to discourage certain behaviors and actions which a particular society deems inappropriate, wrong, or illegal, and that this method of punishment on children is extremely prevalent around the world. People carry out corporal punishment in a wide variety of ways, including burning, forcing ingestion of soap, hair pulling, hitting with objects such as sticks and belts, kicking, punching, pinching, slapping, and spanking, among many others, according to the UN Committee on the Rights of the Child.

While corporal punishment is carried out in many different settings, it occurs primarily in one of three areas. The most common is at home. Save the Children, a humanitarian organization, estimates that 150 states allow (or at least have not prohibited) corporal punishment in the home. In a 2000 report by Zero to Three, a nonprofit child development organization, 61 percent of parents said that spanking was an acceptable form of punishment. In addition, 37 percent said that such punishment was acceptable for children less than two years of age.

Surveys undertaken in individual nations by the Global Initiative to End All Corporal Punishment of Children (or Global Initiative, which is one of the world's leading groups trying to end corporal punishment) revealed that 97 percent of children in Korea reported in 1980 that they had been physically punished, many of them severely. In China, 57.6 percent of children reported physical punishment. There is also a high prevalence of corporal punishment in homes in India, with 69 percent of children reporting some form of corporal punishment.

Teachers and administrators also carry out corporal punishment at schools using canes, paddles, and straps. Global Initiative estimates that 90 countries, including many jurisdictions in the United States, still permit such punishment in schools.

Administrators in juvenile prisons and detention centers also carry out physical punishment of children. A 2000 survey conducted in Nigeria, for instance, found that juvenile offenders in custody frequently faced corporal punishment, and that physical assault was the most common complaint against police. Experts also note that courts around the world call on authorities to administer corporal punishment in juvenile detention centers. In 50 countries, including Colombia, India, Iran, Pakistan, Sudan, and Somalia, a court may order canings, floggings, or whippings of children, among other punishments, notes Global Initiative.

Corporal punishment is widely used in the United States. A poll taken in 2002 revealed that 65 percent of adults approved of spanking as a method to discipline children. In a 1995 study, 49 percent of parents admitted to using corporal punishment to discipline their children.

According to an activist group called the American Family Rights Association, all 50 states have laws which allow corporal punishment at home. For example, New York Penal Code §35.10(1) says that a parent, guardian, or other person entrusted with the care and supervision of a person under 21 years of age "may use physical force, but not deadly physical force, upon such person when and to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such person."

In California, the Welfare and Institutions Code in Section 300 states that "it is the intent of the Legislature that nothing in this section disrupt the family unnecessarily or intrude inappropriately into family life, prohibit the use of reasonable methods of parental discipline, or prescribe a particular method of parenting." It also says that "serious physical harm [to a child] does not include reasonable and age-appropriate spanking to the buttocks where there is no evidence of serious physical injury."

On the other hand, school corporal punishment is less accepted in the United States. For instance, while 28 states and the District of Columbia prohibit corporal punishment in schools, many allow its use. Between 1999 and 2000, a study found that the highest rates of corporal punishment in schools occurred in Alabama, Arkansas, Mississippi, and Tennessee, says Global initiative. Thirty states prohibit corporal punishment in all alternative care settings.

In 1977, the U.S. Supreme Court ruled in a 5-4 decision (in the case of *Ingraham v. Wright*) that the Eighth Amendment of the Constitution, which bans cruel and unusual punishment, applied only to convicted criminals and not to cases of school discipline. It also held that the Due Process Clause of the Fourteenth Amendment did not require schools to hold a hearing before carrying out corporal punishment. In cases where excessive corporal punishment have led to serious injuries, the Court said that a plaintiff still had a right to file a lawsuit.

Proponents of corporal punishment generally argue that it is an effective form of discipline for children. Many also cite passages from the *Book of Proverbs* in the Bible to justify corporal punishment, including "Folly is bound up in the heart of a child,

but the rod of discipline will drive it far from him." Advocates of corporal punishment also argue that how families discipline their children is a private matter, and that outside authorities should intervene only when corporal punishment is extreme or excessive.

Many international legal experts say that provisions in several global treaties call on nations to prohibit the corporal punishment of children within their respective jurisdictions.

In contrast, opponents argue that corporal punishment as a method of discipline is ineffective because it is based on fear rather than respect. Corporal punishment can also lead to low self-esteem, shame, and depression, according to several studies. Many also cite numerous studies which say there is a correlation between the use of corporal punishment during childhood and the development of alcoholism, drug abuse, anxiety, and depression in adults. Others say that schools administer corporal punishment in an unfair manner. For example, they point to statistics showing that, while black students make up 17 percent of all students, they receive 39 percent of all physical punishment.

Furthermore, those who oppose corporal punishment say that its application seems discriminatory against children. They point out that, while various laws around the world make it a crime to assault other people, including children not related to you, there are exceptions for parents who carry out the same acts against their children. One expert, Prof. Elizabeth Gershoff of the University of Michigan, argued: "Americans need to re-evaluate why we believe it is reasonable to hit young, vulnerable children, when it is against the law to hit other adults, prisoners, and even animals." Nadine Block, the director from the Center for Effective Discipline, said: "Under U.S. law, children are the only class of individuals who can be legally hit. Children have less legal protection than someone who is in jail or in the army."

Legal scholars say that several international treaties indirectly address the issue of corporal punishment of children. For example, many cite the 1989 *United Nations Convention on the Rights of the Child* (or CRC), which lists the basic rights of people under the age of 18, including the right to life, right to identity, right to express their own opinions, and the right to privacy, among many others. As of March 2010, over 190 have ratified the CRC and are legally obligated to recognize and protect the rights of children. The UN Committee on the Rights of the Child – which is composed of independent experts – oversees compliance with the CRC by requiring nations to submit periodic progress reports on how they are implementing its provisions.

Although it does not explicitly refer to corporal punishment, the CRC in Article 19 says, in part, that signatory nations must take "all appropriate legislative, administrative, social, and education measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child."

In 2006, the child rights committee issued an interpretation (called "General Comment No. 8") of Article 19, urging all States parties to "move quickly and prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children." For example, it said that nations should pass legislation prohibiting corporal punishment in specific settings such as schools, among other measures. The committee also said that countries should explicitly state that their "criminal law provisions on assault . . . cover all corporal punishment, including in the family" so that the child is "protected from corporal punishment wherever he or she is and whoever the perpetrator is."

Another treaty called the 1966 *International Covenant on Civil and Political Rights* (or ICCPR) – which calls on nations to recognize and protect a variety of civil and political rights, including the right to free speech, freedom of religion, and the right to due process – does not explicitly refer to corporal punishment, but seems to contain provisions which implicitly prohibit it. Article 7, for instance, says that "no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment . . ."

In 1992, the UN Human Rights Committee – which is a body of independent experts monitoring the implementation of the ICCPR – issued its interpretation of Article 7. Specifically, General Comment No. 20 said that the prohibition on torture "must [also] extend to corporal punishment, including excessive chastisement ordered as a punishment for a crime or as an educative or disciplinary measure," and that "it is appropriate to emphasize in this regard that Article 7 protects, in particular, children, pupils, and patients in teaching and medical institutions."

