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The Foreign Intelligence Surveillance Act: Hindering the “War on Terror”? PAGE 6

Critics argue that laws regulating the surveillance of foreign agents are outdated and only hinder the government’s ability to detect and prevent terrorist acts. But others believe that recent amendments to such regulations have threatened basic civil liberties. Where does the debate stand today?

INTERNATIONAL INVESTMENT

Regulating sovereign wealth funds PAGE 3

In recent months, sovereign wealth funds have invested tens of billions of dollars in ailing American companies. But critics note that the operations of these funds are not transparent, and worry about their implications on U.S. national security. What laws currently govern the activities of these funds?

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INTERNATIONAL HUMAN RIGHTS

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U.S. involvement in Iraq has created complex (some say intractable) legal issues, many of which remain unresolved today, including the legality of the invasion, problems concerning the administration of the occupation, the stalemate surrounding the draft oil law, and questions regarding criminal jurisdiction over private security contractors.

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Unwarranted Surveillance in America? The National Security Agency Surveillance Program PAGE 11

Shortly after the September 11 terrorist attacks, the NSA—in order to prevent further attacks—carried out a secret surveillance program against thousands of individuals (including U.S. citizens) without a court order, which led to several lawsuits challenging its legality. What is the status of the program today?

WAR ON TERROR

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In its war on terror, the United States has targeted and killed suspected terrorist leaders, which critics say violates international law. But supporters argue that targeted killings are a legitimate means to address terrorist threats. What is the current American policy on targeted killings?

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The EU recently completed negotiations on a reform treaty which will allow its 27 member nations to make decisions more quickly and present themselves as a unified front in world affairs. But will the parliaments of each country agree to support a treaty which was rejected by voters two year earlier?

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Japan will soon re-introduce a jury system for its criminal proceedings. Some say that this will increase participation in the country's system of legal governance. But others believe that the jury system will not address more fundamental problems in Japan's criminal justice system.

WAR ON TERROR

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The president and Congress have engaged in an on-going legal tussle over whether the CIA should be allowed to use interrogation techniques such as waterboarding against suspected terrorist detainees. Supporters say that they help to provide valuable information, but opponents believe otherwise.

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Kosovo's independence PAGE 40

The province of Kosovo recently declared itself independent of Serbia. While opponents argue that the province violated various aspects of international law, supporters say they will move to recognize Kosovo's independence. What is the current legal status of Kosovo?

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The UN recently adopted its first comprehensive declaration describing the rights of indigenous populations around the world, and also the responsibilities of governments toward them. But critics say that many terms are too-broadly (or not even) defined, which could lead to varying interpretations of different provisions.

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The end of the death penalty? PAGE 42

Late last year, the UN General Assembly passed for the first time a resolution calling on its member nations to suspend the death penalty and eventually end that practice. But analysts note that fewer countries than expected had voted for the resolution, and that the issue remains highly contentious.

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Regulating sovereign wealth funds

In recent months, the media have reported that several investment funds owned or controlled by foreign governments have made investments in the tens of billions of dollars in some of America's largest well-known companies. An investment fund located in the Middle East, for instance, is now the biggest shareholder of Citigroup, which is the nation's largest bank. While some observers say that foreign investment in the United States is not a new phenomenon, critics worry about the scope of recent investments and implications for national security. What are the goals of these sovereign wealth funds (or SWFs)? What kinds of investments are they making? And are there any laws which regulate their investments and activities?

Recent investments by sovereign wealth funds

Since last year, foreign governments—through their SWFs—have invested about \$27 billion in Merrill Lynch, Citigroup, Morgan Stanley, and several other companies, many of whom had posted billions of dollars in losses in the deteriorating subprime mortgage market. As the losses grew larger over the course of several months, economic analysts say that these companies needed funding to maintain their operations and also to sustain the confidence of their shareholders. While some companies had large reserves of cash and liquid assets, other companies did not have the same resources.

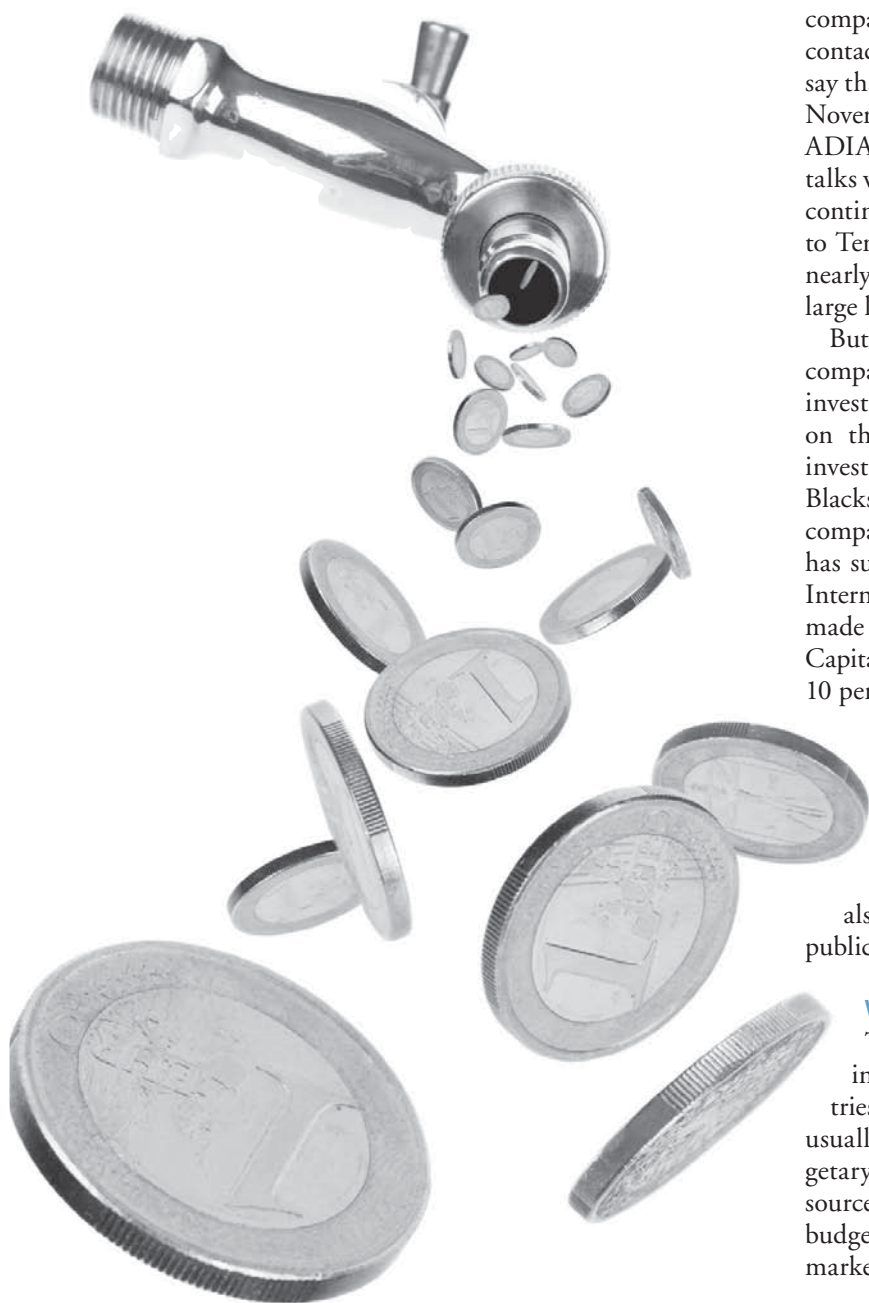
SWFs—some of which have assets in the hundreds of billions of dollars—soon became the only investment funds that had the actual financial resources and willingness to help these ailing companies quickly. Some believe that the companies had directly contacted these SWFs to see if they would invest in them. Reports say that Citigroup—which received over \$7 billion in funding in November 2007 from the Abu Dhabi Investment Authority (or ADIA) located in the United Arab Emirates—is currently in talks with other SWFs to obtain additional funding to help cover continuing losses. Merrill Lynch sold around \$5 billion in shares to Temasek Holdings of Singapore in December 2007, giving it nearly a 10 percent stake in that company which had also posted large losses stemming from the subprime mortgage market.

But not all cases of funding from SWFs have involved companies in financial distress. Experts note that SWFs also invest in certain companies simply to increase the returns on their holdings. A Chinese-controlled SWF, for example, invested \$3 billion in May 2007 for a nine percent share in the Blackstone Group (an American equity fund) as part of the company's preparation for an initial public offering. (It, too, has subsequently experienced losses.) In a similar move, Dubai International Capital (located in the United Arab Emirates) made a \$1 billion investment in a U.S. hedge fund, Och-Ziff Capital Management Group, in October 2007 for close to a 10 percent stake in the company.

Analysts point out that investments made by SWFs in the United States pale in comparison to total investments made by all foreign entities, which include individual investors, mutual funds, and institutional investors. According to American officials, foreigners invested almost \$2 trillion in the U.S. economy last year. They also say that foreigners own about 10 percent of all publicly-traded American assets such as stocks and bonds.

What are sovereign wealth funds?

There is currently no agreed-upon definition for an SWF in international law or even the domestic laws of various countries, including the United States. Analysts say that an SWF is usually a fund created or controlled by a government using budgetary surpluses or excess foreign exchange reserves (among other sources). Experts believe that nations use SWFs to insulate their budgets and economies from volatility in domestic and world markets, to maximize income by investing in a broad range of



The world's largest sovereign wealth funds

Country	Fund name	Year of inception	Source of funds	Assets (in U.S. billions)
United Arab Emirates	Abu Dhabi Investment Authority and Corporation	1976	Profits from oil sales	\$875
Singapore	Government of Singapore Investment Corporation	1981	Excess foreign exchange reserves	\$330
Norway	Government Pension Fund—Global	1990	Profits from oil sales	\$322
Saudi Arabia	Saudi Arabia Monetary Agency	1952	Profits from oil sales	\$300
Kuwait	Kuwait Investment Authority	1960	Profits from oil sales	\$250
People's Republic of China	China Investment Corporation	2007	Excess foreign exchange reserves	\$200
Hong Kong	Hong Kong Monetary Authority Investment Portfolio	1998	Excess foreign exchange reserves	\$140
Russia	Stabilization Fund of the Russian Federation	2004	Profits from oil sales	\$127
Singapore	Temasek Holdings	1974	Excess foreign exchange reserves	\$108
People's Republic of China	Central Hujin Investment Corporation	2003	Other	\$100

Source: U.S. House of Representatives Joint Economic Committee Research Report—"Sovereign Wealth Funds"

assets in other countries, and to enhance social and economic development within their own borders. Some experts say that private pension funds are generally not considered to be SWFs, although both entities share many characteristics. Even though a government entity may oversee the basic administration of a private pension fund, it generally does not control how or where that fund makes its investments. Still, one U.S. official said that "not all analysts [even] distinguish between [pension funds and SWFs]."

Several reports indicate that SWFs currently hold approximately 1.3 percent of the world's financial assets, including stocks, bonds, and bank deposits. By 2015, analysts believe that SWFs could be managing close to five to 10 percent of the world's financial assets, though these are only estimates. The following chart lists some of the world's largest SWFs.

Concerns over sovereign wealth funds

While many SWFs have existed for several decades, they have increased their visibility in recent years. Not only are there more SWFs, say observers, but they have substantially increased their holdings, which now rival the assets held by some of the world's largest pension funds and even central banks. Analysts say that the growth of the number and value of assets held by SWFs have

raised broad concerns. Some believe that governments will use their SWFs to acquire companies, real estate, banks, and other assets primarily for political rather than economic reasons. By exerting influence and control over these assets, SWFs will be able to threaten U.S. national security by obtaining sensitive information and technologies, or by rapidly selling certain assets to stabilize a particular sector of the economy, claim some critics.

Others say that the lack of transparency in several funds has also aroused suspicions. Some funds (such as the Government Pension Fund in Norway) have well-publicized objectives and investment policies, publish regular financial statements with specific information about their sources of funds and particular investments, and are audited by independent accountants. But the investment practices and holdings of many other SWFs are not clearly set forth. This has created anxiety among policymakers in countries where SWFs have made significant investments. And because these investments are being made during a time of heightened terrorist concerns, public opinion can quickly shift against SWFs.

For example, in March 2006, DP World (a company that is owned by the government of Dubai in the United Arab Emirates) purchased the Peninsular and Oriental Steam Navigation Company (P&O), which was the fourth largest ports

operator in the world. Observers note that P&O operated major U.S. port facilities in New York, New Jersey, Philadelphia, Baltimore, New Orleans, and Miami. But after intense domestic opposition (where some critics claimed that the sale could increase the chances of a terrorist attack), DP World ended its bid. In 2005, the Chinese National Offshore Oil Company withdrew its proposal to purchase Unocal, a California-based oil company, for \$18.5 billion after it triggered political protests in the United States.

Some legal analysts say that some of these fears may be overblown. They note that, in the cases involving investments in Citigroup and Merrill Lynch, the SWFs had bought shares that won't allow them to influence the governance of these

Once the investigation is initiated, CFIUS has 45 days to examine the proposed acquisition by using various statutory factors. Once it makes a recommendation, the President has 15 days to finalize a decision and report it to Congress.

Proposals to oversee SWFs

Because of growing concerns about the investments and activities of SWFs, many countries have proposed guidelines to regulate their activities. In October 2007, the United States met with its G-7 counterparts and also with managers of large SWFs to propose a non-binding "best practices" code, which would encourage SWFs to make their investment processes and decisions more transparent. In addition, the Government of Singapore's Investment

Currently, there is no international treaty whose specific purpose is to regulate the activities of and investments made by sovereign wealth funds. Instead, many countries have domestic laws which regulate certain investments and acquisitions made by all foreign investors, which could include SWFs.

companies. Analysts also point out that there hasn't been a single documented case where an SWF had made a particular investment for mainly political reasons or specifically to hurt the markets of another country. Instead, they worry that xenophobia may be playing a role in the criticisms leveled against SWFs (many of which are located in the Middle East). Also, the American public has historically mistrusted foreign investment, they point out.

Existing laws regulating SWFs


Currently, there is no international treaty whose specific purpose is to regulate the activities of and investments made by SWFs. Instead, many countries have domestic laws which regulate investments and acquisitions made by all foreign investors (which analysts believe could include SWFs). In the United States, there is a patchwork of federal statutes that regulates certain aspects of foreign investment. Certain laws, for instance, largely prohibit foreign investment in the maritime and energy sectors of the economy. Another regulation prohibits foreigners from having any "semblance of control" over the domestic airline industry.

A law called Exon-Florio (which Congress amended last year) bestows authority on the President to modify or block any foreign acquisition by "persons engaged in interstate commerce in the United States" that could pose a threat to national security, critical infrastructure, or critical technology. The President delegated his responsibilities under that statute to an existing government agency called the Committee on Foreign Investment in the United States (CFIUS), which undertakes a review process to assess the national security implications of foreign acquisitions of U.S. companies or operations. The agency is chaired by the Secretary of the Treasury and is composed of representatives from various other U.S. agencies.

A foreign company making an acquisition of a U.S. asset may contact CFIUS about the pending transaction. After receiving written notification, CFIUS has 30 days to decide whether to investigate a proposed acquisition. (Investigations are mandatory if the acquirers are foreign governments or state-owned entities.)

Corporation (on behalf of other SWFs) is working with U.S. officials and the International Monetary Fund (IMF) to develop voluntary guidelines which will be presented at the IMF spring meetings in April 2008. Furthermore, the United States and other developed economies are working through the Organization for Economic Cooperation and Development (OECD) to develop another "best practices" code for countries receiving SWF investments.