The 1966 *International Covenant on Economic, Social, and Cultural Rights* (or ICESCR) calls on its 160 signatory nations to recognize and protect a wide variety of individual rights such as the right to education, health, adequate standard of living, and self-determination, among many others. Although the ICESCR does not specifically mention corporal punishment, groups such as Global Initiative say it does so implicitly. For instance, Article 10 states that "special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions."

The UN Committee on Economic, Social and Cultural Rights – a body of independent experts who are responsible for overseeing and monitoring the implementation of the ICESCR – issued in 1999 an interpretation called "General Comment No. 13" concerning the right to education. It said that corporal punishment carried out in schools was inconsistent with the concept of "individual dignity," which it described as "the fundamental guiding principle of international human rights law." It then concluded that nations must "take measures to ensure that discipline which is inconsistent with the [ICESCR] does not occur in any public or private educational institution within its jurisdiction."

Analysts note that, in addition to the United Nations, many international bodies have been moving to prohibit corporal punishment of children. The Inter-American Commission on Human Rights recommended the prohibition of corporal punishment of children, for instance. In 2005, the United Nations Educational, Scientific and Cultural Organization issued a publication (*Against Corporal Punishment – Moving Toward Constructive Child Discipline*) where it states that corporal punishment of children "is a

violation of human rights as well as counterproductive, ineffective, dangerous and harmful to children," and called on nations to prohibit such disciplinary methods in homes, schools, and other institutions. In 2006, an independent expert released the results of the United Nations Study on Violence against Children which offered 12 broad recommendations on how nations can help curb the use of corporal punishment.

In 1998, the European Court of Human Rights in a decision called *A. v. United Kingdom* (where the identity of the plaintiff was left anonymous) determined that, in this particular case, the corporal punishment of the child plaintiff by his stepfather who had used a garden cane violated the prohibition of degrading punishment in the European Convention on Human Rights, and ordered the United Kingdom to pay the plaintiff £10,000 because its laws did not provide sufficient protection to children from such punishment.

What is the current status of efforts to limit or prohibit corporal punishment of children? Over the past several decades, many nations have implemented laws and policies limiting the use of corporal punishment in a variety of settings. Statistics gathered by Global Initiative show that over 100 states currently prohibit corporal punishment in schools and the penal system, 150 as a sentence which can be issued by courts, and 36 in alternative care settings.

For example, India recently enacted the Right to Education Act of 2009, which prohibits school corporal punishment. Other nations banning school corporal punishment include Ethiopia, Kenya, South Africa, South Korea, Sri Lanka, Thailand, Trinidad and Tobago, and Zimbabwe. Almost every nation in Europe has outlawed corporal punishment in schools except for the Czech Republic and France. In Denmark, 57 percent of parents are against corporal punishment. Polls in Sweden revealed that, in 1965, 53 percent of parents believed that corporal punishment was an acceptable form of discipline, but that, by 1997, it had dropped to 11 percent.

Currently nine countries – Austria, Croatia, Denmark, Finland, Germany, Israel, Latvia, Norway, and Sweden – prohibit all forms of corporal punishment in *any* setting, including homes.

Analysts also note that the supreme courts in many nations – such as those in Fiji, Israel, Italy, Namibia, South Africa, and Zimbabwe – have issued decisions prohibiting corporal punishment of children. The Fijian high court, for instance, ruled that such punishment violated its constitution and also international human rights law, said Global Initiative. The High Court of Delhi declared that school corporal punishment is illegal. Its decision said that the ". . . fundamental rights of the child will have no meaning if they are not protected by the state." It continued: "the State must ensure that corporal punishment to students is excluded from schools," and that "the State and the schools are bound to recognize the right of the children not to be exposed to violence of any kind connected with education."

In the United States, advocates in 2007 introduced a bill to ban corporal punishment of infants and toddlers in California, but it was ultimately defeated. Massachusetts tried to ban corporal punishment of children in homes, but the legislature didn't pass the bill.

While many people continue to condemn the use of corporal punishment of children, psychology professor Marjorie Gunnoe at Calvin College in Michigan last year said that her research did not find evidence that spanking is always detrimental to a child's long term development. According to her study, children "who endured parental swats between the ages of 2 and 6 were much more likely to report positive academic records and optimism about their future," and that those who were spanked between ages 7 and 11 actually volunteered more. On the other hand, the group that had never been spanked "never scored the best" on any of 11 behavioral variables. Still, the study said that parents needed to implement a balanced approach to child discipline. It revealed that children spanked during their teenage years had "the worst overall social adjustment."

And even though many legal experts and advocacy groups cite what seems like a growing consensus that international law prohibits corporal punishment of children, the debate surrounding its use still rages on. Just a few years ago, José Laboureur, a teacher in France, received an outpouring of support from parents and other teachers when authorities prosecuted him for assault after he had slapped an 11-year old student who cursed at him, although others have questioned the course of events which led to the actual slap. (France does not formally prohibit corporal punishment in school.) According to reporting in *TIME* magazine, "some education experts say the loud support for Laboureur reflects wider changes in French society . . . Polls show that a majority of French citizens back the use of limited corporal punishment to combat unruliness in schools."

INTERNATIONAL HUMAN RIGHTS

Do people have a right to a toilet?

People living in industrialized countries largely take for granted personal sanitation systems such as toilets, latrines, and their underlying sewage system. But *billions* of others around the world don't have access to any sanitation, and many countries don't or can't provide a basic infrastructure to collect and dispose of raw human sewage whose accumulation in cities and rural areas hurts the environment and leads to disease and pestilence.

Humanitarian groups say that nations must undertake greater efforts to provide their citizens with access to adequate sanitation. To bring more attention to this issue, a private group called the World Toilet Organization had designated November 19 as "National Toilet Day." And, in recent years, more and more human rights experts have been saying that access to sanitation is or has become a basic human right.

Under international law, do people have a right to sanitation? Are there treaties which implicitly or explicitly provide this right? What measures are nations undertaking to implement and promote it? And what obstacles does a legal right to sanitation face today?

Health experts say that 2.6 billion people (or 39 percent of the world's population) living mostly in Asia and Sub-Saharan Africa don't have any access to sanitation facilities such as toilets, and that many countries lack the funds or political will to build an

underlying sewage infrastructure to collect, treat, and dispose of human waste, primarily feces and urine. The Inter Press Service News Agency reports that 69 percent of people living in Sub-Saharan Africa and 67 percent living in Southern Asia lack access to any sanitation. In contrast, 99 percent of people in developed countries have access to sanitation, according to the World Health Organization (or WHO).

Many people who lack access to sanitation engage in an unsanitary practice called "open defecation" where they defecate along railroad tracks, vacant land, and other locations, reported *The New York Times*. Health officials say that 81 percent of people who openly defecate live largely in the rural areas of 11 nations – Bangladesh, Brazil, China, Ethiopia, India, Indonesia, Nepal, Niger, Nigeria, Pakistan, and Sudan.