In response to these and other developments, ADIA announced in March 2008 a set of principles to guide its investments. (A spokesman for ADIA—which one commentator said was "especially secretive" of its operations—said that the investment fund had "accepted the need for increased scrutiny from governments of in-bound investments that may have potential national security implications.") The fund, for example, said that it "has never and will never use its investments as a foreign policy tool." Instead, its common goal will be "to invest [its] proceeds . . . for the current and future benefit of the people of Abu Dhabi and the United Arab Emirates." In addition, the fund said that its investment decisions are made to "maximize risk-adjusted returns." It also noted that "the overwhelming share of [its] international investments are small stakes in companies that involve no control rights, no board seats, and no involvement in the management or direction of firms in which they invest." Legal observers note that these principles fell short of much stronger commitments that were requested by American officials.

While some believe that the American public would like to see firmer regulatory controls over SWFs, others say that this outcome is highly unlikely. The business community, for example, worries that laws specifically regulating SWFs could be used simply as a cover for protectionism. They note that in response to American calls for greater scrutiny of foreign investment several years ago, other nations such as Canada, France, Mexico, and Russia began to consider their own limitations on investments from U.S. companies. 

The Foreign Intelligence Surveillance Act: Hindering the “War on Terror”?

For decades, the American legal system has tried to balance the need to protect the security of the United States against foreign and domestic threats without unduly infringing upon civil liberties, which one analyst defined as those “legal rights that protect a citizen from unfair treatment by the government” (such as the right to free speech, the right to be informed of criminal charges in the case of arrest, and protections against unreasonable searches and seizures by the government). But since the September 11 terrorist attacks, many analysts worry that recently passed laws (and changes to existing ones) have largely strengthened the powers of the federal government in fighting terrorism at the expense of protecting civil liberties. Critics say, for instance, that the government has expanded its surveillance activities not only abroad, but also within the United States.

Several domestic laws generally prohibit government surveillance carried out against Americans within the United States without a court order. Other laws—in particular, the Foreign Intelligence Surveillance Act (or FISA)—allow government surveillance of foreign agents within the United States, but, in many circumstances, still require a warrant from a court. While there is general agreement that FISA has allowed the government to detect and prevent hostile activities carried out by foreign agents within the United States, many critics argue that recent amendments to that law have further threatened civil liberties.

What is the purpose of FISA? Have its provisions been useful in fighting the “war on terror”? What changes did Congress make to FISA since the September 11 attacks? What changes have garnered the most controversy? And where does FISA stand today?

The development of laws regulating government surveillance

Law enforcement officials have long carried out surveillance activities against individuals and groups (such as known criminal figures and organized crime groups) suspected of actively planning or carrying out what they believe to be *ordinary criminal activities*. In these situations, explained one expert, “surveillance begins only at a point when the criminal enterprise is well underway and probable cause exists to believe that a crime has already been or will soon be committed.”

Some of these surveillance measures include monitoring telephone conversations (or wiretapping), placing listening and recording devices in targeted areas, and carrying out physical searches. But these surveillance activities must be conducted within the parameters of various constitutional provisions. The Fourth Amendment, for instance, prohibits the federal government from carrying out searches and seizures without a warrant from a court and without probable cause (i.e., evidence that would lead a reasonable person to believe that an illegal activity has been or is being carried out).

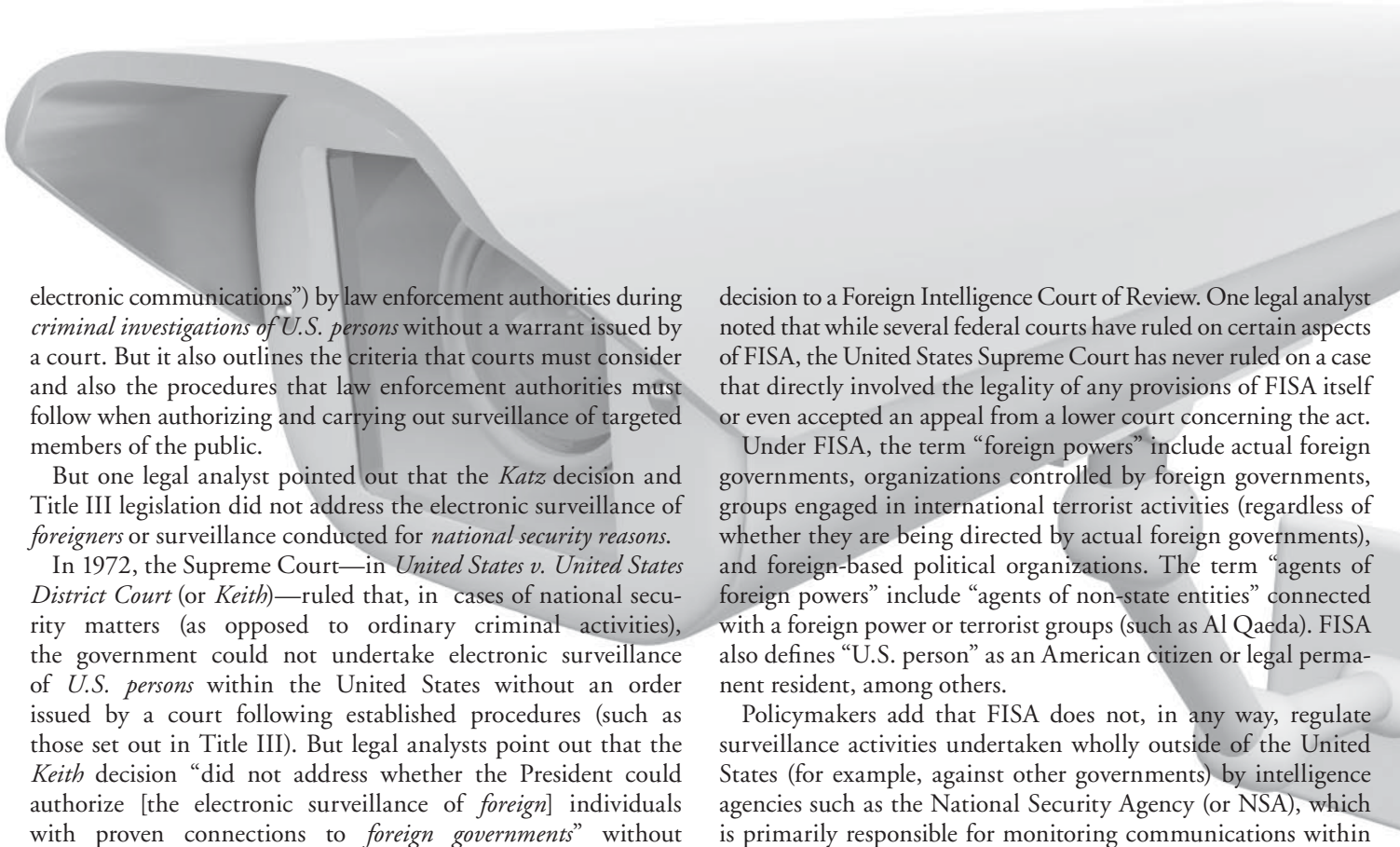
Analysts note that the development of laws that regulate various aspects of government surveillance has evolved over a long history of American jurisprudence. Early laws such as the 1927 Radio Act and the 1934 Communications Act prohibited people from intercepting private radio and telephone messages, respectively. But they did not keep up with technological advances in communications. For example, these laws did not apply to listening devices (including hidden microphones and tape recorders), and, as a result, legal analysts point out that federal authorities “employed [such eavesdropping technology] with

While FISA helps the government to detect and prevent hostile activities carried out by foreign agents within the United States, many critics argue that recent amendments to that law have threatened civil liberties.

increasing regularity.” One expert said that the “government had long maintained that it had extensive discretion to conduct [for example] wiretapping or physical searches to protect national security.”

In 1967, the U.S. Supreme Court ruled in *Katz v. United States* that the Fourth Amendment prohibition against unreasonable searches and seizures carried out by the government without a court warrant even extended (under certain circumstances) to private conversations and not just physical property. The plaintiff—an American citizen—was originally convicted of illegal gambling when the Federal Bureau of Investigation (or FBI) had wiretapped and then recorded his conversations inside a public telephone booth, and then presented his statements as evidence of his illicit activities. One analyst said that prior to this case, “the law said that a wiretap did not constitute a Fourth Amendment search because it did not involve a physical intrusion into a constitutionally protected area.”

In response to this decision and other developments, Congress passed legislation to provide the courts and law enforcement communities with clearer rules and procedures in determining whether they can—and then how to—carry out electronic surveillance against particular individuals within only the United States. For example, Title III of the Omnibus Crime Control and Safe Streets Act (passed in 1968) provides the modern-day legal framework in regulating government surveillance. More specifically, it prohibits eavesdropping (“in wire, oral, or



electronic communications”) by law enforcement authorities during *criminal investigations of U.S. persons* without a warrant issued by a court. But it also outlines the criteria that courts must consider and also the procedures that law enforcement authorities must follow when authorizing and carrying out surveillance of targeted members of the public.

But one legal analyst pointed out that the *Katz* decision and Title III legislation did not address the electronic surveillance of *foreigners* or surveillance conducted for *national security reasons*.

In 1972, the Supreme Court—in *United States v. United States District Court* (or *Keith*)—ruled that, in cases of national security matters (as opposed to ordinary criminal activities), the government could not undertake electronic surveillance of *U.S. persons* within the United States without an order issued by a court following established procedures (such as those set out in Title III). But legal analysts point out that the *Keith* decision “did not address whether the President could authorize [the electronic surveillance of *foreign*] individuals with proven connections to *foreign governments*” without a court order. The Supreme Court went on to recommend that Congress should consider adopting laws specifically to regulate the surveillance of foreign powers, agents, and those working with them.

FISA: A new framework to regulate foreign surveillance

In 1978, Congress passed FISA, which created a new and separate legal framework to regulate the collection of foreign intelligence information through the electronic surveillance of foreign powers, agents of foreign powers, and even U.S. persons (working with those entities) *within* the United States only. Legal experts say that foreign intelligence surveillance under FISA does not require evidence that a crime will or has taken place.

Officials say that collecting such information helps the United States protect itself against “espionage, sabotage, terrorism, and related hostile [foreign] intelligence activities.” FISA also “put an end to the practice of warrantless domestic wiretapping for national security reasons,” according to the Administrative Office of the U.S. Court. The provisions of FISA are codified in 50 USC §§ 1801–1862.

The act created a separate court (called the Foreign Intelligence Surveillance Court or FISA court) whose purpose is to consider applications from (and then grant warrants to) the government to carry out surveillance against alleged agents of foreign powers and other entities in the United States. One expert said that the proceedings are “non-adversarial and are based solely on the Department of Justice’s presentations.” Given the sensitive nature of the proceedings, “persons under surveillance are not informed of [them] nor are they allowed to appear or be represented in the court by a lawyer.” The government may appeal the FISA court’s

decision to a Foreign Intelligence Court of Review. One legal analyst noted that while several federal courts have ruled on certain aspects of FISA, the United States Supreme Court has never ruled on a case that directly involved the legality of any provisions of FISA itself or even accepted an appeal from a lower court concerning the act.

Under FISA, the term “foreign powers” include actual foreign governments, organizations controlled by foreign governments, groups engaged in international terrorist activities (regardless of whether they are being directed by actual foreign governments), and foreign-based political organizations. The term “agents of foreign powers” include “agents of non-state entities” connected with a foreign power or terrorist groups (such as Al Qaeda). FISA also defines “U.S. person” as an American citizen or legal permanent resident, among others.

Policymakers add that FISA does not, in any way, regulate surveillance activities undertaken wholly outside of the United States (for example, against other governments) by intelligence agencies such as the National Security Agency (or NSA), which is primarily responsible for monitoring communications within these other nations through extensive and wide-ranging eavesdropping techniques. Such surveillance carried out by NSA, according to one academic group, “is not limited by Fourth Amendment protections and has traditionally been left to the complete authority of the executive branch.” (For more information regarding the NSA surveillance program, read the article on page 11.)

FISA surveillance: A distinction between foreign agents and U.S. persons

FISA allows the federal government to carry out electronic surveillance without permission from a court for up to a year when that surveillance is used to intercept communications “used exclusively between or among foreign powers” within the United States, and also if there is “no substantial likelihood that the surveillance will acquire the contents of communications to which a United States person is a party.”

On the other hand, the government must obtain a FISA court order to carry out foreign intelligence surveillance within the United States if it could involve the interception of communications of a U.S. person who is knowingly involved in clandestine activities with, for example, agents of foreign powers or who knowingly engages in or supports international terrorism, among other situations. (This is done to protect a U.S. person’s civil liberties.) The government also needs a warrant from the FISA court to conduct surveillance between a U.S. person (within the United States) who is in communication with *any* individual located *outside* of the country and at least one of whom is reasonably suspected of involvement in clandestine activities.

Legal experts note that government officials must fulfill several criteria before the FISA court grants them permission to conduct foreign intelligence surveillance against a U.S. person. For example:

- Under FISA, the government's primary (i.e., sole) motivation to conduct surveillance must be to gather foreign intelligence information. In fact, according to the Administrative Office of the U.S. Courts, "the [FISA] court is instructed not to permit surveillance if the government's *sole* motivation is to use the surveillance for criminal investigative purposes."
- An application to conduct foreign surveillance on a U.S. person requires information such as the identities of the targeted individuals; a statement of facts which supports the government's belief that the intended target is, indeed, an agent of a foreign power; and a certification that "a primary purpose of the surveillance is to obtain foreign intelligence information."
- FISA also requires that the alleged activities of U.S. persons "involve or [are] about to involve a violation of the criminal statutes of the United States" before surveillance takes place. U.S. persons engaged in clandestine activities with foreign powers are usually charged with espionage, which is a criminal offense under Title 18 of the U.S. Code. One political analyst noted that past cases of suspected foreign intelligence activities have overwhelmingly involved U.S. persons who were eventually charged with espionage.
- FISA also states that "no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the First Amendment to the Constitution."

Other legal experts say that obtaining a FISA warrant to conduct electronic surveillance "requires a lower level of proof and less oversight" when compared to the more strict criteria set out under Title III (which is for the surveillance of criminal activities). But they believe that requirements under FISA will deter law enforcement agencies from trying to use FISA as a cover simply to undertake surveillance of criminal activities.

FISA: An obstacle to fighting international terrorism?

In the months after the September 11 terrorist attacks, some officials argued that so-called limits placed by FISA on foreign intelligence surveillance had contributed to the United States' failure to detect and prevent the attacks. "The single greatest structural cause for the September 11th problem," said a former U.S. Attorney General, "was the wall that segregated or separated criminal investigators and intelligence agents. Government erected this wall, government buttressed this wall, and before September 11th, government was blinded by this wall."

Some in the current administration say, for instance, that the process to obtain FISA warrants is too lengthy. "It still takes too long to get FISAs approved," said another former U.S. Attorney General. "FISA applications are often an inch thick and it requires a sign off by analysts out at NSA, lawyers of the [Justice] Department and finally by me. And then it has to be approved by the FISA court."

Other critics say that FISA has not kept up with current technology, and that its provisions "are as outdated as an old switchboard operator." The current technological environment—where many people, including terrorists, communicate with each

other using mobile telephones and encrypted e-mail messages (which run through multiple computer servers around the world)—has made it very difficult for government investigators to determine whether a potential target is a U.S. person and whether the information they are seeking had originated in the United States or abroad, they argue. Without reasonably precise answers to these questions, critics say that the FISA court will be less likely to approve a foreign surveillance request. "These two pieces of information," said one legal expert, "often will be unknowable given today's and tomorrow's technology . . . or at least unknowable in a timely enough way."