The lack of adequate sanitation systems combined with open defecation has led to substantial environmental and health problems. Uncollected feces contaminate people, animals, food supplies, and drinking water, and also attract insects and vermin. (Scientific reports indicate that "one gram of feces can contain 10 million viruses, one million bacteria, 1000 parasite cysts, and 100 parasite eggs.") Such contamination then leads to problems such as diarrhea – which claims the lives of 1.8 million people every year, according to the *Taipei Times* – and also lost economic productivity as workers afflicted with those conditions must stay at home to recover. The media have also reported that the lack of sanitation affects women in particular who, according to some estimates, have collectively missed 200 million days of school during their menstruation period because their schools lack adequate toilet facilities.

The lack of access to adequate sanitation has been a problem for as long as human history. Many human rights and humanitarian groups have been pushing governments to address this issue more forcefully. In recent years, they have started to claim that access to sanitation is or has become a human right (such as those long-recognized by many nations, including the right to free speech, freedom from discrimination, and freedom from torture, among other rights), and that governments have an obligation to work progressively towards the realization of a right to sanitation by passing laws and regulations, and by providing incentives to facilitate its long-term development. What is the legal basis for such a claim?

***International treaties*:** Many human rights groups argue that the right to sanitation (which is usually linked to a separate "right to water") is *implicit* in several international treaties. For example, in the 1966 *International Covenant on Economic, Social, and Cultural Rights* (or ICESCR), Article 11(1) says that "States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions," and that they must "take appropriate steps to ensure the realization of this right." Article 12(1) says that "States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

Even though these articles do not explicitly mention a right to sanitation, many advocates for such a right say that it would be difficult for people to enjoy explicitly stated rights (such as those to an adequate standard of living and also health) if governments did not also recognize a right to sanitation. The Centre on Housing Rights and Evictions – one of many non-profit groups at the forefront of promoting a right to sanitation – argues that "while adequate food, clothes, and shelter are all basic human needs that are indispensable for an adequate standard of living, they are not sufficient . . . Similarly, it is impossible to say that a person who does not have access to a safe and adequate toilet or latrine, and therefore has to defecate in the open, has an adequate standard of living."

Legal experts believe that there is a growing consensus that, under several international treaties, people have a right of access to sanitation such as toilets and latrines.

Others note that the UN Committee on Economic, Social, and Cultural Rights – a group of independent experts which monitors the implementation of the ICESR – had issued several authoritative interpretations called "General Comments" which say that a right to sanitation is implicit in the ICESCR even though that treaty does not explicitly mention such a right. For instance, in General Comment No. 4 (adopted in 1991), the UN committee stated that, under its interpretation, a right to adequate housing must contain "certain facilities essential for health, security, comfort, and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation . . ."

In General Comment 14 (adopted in 2000), the UN committee interpreted "the right to health, as defined in Article 12(1), as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation . . ."

Various analysts say that the 1989 *Convention on the Rights of the Child* (or CRC) also gives children an implicit right to adequate sanitation. For example, Article 24 of the CRC says that States Parties "recognize the right of the child to the enjoyment of the highest attainable standard of health," and that they must implement this right by ensuring that "all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of . . . hygiene and environmental sanitation." While the CRC does not mention an explicit right to sanitation, it would be difficult for governments to protect a child's right to health without recognizing a right to sanitation, say some legal experts.

In addition to treaties where the right to sanitation may be implicit, there are other international agreements where this right seems to be *explicit*. For example, the 1949 *Geneva Convention relative to the Treatment of Prisoners of War* states in Article 29 that "the Detaining Power shall be bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps [where prisoners of wars are being detained] and to prevent epidemics." Under the 1949 *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Article 85 states

that "internees shall have for their use, day and night, sanitary conveniences which conform to the rules of hygiene and are constantly maintained in a state of cleanliness."

The right to sanitation also seems explicit in the 1979 *Convention on the Elimination of All Forms of Discrimination against Women*, say advocates. Article 14(2)(h) says that State Parties must ensure women living in rural areas the right to "enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport, and communications."

***Regional treaties*:** Advocates also argue that a right to sanitation seems to be implicit in many regional treaties. For instance, the 1998 *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights* declared in Article 10 that "everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental, and social well-being."

Under the 1990 *African Charter on the Rights and Welfare of the Child*, Article 14 states that "every child shall have the right to enjoy the best attainable state of physical, mental, and spiritual health," and that governments must take certain measures – such as ensuring the provision of adequate health care and safe drinking water – to implement this right. And the 1992 *Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (issued by the Economic Commission for Europe) calls on nations to implement "collective systems of sanitation or where sanitation by other means should be improved."

As in the case of other treaties, many legal analysts argue that it would be difficult for governments to protect certain explicitly stated rights in these regional treaties if they did not also protect a right to sanitation.

***Political conferences*:** Advocates also point out that, during several conferences, nations have issued political statements broadly supporting a right to sanitation. For instance, the International Conference on Population and Development in 1994 issued a "Programme of Action" where it stated, under Principle 2, that people "have the right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water, and sanitation." In 1996, the United Nations Conference on Human Settlements adopted a similar statement.

***Expert reports*:** Beyond treaties and conferences, a number of United Nation reports written by independent experts have supported the view that there is a right to sanitation. For example, a UNICEFF report in 2000 titled *Sanitation for All* stated that "access to sanitation facilities is a fundamental human right that safeguards health and human dignity."

In 2004, the UN Sub-Commission on the Promotion and Protection of Human Rights issued a report (E/CN.4/Sub.2/2004/20) which said, in part, that "the right to drinking water and sanitation constitutes a part of internationally recognized human rights and may be considered as a prerequisite to the realization of other human rights." It issued another report in 2006 (E/CN.4/Sub.2/2005/25) saying that governments must provide sanitation that is physically accessible, culturally acceptable, affordable, and safe.

The UN High Commissioner for Human Rights in 2007 issued its own separate report (A/HRC/6/3) which concluded that "while access to safe drinking water and sanitation is not explicitly recognized as a human right per se in human rights treaties, it has been acknowledged by two expert bodies . . . as well as by States in several resolutions, declarations, and plans of action." It then concluded that "it is now time to consider access to safe drinking water and sanitation as a human right."

There seems to be a growing consensus on the existence of a right to sanitation. But observers note that the world community still needs to undertake substantial work in implementing such right. While many believe that various treaties, expert reports, and political conferences have created a legal foundation to support the existence of sanitation as a human right, they have largely done so in a very broad manner.

For example, the Centre for Housing Rights and Eviction points out that "the right to sanitation [as laid out by treaties and expert reports] does not define a specific policy or framework for implementation." The 2004 report issued by the Sub-Commission on the Promotion and Protection of Human Rights said that "the more difficult question remains the scope of the contents of this right [to sanitation]."

And the 2007 report of the UN High Commissioner for Human Rights stated that "human rights instruments offer little guidance as to the scope and content of the term 'sanitation,'" and that they "do not elaborate upon the specific requirements these various concepts carry." It even critiqued the 2006 UN sub-commission report, noting that its guidelines "alternatively refer to adequate, basic, acceptable and appropriate sanitation of a culturally acceptable quality without clearly defining what these various requirements mean."

Analysts say that nations should begin the process of defining several terms and creating standards to implement an actual right to sanitation. There is, for instance, no official definition of "sanitation," though many human rights groups refer to the one used by the UN Millennium Project Task Force on Water and Sanitation, which states, "Sanitation is the access to, and use of, excreta and wastewater facilities and services that ensure privacy and dignity, ensuring a clean and healthy living environment for all." In addition, the 2007 report said that nations needed to create standards for safe and affordable sanitation, more concrete obligations for governments, and also have to clarify the role and duties of private companies, among many other issues.

Experts such as those at the Centre on Housing Rights and Evictions note that governments face many other obstacles in recognizing and promoting a right to sanitation. They believe that, in most countries (including the industrialized nations), sanitation is still a taboo subject which people do not discuss openly. "We've managed to talk about sex when it comes to HIV and AIDS, but we still can't talk about pee and poo, and how it affects people's everyday lives and social and economic development," said one commentator. But many believe that sufficient and continuing dialogue will overcome this obstacle.

In addition, advocates say that nations need to clarify the role of governments concerning the right to sanitation. Because many different agencies within municipal governments handle different aspects of sanitation, it is difficult to prioritize and coordinate this issue, according to the Centre on Housing Rights and Evictions.

Furthermore, many governments often lack funds and the

political will to establish minimum levels of sanitation, which require running water – which is scare in many urban and rural areas around the world – and an underlying system to collect and properly dispose of human waste. There is also a misconception among governments that a right to sanitation will require them to install toilets for every household within their jurisdictions, which experts say is false. Rather, advocates argue that governments should facilitate the long-term development of better access to sanitation through different initiatives such as working with aid agencies and the private sector, and also by passing laws and regulations to protect that right.

Despite these obstacles and the ambiguity of international law, many countries in recent years have undertaken their own initiatives to provide greater access to sanitation. For example:

- The national and municipal governments in Uruguay have provided much of the country with sewage and sanitation services. According to a 2003 WHO and UNICEF survey, approximately 78 percent of all people living in both urban and rural areas have access to sanitation and sewage services.
- In December 2001, Venezuela passed a Water and Sanitation Law which established a regulatory agency for those public sectors. A 2008 report by the Ministry of Environment claimed that 93 percent of all people in Venezuela have access to water and sanitation services. That country's constitution also requires the promotion and improvement of "urban and household sanitation, including cleaning, waste collection and treatment, and civil protection."
- Bangladesh has implemented an approach called "community-led total sanitation" (or CLTS) which, according to its proponents, "focuses on igniting a change in sanitation behavior rather than constructing toilets." By educating communities about the negative impact of practices such as open defecation, many hope that this approach will push communities in various countries to change their sanitary practices. Nations such as China, Egypt, and the Pacific island of Timor Leste have undertaken this approach to sanitation.

The United Nations has also undertaken greater efforts in pushing countries to provide greater access to sanitation. For instance, at the 2002 World Summit on Sustainable Development, delegates set a new target "to halve the proportion of people who do not have access to basic sanitation by the year 2015." But analysts at the Centre for Housing Rights and Evictions said that "the sanitation target remains one of the most off-track." The UN also declared 2008 as the "International Year of Sanitation." And in November 2009, three independent UN legal experts issued a joint statement calling on nations to provide adequate sanitation to those in prisons. One of the experts, Catarina de Albuquerque, said that "access to sanitation is fundamental for a life in dignity, which all people are entitled to."

Still, experts note that billions of people today still don't have access to sanitation. A joint WHO and UNICEF report – *Progress on Sanitation and Drinking Water* – issued in March 2010 revealed that the proportion of people who openly defecate had declined "by more than one-third from 25 percent in 1990 to 17 percent in 2008." But combined with constant population growth, the absolute number of people openly defecating had actually increased by 36 million.

INTERNATIONAL HUMANITARIAN LAW

What are your rights after earthquakes and other disasters?

Over the past several decades, the media have reported thousands of stories describing the aftermath of both man-made and natural disasters around the world – including those caused by earthquakes, tsunamis, general armed conflict, ethnic conflict, political violence, and religious persecution, among many others – where hundreds of thousands of people have been killed and where millions of others are forced to leave their homes. In the aftermath of these and other disasters, what rights do people have and what obligations must governments carry out under international law?

In January 2010, a 7.0 magnitude earthquake struck Haiti, killing approximately 230,000 people, injuring about 300,000 others, and causing between $8.1 billion and $13.9 billion dollars in damage. More than one million people have become homeless as a result of the earthquake. A month later, an unrelated 8.8 magnitude earthquake struck near Chile's second largest city, Concepción, killing more than 700 people and displacing 2 million others.

People who are forced to leave their homes but still remain within their nations after these man-made and natural disasters are called "internally displaced persons" (or IDPs) by human rights and humanitarian groups. IDPs are similar to refugees, who are an internationally recognized category of people who flee their homes due to persecution only. (Contrary to popular belief, refugees do not include people who are forced to leave their homes because of natural disasters or those who travel to other countries to find better work opportunities.) But unlike IDPs, refugees have crossed a border into another nation.

Observers over the years have noted that, in the immediate aftermath and accompanying chaos of these disasters, many governments have carried out policies which seem to restrict the rights of people. For example, civilian and military authorities may begin to place people in camps and forcibly prevent them from leaving. Others may separate family members from each other or prevent their reunion. In other cases, governments have been slow to respond to a disaster or have carried out relief efforts in a discriminatory manner. Some, for instance, have delivered humanitarian supplies to certain people and ethnic groups before embarking on a wider scale distribution. Other nations have actually refused to accept foreign aid.

Human rights experts say that people still have certain rights and governments have several obligations even in the aftermath of a large disaster. Currently, there are no international treaties which specifically address how nations must address IDPs. Instead, to address the plight of IDPs, an international group of experts in 1998 presented the *Guiding Principles on Internal Displacement* (or Guiding Principles) to the United Nations.

The Guiding Principles are not considered an international

treaty which nations must ratify and whose provision they must implement in their national legislation, according to legal analysts. Rather, they provide nations with 30 broad principles (or guidelines) describing the rights of persons during times of forced displacement and subsequent resettlement. For example:

- Principle 3 states that IDPs have "the right to request and to receive protection and humanitarian assistance from [state] authorities," and that "they shall not be persecuted or punished for making such a request."
- Principle 14 says that IDPs "have the right to move freely in and out of camps or other settlements." If a nation determines that confinement to a camp is necessary because of exceptional circumstances, then, under Principle 12, "it shall not last longer than required by the circumstances."
- Under Principle 15, IDPs have "the right to seek safety in another part of the country," and also the right "to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk."
- Principle 16 says that IDPs "have the right to know the fate and whereabouts of missing relatives," and that the proper authorities "shall endeavour to collect and identify the mortal remains of those deceased, prevent their despoliation or mutilation, and facilitate the return of those remains to the next of kin."
- Under Principle 17, "family members who wish to remain together shall be allowed to do so," and that "all appropriate steps shall be taken to expedite the reunion of such families, particularly when children are involved."