But civil liberties groups have vigorously rebutted these points. For example, one organization argued that "the FBI's terrorist surveillance efforts were a train wreck long before 9/11, and not because of any wall" supposedly created by FISA. According to current and former government officials, FBI offices nationwide had antiquated databases, did not have enough Arabic translators, and the FBI was not interested in pursuing international terrorism cases before the September 11 attacks. Even the 9/11 Commission Report, said one prominent group, pointed to "fundamental organizational breakdowns in the intelligence community and the government's failure to make effective use of the surveillance powers already at its disposal."

In the months after the September 11 terrorist attacks, some officials argued that so-called limits placed by FISA on foreign intelligence surveillance had contributed to the United States' failure to detect and prevent the attacks.

In response to criticisms that the FISA warrant process was too slow, another group points out that investigators have "recourse to the emergency warrant procedures to speed applications," and that "most problems with the speed of the FISA application process are due to the executive branch's own policies and procedures, rather than FISA itself."

Others have argued that Congress can also amend FISA provisions in order to take into account changes in technology. "To the extent that FISA may appear to present obstacles," said one observer, "Congress should review and clarify its definitions." Another legal analyst added that "even if FISA requirements are no longer suited to law enforcement and counterterrorism needs, those requirements must be updated by Congress rather than through [say] an executive order." One group noted that, since its passage in 1978, Congress had amended FISA more than 50 times, and that most of these changes took place before the September 11 terrorist attacks.

For example, FISA initially covered only eavesdropping and wiretapping. But, during the 1990s, Congress amended FISA to allow physical entries, the use of pen register and trap devices (which are devices that record outgoing phone numbers and incoming numbers, respectively, from a specific telephone line), and the collection of certain business information.

Recent amendments to FISA

In the months and years after the September 11 terrorist attacks, Congress amended FISA several times. The following is a summary of some of those amendments:

Amendment (Year)	Provisions of amendment relating to FISA
USA PATRIOT Act (or Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act) (2001)	<ul style="list-style-type: none"> • As originally passed by Congress, the primary (i.e., sole) purpose of FISA surveillance must be to gather foreign intelligence information. The PATRIOT Act now states that the government may undertake surveillance under FISA if “a <i>significant</i> portion of the surveillance was for intelligence purposes,” among other criteria. • Legal experts note that the PATRIOT Act does not define the word “significant,” which some critics fear will “lead to inconsistent determinations and potential overuse of FISA standards” in authorizing surveillance. Other analysts worry that this change will allow the government to undertake surveillance under FISA simply as a cover to gather evidence of criminal activity. • In 2002, the Foreign Intelligence Court of Review (in <i>In Re Sealed Case</i>) ruled that the government can use evidence of a crime gathered through FISA surveillance as long as the primary motivation for the surveillance was not to gather such evidence. <hr/> <ul style="list-style-type: none"> • The PATRIOT Act also allows what some critics have described as “roving wiretap” authority, “which allows the interception of any communications made to or by an intelligence target without specifying the particular telephone line, computer, facility to be monitored.” • Some analysts point out that, under previous FISA requirements, the government had to provide a detailed description of the targeted communications and facilities (in order to avoid violating the privacy rights of U.S. persons whose communications may be accidentally intercepted during surveillance). • Some critics believe that, under the change in the PATRIOT Act, the government can use FISA to monitor all communications from large facilities such as “libraries, university computer labs, and cybercafés” without having to identify a targeted individual or a specific communication.
Intelligence Reform and Terrorism Prevention Act (Section 6001) (2004)	<ul style="list-style-type: none"> • The previous FISA definition of “agent of a foreign power” included individuals engaged in activities in conjunction with international terrorist groups. But policymakers argued that the definition would prevent the United States from carrying out surveillance against a non-U.S. person who happens to be a terrorist, but is not formally connected with a particular terrorist group. (They have termed such an individual as a “lone wolf.”) • The new definition of “agent of a foreign power” now includes these “lone wolf” agents. • According to one legal analyst, the government “need not provide facts and circumstances justifying a belief that the target of the electronic surveillance . . . is connected to a foreign nation, foreign group, or international terrorist organization.”
Protect America Act (PAA) (August 2007)	<ul style="list-style-type: none"> • The PAA allows the government to conduct electronic surveillance (of telephone calls and e-mail messages, for instance) between a U.S. person within the United States and <i>any</i> individual (whether a foreigner or even another U.S. person) who is “reasonably believed to be located outside of the United States” without a warrant issued by the FISA court. • Before the amendment’s passage, the government needed a warrant from the FISA court to conduct surveillance between a U.S. person (within the United States) who is simply in communication with <i>any</i> individual located <i>outside</i> of the country. But the PAA no longer requires that the targeted person overseas is, for example, a suspected terrorist or an agent of a foreign power planning clandestine or terrorist activities. <hr/> <ul style="list-style-type: none"> • But the PAA also requires that the government establish procedures which will help determine whether the “acquisition of foreign intelligence information . . . concerns persons reasonably believed to be located outside the United States.” • The PAA, the U.S. Attorney General and the Director of National Intelligence (and not the FISA court) will have the authority to approve such surveillance. One expert added: “The [FISA] court’s only role will be to review and approve the procedures used by the government [in determining whether surveillance targets are reasonably believed to be located outside the United States]. It will not scrutinize the cases of the individuals being monitored.” <hr/> <ul style="list-style-type: none"> • Congress passed the PAA with majorities in the House of Representative (227-183) and the Senate (60-28) in August 2007. • Most of its provisions sunset (i.e., automatically expire) in February 2008 without explicit reauthorization from Congress.

Sources: See the specific legislation itself



C.V. Starr Lecture

February 20, 2008

Smart Power and Human Rights: Reestablishing U.S. Human Rights Leadership



**Suzanne Nossel,
Chief of Operations,
Human Rights Watch**

Some say that one of the central challenges facing the next president will be to reestablish the United States' legitimacy and effectiveness as a standard-bearer of human rights. Potent long-term threats to American national security, including terrorism and proliferation, will also demand new approaches for promoting human rights. Suzanne Nossel will address the imperative of restoring the U.S.'s leadership in the arena of human rights and the promotion of democracy, address the hurdles and challenges to doing so, and propose strategies and approaches to guide the way.

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information and registration.**

Many groups worry that some of these provisions (particularly the amendments passed in 2007) will erode civil liberties and give the government too much leeway in conducting surveillance and monitoring private communications without probable cause:

- One leading opponent said that the 2007 amendments, for instance, represents “the most dramatic change in the 30-year history of FISA and will leave millions of Americans subject to electronic surveillance, without court review, regardless of whether they are suspected of any wrongdoing.”
- Another organization believes that any procedures used to determine the identity of the surveillance target outside the United States are not “an adequate substitute for independent judicial review of surveillance that would invade the privacy of millions of Americans.” In response to these criticisms, an administration official responded: “If you’re targeting someone outside the country, the fact that you doing the [intelligence] collection inside the country, that shouldn’t matter.”

Many groups worry that amendments to FISA passed in 2007 will erode civil liberties and give the government too much leeway in conducting surveillance and monitoring private communications without probable cause.

- Others say that the bill “contains no meaningful reporting requirements to the FISA court concerning even the number of Americans (here or abroad) who would be monitored under these new surveillance authorities.”
- Although the PAA amendments will expire six months after their enactments, other opponents point out that approved surveillance operations can remain in effect even after the amendments actually expire. Some believe that the administration will approve several surveillance operations moments before the amendments expire.

Critics also worry that the government will overly rely on FISA surveillance. In a 2005 annual report, the U.S. Department of Justice had submitted 2,074 applications for surveillance under FISA (an all-time record). While the government withdrew one application, none of the others were rejected by the FISA court. On the other hand, during that same year, the Department of Justice conducted 1,773 wiretaps for criminal investigations under Title III, which has more strict standards for approval.

Congress is currently debating whether to extend the provisions of the PAA amendment (or even make them permanent) beyond its February 1, 2008, expiration date. In late January 2008, the president signed a 15-day extension of the PAA amendment so that Congress would have more time to work out an agreement. While the Senate voted to make the PAA amendment permanent, it could not reach an agreement with the House of Representatives. The PAA amendment later expired. Experts say that while surveillance operations previously approved under the PAA will continue, any new surveillance measures would require a warrant from the FISA court. 🌐

Unwarranted Surveillance in America?

The National Security Agency Surveillance Program

Shortly after the September 11 terrorist attacks, policymakers and advocacy groups around the nation began to debate the role and relevance of the Foreign Intelligence Surveillance Act (or FISA) in fighting terrorism. This act allows the government, under certain circumstances, to conduct surveillance of foreign agents within the United States (and those helping them) by monitoring their telephone conversations and tracking e-mail messages, among other techniques. FISA, say legal experts, helps to detect and prevent clandestine and terrorist activities while also maintaining civil liberties such as prohibiting government searches and seizures without a court warrant (which is a provision contained in the Fourth Amendment of the U.S. Constitution).

In the midst of this debate, the White House, in December 2005, publicly acknowledged the existence of a secret surveillance program carried out by the National Security Agency (or NSA) against thousands of individuals within the United States (including U.S. citizens) without a court order shortly after the September 11 attacks. This raised concerns not only among civil libertarians, but also lawmakers from both major political parties. They said that, under FISA, the government must obtain a warrant from

a special court if the surveillance of foreign agents could involve the interception of communications of U.S. persons.

What information is available concerning the NSA program? What is its current status, and is the program legal under existing laws?

Known details of the NSA program

According to legal analysts, civil liberties groups, and media organizations, there is little publicly available information concerning the NSA surveillance program. The current administration has also refused to divulge its operational details, arguing that revealing such information (which it regards as state secrets) would alert terrorists around the world, and, in turn, harm national security.

Working directly with large telecommunication companies (such as AT&T, BellSouth, and Verizon) soon after the September 11 attacks, the NSA intercepted and monitored international communications, including telephone calls and e-mail messages, made by people within the United States (including U.S. persons) to anyone located outside of the country—all without a warrant from a court. These companies also gave the call records of tens of millions of their customers to the government. The NSA then scrutinized all of this information for any links to Al Qaeda and other terrorist organizations. According to one commentator, because global communications are now taking place over fiber optics networks owned mostly by telecommunications companies, the government had to work with them to gain access to these networks. Decades ago, the NSA “[vacuumed] up phone, fax, and data traffic merely by erecting its own satellite dishes” because most communications were conducted by sending signals to satellites in outer space.

The NSA program, say officials, had initially monitored the communications of up to “500 people in the United States at any given time.” But this number “may have reached into the thousands since the program began,” concluded another analyst. Also, the NSA had monitored 5,000 to 7,000 people overseas suspected of terrorist ties. Policymakers have claimed that the NSA eavesdropping program had, for instance, uncovered and helped to stop Al Qaeda terrorist attacks in 2003 against the Brooklyn Bridge, and also against pubs and train stations in Britain.

The NSA is the nation’s largest intelligence agency. One official said that if that agency were “considered a corporation in terms of dollars spent, floor space occupied, and personnel employed, it would rank in the top 10 percent of the Fortune 500 companies.” The NSA is primarily responsible for intercepting foreign signals intelligence



(such as communications carried out through telephones, computers, and other electronic means) via spy satellites, code breaking, and other classified means. Targets include “foreign governments, diplomats, trade negotiators, as well as drug lords and terrorists,” said one commentator. Legal experts say that NSA surveillance is generally not limited by Fourth Amendment search-and-seizure restrictions because the targets are usually foreign nationals who don’t have any ties to the United States and who are located exclusively in other nations.

government had also informed the FISA court in April 2002 about some aspects of the NSA program.

Investigative journalists and other government officials reported that the president had retroactively authorized the NSA program by issuing a secret executive order in October 2001. The president then regularly issued executive orders every 45 days (after reviews by the Justice Department) to continue the program. According to news reports, the NSA surveillance program initially had little oversight. “The [NSA] can choose its eaves-

Soon after the September 11 attacks, the NSA intercepted and monitored international communications (including telephone calls and e-mail messages) made by U.S. citizens to anyone located outside of the country—all without a warrant from a court.

Historians note that, decades ago, some administrations had ordered the nation’s intelligence agencies (which largely monitor and collect *foreign* communications) to eavesdrop on *domestic* telephone conversations of U.S. persons and groups whom they viewed as political opponents. Congress later passed FISA, which greatly restricted such activities without a court order. “It’s almost a mainstay of this country that the NSA only does foreign searches,” said one former senior official. Another analyst added that “traditionally, the FBI, not the NSA . . . conducts most domestic eavesdropping.”

When Congress passed FISA in 1978, it created a new legal framework to regulate the surveillance of foreign agents (and even U.S. persons working with those entities) *within* the United States only. Unlike domestic surveillance of criminal activities, legal experts say that, under FISA, foreign intelligence surveillance does not require evidence that a crime will occur or has taken place. The act also created a separate court (called the Foreign Intelligence Surveillance Court or FISA court) to consider applications from the government to conduct foreign surveillance.

Under FISA, the surveillance of only foreign agents does not require permission from the FISA court for up to a year. On the other hand, the government must obtain a court order to carry out surveillance of foreign agents if it could also involve the interception of communications of a U.S. person who may be involved in clandestine and terrorist activities along with the foreign agents. Under FISA, the government must satisfy several criteria before receiving permission to carry out such surveillance against U.S. persons. By requiring a court order, rights groups say that FISA forces the government to justify its request to conduct surveillance, which, in turn, helps to prevent an erosion of civil liberties. (For an in-depth analysis of FISA, please read the article on page 6.)

Recent reports say that the Executive branch had briefed several senior members of Congress on the NSA program in October 2001, though one senator said that these briefings did not provide specific details of the program, and that “they were not given an opportunity to either approve or disapprove.” The

dropping targets and does not have to seek approval from Justice Department or other administration officials,” said one analyst.

When several senior officials and even a judge on the FISA court had expressed concerns about the legality of certain aspects of the NSA program, the Justice Department audited the program in 2004, after which it “expanded and refined a checklist to follow in deciding whether probable cause existed to start monitoring someone’s communication,” said some officials. But the details of these procedures are classified and unavailable to the public.

Current developments in the NSA program

In January 2007, the administration announced that it had ended the NSA’s practice of conducting warrantless surveillance. Instead, it had worked out an arrangement whereby government officials would request warrants from the FISA court on an expedited basis to conduct surveillance on the international communications made by particular U.S. persons within the United States.

But one analyst pointed out that “officials would not describe whether the [FISA] court had agreed to new procedures to streamline the process of issuing [warrants].” The NSA later revealed that it had not conducted warrantless surveillance on U.S. persons since February 2007, and that it had, instead, sought FISA warrants to conduct all domestic surveillance. But in a statement made to Congress in May 2007, the administration argued that the president had the legal authority under the Constitution to resume NSA domestic surveillance (without a warrant from the FISA court) if he determined it was necessary.

In August 2007, Congress approved several amendments to FISA through the Protecting America Act (or PAA), which would allow the NSA to conduct electronic surveillance between a U.S. person within the United States and *any* individual who is “reasonably believed to be located outside of the United States”—all without a warrant issued by the FISA court. One legal expert said that the amendment “more or less legalizes the NSA program,” though this authority expires automatically on February 1, 2008. (Read about the PAA in greater detail on page 9.)

NSA surveillance program: In conflict with FISA?

Opponents of the NSA program have argued that, under FISA, the government must get permission from the FISA court to allow the NSA—or any agency for that matter—to conduct domestic surveillance. (It pointed out that many targets had most likely involved U.S. persons.) They have even described the NSA program as “unnecessary” because “by getting warrants through the [FISA court], the NSA and FBI could eavesdrop on people inside the United States who might be tied to terrorist groups without skirting long-standing rules.”

In addition, though administration officials have said that they are now obtaining warrants from the FISA court on an expedited basis to conduct NSA surveillance, civil libertarians and even members of Congress say they are not sure about the legality of these procedures (which have not been revealed publicly) in obtaining the warrants. “Senior lawmakers . . . [are] still uncertain . . . about how the [FISA] court would go about approving warrants, how targets would be identified, and whether that process would differ from the court’s practices since 1978,” they argued.