Governments also have a wide array of obligations under the Guiding Principles in the aftermath of a disaster. For instance:

- Under Principle 3, "national authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction." Along these lines, Principle 18 says that "at the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to essential food and potable water; basic shelter and housing; appropriate clothing; and essential medical services and sanitation."
- Under Principle 20, governments must issue identity documents to IDPs, including passports, birth, and marriage certificates. In addition, "the authorities shall facilitate the issuance of new documents or the replacement of documents lost in the course of displacement, without imposing unreasonable conditions."
- Even in the aftermath of a disaster, authorities must ensure that children receive free education at the primary level under Principle 23.
- Principle 28 says that governments are obligated to establish conditions and provide means for IDPs to return home or resettle in another area of the country.

Humanitarian organizations also have rights under the Guiding Principles. Under Principle 25, "international humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced." To allay concerns about violating the sovereignty of nations, Principle 25 also states that "such an offer [of assistance] shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith." Principle 26 calls on nations to respect and protect aid workers, their vehicles, and supplies.

Even in the aftermath of a disaster, international principles say that people have, for instance, a right to continue receiving primary education, and that governments have obligations to distribute food, water, and shelter.

The rights laid out under these principles are not newly created rights which had been previously unrecognized by governments around the world, according to legal experts. Rather, the drafters of the Guiding Principles had drawn them from existing international human rights and humanitarian law treaties, saying that these rights are "inherent in these bodies of law." A document called the *Annotations to the Guiding Principles* explains the legal basis for each principle. For example:

- The right of IDPs under Principle 12 to move freely in and out of camps comes from the *International Covenant on Civil and Political Rights,* which says in Article 9 that "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention." In addition, Article 78 of the Fourth Geneva Convention allows for "internment and assigned residence of civilians in occupied territories only if such measures are required by the security of the state with absolute necessity."
- The legal basis for Principle 17 (allowing for family members to remain together) comes from Article 9(1) of the *Convention on the Rights of the Child,* which says "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine . . . that such separation is necessary for the best interests of the child."
- The legal basis for Principle 3 – stipulating that national authorities have the primary responsibility to protect and help IDPs – comes from various international treaties such as the *Charter of the United Nations* (which, in Article 2(7), "prohibits intervention in matters that are essentially within the domestic jurisdiction of a state") and also from various U.N. General Assembly resolutions, including one passed in December 1990 (Resolution 45/100), which reaffirmed "the sovereignty of affected States and their primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within their respective territories."
- The right of humanitarian organizations to offer their services to IDPs under Principle 25 comes, in part, from Article 3(2) of all the *Geneva Conventions,* which states that "an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict."

While the Guiding Principles clarify the rights of IDPs and obligations of states after a disaster, they don't have a strict

enforcement mechanism. Instead, experts say that IDPs must turn to separate regional and international human rights instruments to guarantee their rights, though they question the effectiveness of this approach. IDPs from member countries of the Organization of American States could, for instance, look to the American Convention on Human Rights (or American Convention), which, under Article 44, allows people to lodge complaints against a State Party for violations of that convention. To enforce their right to family unity, they can point to Article 17(1) of the American Convention, which states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the state."

Are nations respecting and carrying out the provisions of the Guiding Principles? In the case of the earthquake in Haiti, critics say that the government's efforts to help its people have been inadequate. Many have also criticized the United Nations. A group called Refugees International – a non-governmental organization that advocates for refugees – recently released a report (*Haiti: From the Ground Up*) criticizing the lack of coordination of UN humanitarian efforts in Haiti. Specifically, the report faulted the United Nations for ". . . insufficient coordination with local organizations in delivering aid and establishing security."

Others have pointed to instances where Haiti did not seem to be fulfilling its obligations under the Guiding Principles. For example:

- Critics assert that the government has not provided survivors with adequate levels of emergency shelter, adequate sanitation, safe drinking water, medical services, and food, which it is required to do so under Principle 4. "Only half of those displaced," said one commentator, "have received even the crudest means of emergency shelter: plastic tarps and tents . . ."
- Many media sources have reported that police are not allowing deliveries of food and water to the approximately 2,500 IDPs currently encamped on the grounds of the Prime Minister's residence in an alleged effort to force them to leave the area. Some believe that this could be a violation of Principle 18(2), which calls on authorities to provide food and water to IDPs "regardless of the circumstances."
- The media have reported that the Haitian government is refusing to open slightly damaged and even undamaged schools "until all schools can reopen." But under Principle 23, governments must provide children with primary school education even after a disaster.

While many could claim that Haiti had violated several provisions in the Guiding Principles, others believe that it would be unfair to judge the actions of any government without taking into account the severity and scale of a disaster and the already-existing resources of a particular nation. UN officials, such as Catherine Bragg, the Assistant Secretary-General for Humanitarian Affairs, indicated that the massive scale of Haiti's earthquake (and also the deaths of 100 UN staff members who were already in that country) had slowed down initial relief efforts. She also said that the Haitian earthquake was "the most complex humanitarian response we have ever had to deal with," and that "it would be very easy to make negative comments about how things are coordinated."

Others note that Haiti is the poorest nation in the Western Hemisphere, and that – while its government should strive to carry out its obligations under the Guiding Principles – it would be unrealistic to believe that it would be able to mobilize the resources comparable to a much richer nation without substantial help from the international community.

In other cases, even with the Guiding Principles in place, a nation can still refuse to follow its provisions and still not face any serious consequences. In May 2008, Cyclone Nargis struck southern Myanmar, killing approximately 85,000 people and displacing millions of others. Another 54,000 people were missing. Even in the face of a humanitarian catastrophe, critics say that Myanmar's secretive military junta had initially refused to accept humanitarian aid from other countries. (Principle 25 of the Guiding Principles calls for the right of international humanitarian organizations to offer their services to IDPs.)

American and French ships stocked with supplies waited several weeks in international waters off the coast of Myanmar, pending permission to dock. But according to media reports, "fifteen separate attempts to obtain the junta's permission to help with relief efforts were refused." UN Under-Secretary-General for Humanitarian Affairs John Holmes complained that "the biggest problem we have at the moment is that international humanitarian staff is not being allowed down into the affected area . . ." Myanmar did eventually bow to international pressure and allowed some foreign aid workers to enter the country

Even though the Guiding Principles have clarified the rights of people and the obligations of governments after a disaster, some analysts point out that, in many cases, a government will naturally carry out its provisions anyway. In the aftermath of the recent earthquake in Chile, many desperate and hungry people looted stores for necessities such as food and water. But when they soon began to target electronic goods and appliances, Chile's president sent 10,000 troops to patrol urban areas and also declared a curfew to curtail further looting. Principle 21 of the Guiding Principles says that "the property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts: pillage."

Some say despite its shortcomings, the Guiding Principles are still useful, especially in cases where – in the midst of confusion after a disaster – a government may be violating individual rights and may not be aware that it is doing so. But in other cases, a government will usually take a course of action independent of (but in accordance with) what is required under the Guiding Principles. "If I saw hundreds of people looting simply for the sake of looting, I don't need a set of international principles telling me to stop the looting," said one commentator. "It's something I would do anyway."

UNITED NATIONS

Renewed efforts to stop nuclear proliferation

Last year, the United States – along with the UN Security Council – refocused its attention towards addressing the proliferation of nuclear weapons. Analysts say that the main international treaty which is supposed to prevent the spread of nuclear weapons has not adequately contained the nuclear ambi-

tions of states such as Iran and North Korea, and that the international community has made little progress in dealing with them. But last year, the Security Council passed an important resolution to begin addressing these concerns. What measures does the resolution contain, and will they be effective in curbing the spread of nuclear weapons?

In September 2009, President Barack Obama presided over a meeting at the United Nations Security Council – the first American president ever to do so – where it unanimously adopted Resolution 1887, which calls on UN member states to undertake new efforts to halt the spread of nuclear weapons. Obama stated that nuclear weapons still posed a "fundamental threat" to the world, especially if they get into the hands of terrorists or rogue states, and that he was committed to "a world without nuclear weapons." Experts say that this renewed initiative in curbing the spread of nuclear weapons is largely focused on Iran and North Korea, and also terrorist groups trying to obtain nuclear weapons technology.

In 2002, Iran admitted that it had operated (for nearly 20 years) an undisclosed facility to enrich uranium for what it claimed were peaceful purposes such as creating fuel for civilian nuclear power plants used to generate electricity. But investigators from the International Atomic Energy Agency (or IAEA) said that the undisclosed facility was enriching uranium at levels exceeding those necessary for civilian purposes. And the fact that it had operated the facility in secret for a long period of time prompted suspicions that the Iranian government was actually operating a nuclear weapons program under the guise of its civilian program.

Over the past several years, the Security Council has conducted several negotiations with Iran and even imposed increasingly stringent economic sanctions on that nation in an effort to stop its uranium enrichment program. But negotiations remain at a standstill today, and Iran has threatened to speed its efforts further.

In 1994, North Korea reached an accord (called the Agreed Framework) with the United States, South Korea, and Japan in which it agreed to shut down the operations of and eventually dismantle its nuclear energy program – which many experts believed was a nuclear weapons program – in return for heavy oil shipments and assistance in the construction of two civilian nuclear reactors. In 2002, the United States claimed that North Korea had violated the Agreed Framework by secretly enriching uranium for a nuclear weapons program. In 2006, North Korea announced it had successfully carried out its first nuclear weapons test, which was followed by a second test in May 2009.

Negotiations to end that nation's nuclear weapons programs are also at a standstill, and many experts even question whether North Korea will ever give up those weapons.

In 2004, Abdul Qadeer Khan – a Pakistani scientist and engineer known as the "father of Pakistan's nuclear weapons program" – admitted to operating an international network to sell nuclear weapons designs, blueprints, parts, and other technologies to countries such as North Korea. Investigators say that Dr. Khan's network even provided "customer support" to his buyers, which prompted the head of the IAEA to describe the network as the "Wal-Mart of private-sector proliferation."

Experts say that the activities of Iran and North Korea, along with the case of Abdul Khan, highlighted some of the alleged deficiencies of the *Nuclear Nonproliferation Treaty* (or NPT), which is supposed to help prevent the spread of nuclear weapons.

The NPT is the most widely accepted arms control agreement prohibiting the development and proliferation of nuclear weapons and nuclear weapons technology, according to arms control experts. Coming into force in 1970, the NPT currently has 189 signatory nations. According to Articles I and II of the treaty, nuclear-weapon states agree not to help non-nuclear-weapon (NNW) states develop or acquire nuclear weapons or weapons technology. NNW states, in turn, agree not to develop, acquire, or seek assistance in the development of nuclear weapons in exchange for access to nuclear technology for peaceful purposes (such as the generation of electricity). To verify compliance with the treaty's provisions, NNW states must open their declared nuclear facilities to inspections by the IAEA.

The UN Security Council said that a state has a right to demand the return of its nuclear technology from another state which withdraws from the treaty used to curb the spread of nuclear weapons.

Although the NPT treaty requires NNW states to forswear the development of nuclear weapons, Article IV says that "nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production, and use of nuclear energy for peaceful purposes . . . in conformity with Articles I and II of this Treaty." According to arms control experts, Article IV allows countries to enrich nuclear materials such as uranium solely for peaceful purposes such as creating fuel for nuclear reactors to generate electricity. But they also point out that a NNW state government can (if it chooses to do so) readily convert a civilian nuclear program into a weapons program.

Under this so-called Article IV "loophole," a country could say, for example, that it is simply developing the technical expertise of refining nuclear fuel for ostensibly peaceful purposes. But after achieving this capability, that country could then renounce its NPT obligations (which a country may do under the treaty "if it decides that extraordinary events . . . have jeopardized the supreme interests of its country"), produce weapons-grade fuel, and then declare itself a nuclear weapons state.

Many officials suspect Iran of using this tactic even though that government continues to deny it. According to the previous Secretary General of the UN: "States that wish to exercise their undoubted right to develop and use nuclear energy for peaceful purposes must not insist that they can only do so by developing capacities that might be used to create nuclear weapons." Also, after the United States and other nations accused North Korea of violating the terms of the Agreed Framework, North Korea announced that it would withdraw from the NPT. Observers note that while North Korea faced international rebuke, it did not suffer heavy consequences for withdrawing from the treaty.

C.V. Starr Lecture

April 21, 2010

Defamation of Religion: The International Debate

Dinah PoKempner
General Counsel,
Human Rights Watch

The cartoon depiction of the Islamic prophet Muhammad by a Danish newspaper in 2005 and its aftermath revealed the continuing friction between the boundaries of religious tolerance and freedom of expression. While the Organization of the Islamic Conference has promoted UN resolutions against what it calls "Islamophobia," other countries have enacted laws banning the headscarf and "glorification" of terrorism. The UN Human Rights Committee is drafting guidelines to clarify the lines between protected expression and hate speech. Where should these lines be drawn? Dinah PoKempner will discuss the narratives that shape this debate.

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

In an effort to begin addressing this deficiency and others in the NPT, the Security Council passed Resolution 1887 under which UN member states must agree to the following statements and initiatives, among many others:

- States must give greater authority to the Security Council to take appropriate action against states which violate the NPT. Under past practices, concerned governments would refer problems first to the IAEA followed later by the Security Council. In contrast, this new provision encourages states to address any problems directly to that body.
- States must address withdrawals from the NPT without delay, and also hold the withdrawing state responsible for any violations of the NPT committed prior to the withdrawal.
- A state has a right to demand the return of its nuclear technology from another state which withdraws from the NPT or whose nuclear programs are found to be in violation of IAEA rules.
- States must implement stronger controls on nuclear exports, and also ensure that the IAEA has enough resources and support to implement safeguards.
- States must increase security for nuclear weapons materials and encourage others states to take effective measures in preventing these materials or technical assistance from getting into the hands of terrorists.

Some analysts say that while the passage of Resolution 1887 begins the process of addressing deficiencies in the NPT, the resolution doesn't provide any specific guidance on how nations must implement its various provisions. For example, it doesn't say how countries may demand the return of nuclear supplies or hold states responsible for violations of the NPT after withdrawal.

One observer believes that the resolution is mostly a political statement which sets the groundwork for an upcoming summit in May 2010 where nations will formally review the effectiveness of the NPT in New York and propose measures to strengthen it or clarify certain provisions.

UNITED NATIONS

A super-agency for women only?