But supporters of the NSA program have said that the regular process of obtaining permission from the FISA court to conduct domestic surveillance was too slow. (Read FISA article on page 6.) In addition, the government claimed that—as commander of the

Opponents of the NSA program have argued that the government must get permission from a court to conduct domestic surveillance.

armed forces under Article II of the Constitution—the president had the inherent legal authority to order the domestic surveillance of U.S. persons within the United States without court warrants in order to protect the country from internal and external threats. In a supplemental brief submitted to the Foreign Intelligence Surveillance Court of Review in September 2002, the government claimed “that the Constitution vests in the president inherent authority to conduct warrantless intelligence surveillance (electronic or otherwise) of foreign powers or their agents, and Congress cannot by statute extinguish that constitutional authority.”

Furthermore, government officials argued that Congress had given authority to the NSA (via the president) to order warrantless surveillance. They point out that Congress had passed (just one week after the September 11 terrorist attacks) a resolution called the “Authorization to Use Military Force,” which gave authority to the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.” One appropriate use of “force,” they claimed, was allowing the NSA to eavesdrop on international communications originating in the United States without a warrant from the FISA court.



The 2008 Otto Walter Lecture

April 9, 2008

Self-defense from the Wild West to 9/11: Who, What, When



Amos N. Guiora,
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Quinney College of Law,
University of Utah; and
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Defense Forces Judge
Advocate General's
Corps (Lt. Col. Ret.)

Professor Amos N. Guiora will examine the concept of state self-defense and describe the inconsistency between modern-day armed conflict against terrorists and existing international law, which largely views conflicts among nations only. He will propose a multi-disciplinary perspective to bridge this gap. Professor Guiora will also examine the development of a new state self-defense standard by using the American Wild West as a historical analogy where a sheriff must decide when and against whom and under what circumstances he may take action against perceived threats.

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Consequences of the NSA program

Lawsuits against telecommunication companies: Since December 2005, many plaintiffs—which include privacy rights and civil libertarian groups—have filed over 40 lawsuits against several telecommunications companies. They argued, for instance, that companies such as AT&T had, in direct violation of FISA, helped to carry out surveillance against its customers, including Americans within the United States, without obtaining a warrant from a court. (According to FISA, penalties for violating its provisions include imprisonment, fines, civil liabilities, and punitive damages.)

The government claimed that, in order to protect the country from internal and external threats, the president had the inherent legal authority to order the domestic surveillance of U.S. persons within the United States without court warrants.

Other lawsuits have argued that, by participating in the NSA program without obtaining a court order, these companies had violated their customers' Fourth Amendment rights against unreasonable searches and seizures without probable cause, and also a variety of federal privacy laws such as the Electronic Communications and Privacy Act. One lawsuit, in particular, is asking a court to award the plaintiffs damages of \$200 billion.

In response to these lawsuits, the current administration has been lobbying Congress to pass a law which would grant retroactive immunity to those telecommunication companies which had participated in the NSA program. Senior policymakers, including the director of national intelligence, have argued that it would be unfair to make these private companies liable for participating in a classified program to defend the United States against further terrorist attacks after receiving assurances—from the “most senior legal officials”—that doing so would be legal. “If the attorney general of the United States says that an intelligence-gathering operation has been determined to be lawful, a company should be able to rely on that determination,” said a former official. “No company can realistically be expected to contradict such judgments by the attorney general, as they will simply not have the facts at hand to do so.” Another former official added that if Congress did not grant retroactive immunity, these companies would be less likely to cooperate with the government in future terrorism cases, which could then hurt national security.

But critics point out that other telecommunication companies, citing potential violations of existing laws, had refused to participate in the NSA surveillance program. Others have said that granting immunity “would set a bad precedent in which companies would feel compelled to agree to legally questionable government demands without any fear of retribution.” Currently, Congress is still debating whether to grant some form of immunity to these companies.

Court ruling: In August 2006, a federal district court ruled—in what was deemed as the “first judicial assessment of the administration’s arguments in defense of the [NSA] surveillance


program”—that certain aspects of that program violated existing laws, and ordered the government to shut it down. In its ruling (*American Civil Liberties Union, et al. v. National Security Agency, et al.*), the court held that the NSA program was “obviously in violation of the Fourth Amendment” because it has “undisputedly been implemented without regard to FISA.”

The decision also stated that the NSA program violated the First Amendment rights of the plaintiffs because, by potentially monitoring their communications, the NSA program curtailed their freedom of speech. (The ACLU stated that its lawyers had to travel and meet personally

with clients and sources—instead of contacting them by telephone or e-mail—because it feared that the NSA was monitoring their communications.) The ruling also rejected the government’s argument that the congressional “Authorization to Use Military Force” resolution and the president’s inherent powers under the Constitution “allowed him to violate the [FISA] law or the Fourth Amendment.” But the court allowed the NSA program to continue while the government appealed its decision.

In July 2007, a panel of judges on an appeals court (in a 2-1 decision) overturned the district court’s ruling. But the majority decision did not address the legality of the NSA program. Instead, it ruled that the plaintiffs did not have standing (i.e., a legitimate basis) to bring the lawsuit in the first place. In order to show that it has a right to bring a lawsuit, a plaintiff must show, for example, that it suffered or will suffer an actual injury, and that the injury can be traced back to the defendant’s actions.

In the NSA case, the panel of judges ruled that “[t]he plaintiffs did not . . . produce any evidence that any of their own communications have ever been intercepted by the NSA.” It continued: “Notably, the plaintiffs do not allege as injury that they personally, either as individuals or associations, anticipate, or fear any form of direct reprisal by the government such as criminal prosecution, deportation, administrative inquiry, civil litigation, or even public exposure . . . The injuries that these plaintiffs allege are not so direct; they are more amorphous . . .” The ACLU appealed the decision to the U.S. Supreme Court, which then declined to hear the case—without comment—in February 2008.

In the meantime, analysts are not sure whether the NSA has actually resumed its surveillance program. While the PAA amendments seem to legalize the NSA program, others believe that many telecommunication companies (in the face of current lawsuits) are unlikely to resume full cooperation with the NSA in that agency’s surveillance efforts. 

Amending birthright citizenship: A better way to control illegal immigration?

Analysts estimate that over 10 million illegal immigrants currently work or live in the United States. While many business groups say that a majority of these immigrants have, for example, undertaken employment in areas of the economy which need more manpower, others believe that such immigrants—who use public services such as hospital care and public educational services—are becoming a growing financial burden.

In recent years, Congress has tried (but failed) to reform its immigration laws in order to control what many believe is a growing tide of illegal immigrants (i.e., foreigners who come to live or work in the United States without obtaining legal authorization). In one particular route, several members of Congress have proposed changing those regulations which govern what is called “birthright citizenship.” Proponents say that amending these particular provisions—which now automatically grant U.S. citizenship to children born in the United States regardless of the legal status of their parents—could possibly stem the flow of illegal immigration. But opponents believe otherwise. What is the current legal status of this debate?

Becoming an American citizen

In the United States, the federal government is mainly responsible for passing and enforcing the country’s immigration laws. The most complete body of these laws are contained in the Immigration and Nationality Act of 1952 (or INA), which is codified in Title 8 (“Aliens and Nationality”) of the U.S. Code. Prior to the passage of the INA, a variety of statutes governed immigration law, but they were not organized into a single body of law, say legal experts. Congress has also amended the INA over the course of several decades.

Under the INA, there are three general ways to acquire U.S. citizenship. The concept of right of blood confers citizenship at birth to individuals who are born to a citizen parent (irrespective of their places of birth). The INA also lays out a naturalization process through which a person may become a U.S. citizen. And under the concept of territorial birthright citizenship, almost any person born in the United States or within its jurisdiction

(regardless of the legal status of his parents) becomes a citizen automatically. This route to citizenship is codified in INA § 301(a) and is also guaranteed by the 14th Amendment of the U.S. Constitution.