It should come as no surprise that women generally live much more difficult lives and carry far more burdens than men. While the world community has made great strides in improving women's living standards and also granting them many rights which were accorded only to men, advocacy groups say that a greater percentage of women still live in poverty, suffer from discrimination, and find far fewer opportunities. To better coordinate efforts in helping women worldwide, the United Nations recently voted to combine several of its agencies serving women's needs into a single super-agency.

According to human rights and advocacy groups, the plight of women seems almost insurmountable. Various statistics reveal that women constitute nearly 70 percent of the world's 1.3 billion poor people, are the primary victims of war and make up 80 percent of the world's refugees, bear the brunt of the global AIDS epidemic, earn about three-fourths of the pay for the same work carried out by men, and are poorly represented in parliaments

and judiciaries worldwide, including the United Nations where only seven of its 185 highest-ranking diplomats are women.

To address these significant disparities between men and women worldwide, the UN – over the course of many years – created four large agencies to address specific issues concerning women. The UN Development Fund for Women, for example, focuses on enhancing women's rights and advancing their representation in government, ending violence against women, and reducing the prevalence of HIV/AIDS among women and girls, as well as other programs. The UN Division on the Advancement of Women primarily focuses on advocacy to improve the status of women.

The International Research and Training Institute for the Advancement of Women develops research and training programs to empower women and which take into account certain perspectives of women. The Office of the Special Advisor on Gender Issues advises the UN Secretary-General on gender issues, and also helps to design policies to improve the status of women within the UN system.

A newly created UN agency which does not have a specific name or a clear mission will combine the work of four existing agencies addressing women's issues.

In addition to these four UN agencies, the world community in 1979 adopted an international treaty – the *Convention on the Elimination of all forms of Discrimination Against Women* (or CEDAW) – which specifically addresses discrimination against women. Often referred to as an international bill of rights for women, CEDAW requires it 186 signatory nations to take measures to end discrimination against women in various fields and areas of life, including employment, education, health care, family life, among many others; create national action plans for countries to end such discrimination; incorporate the principle of equality of men and women into their laws; and establish tribunals or public institutions to ensure the protection of women against discrimination by persons, organizations, or businesses.

Despite these advances, critics point out that the general status of women still has not improved significantly around the world. They say that discrimination against women still runs rampant, and that women still carry a significant portion of life's many burdens.

As a result, many have long questioned the effectiveness of CEDAW in ending discrimination against women. They note, for example, that its provisions are not enforceable. That is to say, a country will not face any serious consequences for failing to carry out its obligations. The treaty also allows a nation to make reservations, meaning that it can "opt out" of carrying out certain requirements. Almost 30 nations have even made reservations to the core provisions of CEDAW, according to the United Nations. But to be fair, legal observers point out that these shortcomings are not the fault of the treaty itself, but belong to the member governments which negotiated the actual text of the agreement.

Various activists have also concluded that the UN's response to women's issues is a "lamentable failure," noting that its various agencies carry out hundreds of conflicting and overlapping programs without extensive coordination.

Building on efforts initiated by his predecessor, the current UN Secretary-General, Ban Ki-Moon, believed that having four separate agencies did not seem to advance the needs of women worldwide. In describing the current UN structure for helping women, he said: "It is fragmented. It is inadequately funded, and insufficiently focused on country-driven demands."

In September 2009, the General Assembly unanimously passed a draft resolution which will merge the four UN agencies dealing with women's issues into a single agency. The draft resolution also calls on the Secretary-General to "produce, for the consideration of the General Assembly at its 64th Session, a comprehensive proposal specifying the mission statement of the composite entity [and] the organizational arrangements . . ." The new organization, which does not yet have an official name, will be headed by an under-secretary-general who will report directly to the Secretary-General. (The position of under-secretary-general is the third highest rank in the UN system, and outranks the positions held by the present chiefs of the four existing women's agencies.)

Civil society groups, such as the Gender Equality Architecture Reform Campaign, are pressing the Secretary-General to select an under-secretary-general "who is grounded in women's rights and gender equality." They are also encouraging donor countries to contribute at least $1 billion to support the super-agency for women. These groups are hoping that the new super-agency will become operational by March 2010, in time for the review conference of the Commission on the Status of Women.

A super-agency for women would not be the first UN agency dealing with a specific group of people. Other UN agencies which focus on specific groups include the Office of the United Nations High Commissioner for Refugees, which deals with refugees, and also the United Nations Children Fund, which addresses the needs of children.

WORLD TRADE ORGANIZATION

Will American media goods now flood Chinese markets?

In what experts are describing as a "significant victory" for the foreign media industry, the World Trade Organization (or WTO) ruled that China had unfairly discriminated against foreign companies trying to import and distribute media products in one of the world's largest consumer markets. Some say that this decision will help nations such as the United States sell more of its books, magazines, CDs, and DVDs in China, and also undercut China's huge counterfeiting industry. But others believe that the ruling's immediate impact on sales of U.S. media and counterfeit goods will be limited.

China has, over the past several decades, transformed its once-closed economy into one which relies increasingly on trade with and foreign investment from other nations. It recently surpassed Germany to become the world's largest exporter of goods ranging from low cost items such as hardware supplies to expensive electronic products, including computers and home appliances. Still,

economists point out that the government continues to play a significant role in China's economy through heavy planning, for instance.

China has also opened its own domestic markets to foreign goods and services. But, like many other nations, it protects struggling and inefficient home industries from foreign competition by imposing (among other measures) trade barriers disguised as various regulatory requirements – such as complex licensing procedures, long approval processes, and burdensome inspections – which, in turn, could make foreign goods more expensive and less competitive in Chinese markets.

Analysts also point out that China, even with its growing market economy, is still ruled by an authoritarian government over-

A WTO decision rejected China's argument that the only way it can protect public morals from offensive content found in foreign media materials is by allowing only Chinese companies to review and distribute them.

seen by a single political party which heavily censors reading materials (such as books, newspapers, and magazines) and audiovisual products (including CDs and DVDs) produced by both domestic and foreign companies – all in an effort to prevent dissent, undermine political opposition, and keep its official views at the forefront.

In addition to suppressing dissent, observers believe that China uses its censorship policies as a disguise for protectionism. By inaccurately labeling certain foreign goods as politically objectionable or socially offensive, the government could limit their import and distribution, hence preventing them from competing with similar domestic products. Business analysts say that cultural goods – such as publications, films, and various audiovisual products – are the most susceptible to protectionism via censorship policies.

While this kind of protectionism affects many countries, many say that the United States has borne its strongest brunt. The United States sells more copyrighted materials ($126 billion in 2007) than other nation in the world, and sales of these goods exceed "the foreign sales of such vital American industries as aircraft, automobiles, agriculture, and pharmaceuticals," according to executives.

In recent years, American media companies with operations in China have complained about such regulations. In one particular case, the United States in November 2007 asked the WTO to determine whether certain Chinese laws regulating the import and distribution of certain publications and audiovisual products violated international trade rules by unfairly discriminating against foreign companies while favoring domestic ones.

Based in Geneva, the WTO is the premier international organization that sets the rules for international trade and the settlement of trade disputes. It administers three main agreements governing, respectively, trade in goods (the *General Agreement on Tariffs and Trade* or GATT), services (the *General Agreement on Trade in Services* or GATS), and also one for intellectual property, among many others. Each treaty, in turn, calls on each WTO member to adopt trade policies which conform to these various agreements.

Agreements administered by the WTO operate under important principles designed to prevent unfair trade discrimination among nations. (Before World War II, such practices had exacerbated existing political tensions among nations.) For example, under a principle called "national treatment," a WTO member nation must treat foreign goods or services just as it would those of its own nationals. So if a nation imposes certain regulatory requirements on the services provided by a foreign-owned company operating on its territory, it must impose those same requirements on domestic companies, too. In the same fashion, if a nation grants domestic companies a certain benefit, it must also grant the same benefit to a foreign company within its jurisdiction.

In addition to overseeing various trade agreements, the WTO also adjudicates trade disputes among its members. One nation may, for example, complain that the trade policies of another country violate WTO rules. In such a case, the WTO creates an ad hoc dispute settlement panel – composed of three policy and legal experts who serve as judges – to resolve that dispute. After reviewing submissions from the disputing parties, the panel issues a ruling known as a "report." The losing party may appeal to a standing Appellate Body whose decision is final.

Unlike other international organizations where adherence to agreements and rules is often voluntary on the part of member nations, adherence to the WTO's rulings is legally binding on its members. If a losing side to a dispute does not comply with a final ruling, the WTO may authorize the winning party to impose sanctions. (The WTO itself does not impose sanctions.)

***Import rights*:** In the case concerning China, the United States argued that certain regulations did not allow all domestic and foreign companies operating in China to import foreign reading materials and audiovisual goods into that country. Instead, it claimed that these regulations gave only "certain Chinese-designated and wholly or partially-owned enterprises" (popularly described as "middlemen") the right to import such products.

But when China joined the WTO in 2001, it agreed – in a supplemental agreement called the "Protocol on the Accession of the People's Republic of China" (or the Protocol) – that "all enterprises in China shall have the right to trade [i.e., the right to import and export] in all goods throughout the customs territory of China," said the United States. (Business analysts note that it usually costs a company more money – in terms of fees and other costs – to have middlemen import goods rather than simply having that same company do so itself.)

In addition, said the United States, by giving the right to import certain publications and audiovisual products to only certain domestic companies, China's regulations seem to violate the principle of national treatment, which would, in this specific case, call on China to grant the right to import publications and audiovisual goods not only to its own nationals, but to foreign companies operating within its territory as well. The Protocol in Section 5(2) states that "all foreign individuals and enterprises, including those not invested or registered in China, shall be

accorded treatment no less favorable than that accorded to enterprises in China with respect to the right to trade," argued the United States.

***Distribution rights*:** The United States also argued that certain Chinese regulations allowed only a limited number of stated-owned or government-approved distribution companies to distribute imported publications and audiovisual products throughout China, even though there were many foreign-owned distribution companies operating in that country. (These distribution companies would review the content of the materials – as part of the government's censorship policies – and then distribute them to retailers.) As in the case of the right to import, foreign owners of publications and audiovisual products would also have to pay additional fees to and, in many cases, share profits with these distribution companies.

By allowing only certain Chinese companies to distribute imported publications and audiovisual products, China violated GATS Article XVII (concerning national treatment), which states that "each member shall accord to services and service suppliers of any other Member . . . treatment no less favorable than that it accords to its own like services and service suppliers," said the United States. In addition, it pointed out that Article XVI(2)(a) of the GATS states that "a Member shall not maintain or adopt . . . limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, [or] exclusive service suppliers . . ."

China responded that it did not limit the importation and distribution of foreign publications and audiovisual products to only certain domestic entities. "The channels for foreign publications, films, and audiovisual products entering the Chinese market are extremely open," said the Chinese Ministry of Commerce in a statement.

It also argued that, in cases where it did limit import and distribution rights to certain domestic companies, it did so to protect "public morals," and that only these particular measures in their current form could do so. Chinese officials noted that Article XX of the GATT allows WTO member nations to adopt trade measures which would otherwise be illegal if these measures were "necessary to protect public morals," and also to protect "human, animal or plant life or health." In a submission to the WTO, China stated that "it is of vital interest for China to impose a high level of public morals through an appropriate content review mechanism that prohibits any cultural goods that could have a negative impact on public morals."

On the other hand, the United States said that it was not challenging "China's right to determine its desired level of protection" against what that country deemed offensive content. Rather, it believed that China could have protected public morals through less restrictive trade measures which did not discriminate against foreign entities operating in China. In one example cited by the International Trade Reporter, the United States "noted that domestic producers of publications and audiovisual products in China carry out their own in-house content review, and that a similar arrangement could be envisaged for foreign firms."

In August 2009, a WTO dispute settlement panel issued its ruling which largely agreed that China's regulations on the importation and distribution of foreign publications and audiovisual products violated WTO trade rules on trading rights and national treatment. It also ruled that "China has not persuaded us that requiring publication import entities to be wholly state-owned contributes to the protection of public morals in China . . . ," agreeing with the United States that China could have implemented less trade restrictive measures to protect public morals. It then called on China to bring these regulations "into conformity with its obligations," meaning that China would have to amend them or work out some arrangement to satisfy the concerns of the United States. (But the report did not say how exactly China must comply with its WTO obligations.)

China appealed the ruling, again arguing that it could protect public morals only through its currently-existing import and distribution restrictions. But the Appellate Body in December 2009 largely upheld the panel's report. According to the *International Trade Reporter*, the United States and China are currently negotiating a deadline for China to comply with the WTO's decision.

While the Office of the United States Trade Representative (or USTR) and media executives had described the WTO panel report as "a landmark ruling," other analysts note that it could take China years to change its import and distribution procedures, and that the United States may have to lodge another WTO complaint against China if it was dissatisfied with China's initial response. In several other WTO cases, the complaining country had to wait years – and, in one case concerning the banana trade, nearly 15 years – for the losing side to a dispute to comply with a panel report.

Still, the media industry notes that the WTO ruling gives the United States an official legal victory which it can use to apply further pressure on China. Others say that the decision sends a warning to other countries who may try to implement similar restrictions on the import and distribution of various media products.

Some have claimed that by limiting the importation and distribution of foreign media products, China had only encouraged the piracy of such materials. "China's current limitations on the imports of official U.S. DVDs and other media products has created a large domestic counterfeit industry, much to U.S. annoyance," claimed the BBC, for instance. The USTR added that the WTO ruling will help legitimate American media products "get to market and beat out the pirates." According to the International Intellectual Property Alliance, piracy costs American companies $3.5 billion in lost revenue every year.

But other observers dispute such claims, saying that piracy would thrive regardless of the number of importers and distributors in China. The Central Intelligence Agency estimated that the GDP per capita in China was $6,500 in 2009, and that people would most likely pay cheaper prices for pirated materials rather than purchasing legitimate copies, which are almost always more expensive. "As long as there's money to be made in the manufacturing and selling of bootlegged CDs, movies, and videogames," said Brian Wingfield who is Washington Bureau Chief of *Forbes*, "thieves will do it – regardless of market rules."

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