The legal basis and development of birthright citizenship

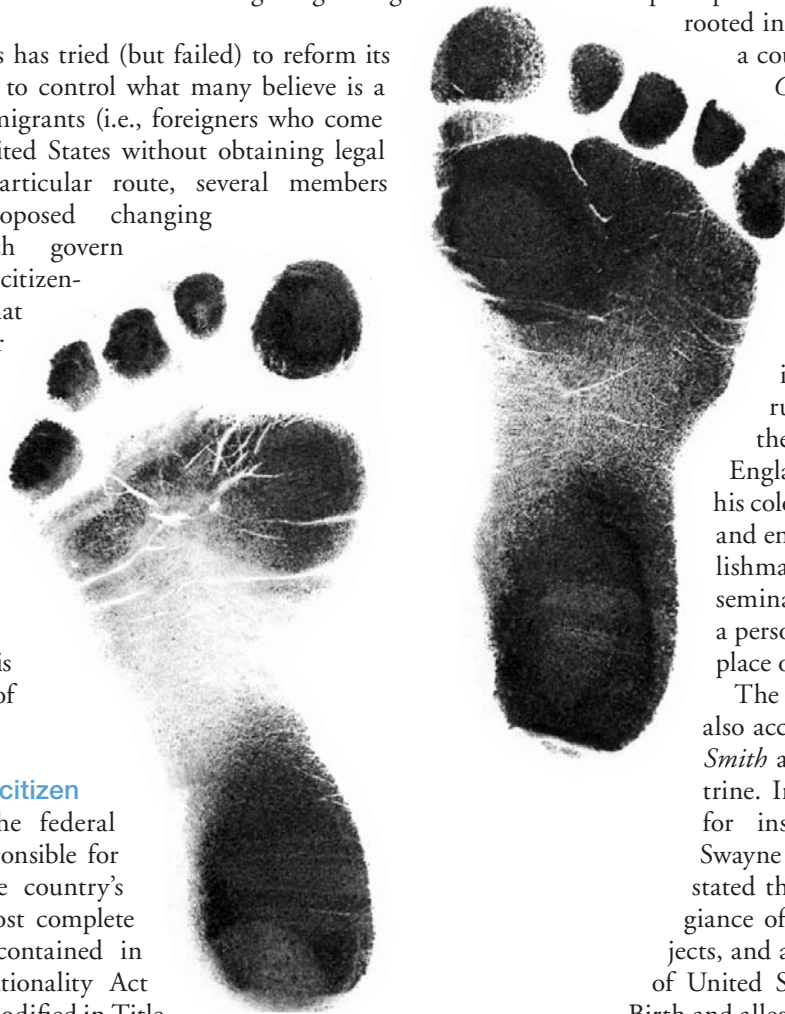
The principle of territorial birthright citizenship is rooted in English jurisprudence. In 1609, a court in England had to decide (in *Calvin v. Smith*) the legal status of

King James IV’s Scottish subjects in England. Some had argued that because Robert Calvin (the plaintiff) was born in the kingdom of Scotland, he did not have the same rights as English subjects such as the right to bring legal action in English courts. But the court ruled that everyone born within the “dominions” of the King of England (whether in Scotland or in his colonies) was subject to all the duties and entitled to all the rights of an Englishman. Legal experts say that this seminal case established the notion that a person’s legal status is based upon his place of birth.

The early courts in the United States also accepted the reasoning in *Calvin v. Smith* as established common law doctrine. In an early Supreme Court case, for instance, Justice Noah Haynes Swayne adopted the Calvin doctrine and stated that “all persons born in the allegiance of the king are natural-born subjects, and all persons born in the allegiance of United States are natural born citizens.

Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country . . . since as before the Revolution.”

Although birthright citizenship was accepted as common law doctrine, legal historians point out that a federal birthright law did not exist in the United States. Prior to the Civil War, individual states had, instead, established their own criteria for citizenship (though a citizen of a particular state was automatically considered a citizen of the United States). Some say that this allowed the states to deny citizenship to certain classes of people. In 1856, the U.S. Supreme Court—in *Dred Scott v. Sanford*—ruled that blacks of African descent (including freed slaves) could not be considered citizens of the United States.



After the Civil War, Congress overturned this decision and settled the question of citizenship of newly freed slaves in 1868 by ratifying the 14th Amendment, which (in part) states: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.” Legal analysts have referred to this specific portion of the 14th Amendment as the “Citizenship Clause,” and say that it created two requirements to acquire citizenship automatically at birth: (i) the individual has to be born within the United States and (ii) he must be subject to the jurisdiction of the United States. Almost any person, therefore, born within the United States and subject to its jurisdiction automatically becomes a U.S. citizen. But INA § 301(a) imposes certain limits on the application of the 14th Amendment. For instance, children born in the United States to foreign diplomats, hostile enemy forces, or born on U.S. territory while it is under the control of a foreign power are not considered subject to American jurisdiction, and, therefore, are not accorded automatic citizenship at birth.

Over the years, the U.S. Supreme Court had also issued several decisions which laid the modern legal foundation for birthright citizenship. In 1884, the Court—in *Elk v. Wilkins*—tried, for the first time, to articulate the parameters of the second requirement of the Citizenship Clause concerning jurisdiction. It ruled that native Indians born within the United States were not U.S. citizens even if they renounced their ties with their tribes. “Children born domestically to American Indians were actually under the jurisdiction of the tribe, which itself had no allegiance to the United States, and was therefore not under the jurisdiction of the United States,” said one legal analyst in describing the decision. But Congress, in 1924, passed legislation which granted U.S. citizenship to Native Americans.

In its 1898 decision *United States v. Wong Kim Ark*, the Court ruled that a person was an American citizen by virtue of his birth within the United States even if his parents were not citizens. In that case, the United States denied re-entry to Wong Kim Ark after a brief trip abroad. (He was born in San Francisco to Chinese parents who were not citizens, but had legally entered the United States under treaties established to encourage migration.) Basing his argument on the 14th Amendment, Wong Kim Ark claimed a right to admission as a citizen of the United States. Analysts say that the *Wong Kim Ark* decision firmly established the general rule of automatic citizenship by birth.

While there have been several cases involving the citizenship status of people born within the United States to legal immigrants (including *Wong Kim Ark*), analysts say that the Supreme Court had never ruled explicitly on whether the 14th Amendment grants automatic citizenship to children born in the United States to illegal immigrants.

Birthright citizenship in other countries

In contrast to policies in the United States (which generally grants automatic citizenship to people born in its territory or jurisdiction), most other countries around the world do not even recognize the concept of territorial birthright citizenship, say legal experts. (Currently, there is no single international treaty that regulates how nations should address various issues concerning immigration, including citizenship, asylum, and migration flows.) While there are a handful of other nations

that do have some form of birthright citizenship, they impose many more conditions and restrictions. The chart on page 17 describes some of the policies of those countries that grant birthright citizenship.

Concerns over birthright citizenship

Recent opinion polls in the United States show that people are concerned about illegal immigration. For example, over 60 percent of the public say that the issue of illegal immigration is very important, according to a poll taken in July 2007. Nearly 70 percent said that they wanted to see a decrease in the number of illegal immigrants entering the country. And another 54 percent believed that illegal immigration was hurting the United States.

Critics of birthright citizenship have argued that when a child is born in the United States, he is not subject to its jurisdiction because his parents (who are citizens of another country) do not have an allegiance to the United States government.

Under one particular approach, many say that Congress should amend current immigration laws in order to curtail automatic birthright citizenship. Supporters of this approach generally argue that an expansive interpretation of the Citizenship Clause of the 14th Amendment—under which any person currently born in the United States automatically becomes a citizen irrespective of the parents’ immigration status—has encouraged and continues to encourage foreigners to bypass established immigration procedures, and enter the United States illegally in order to give birth to a child who will then be considered a U.S. citizen. According to U.S. Census data, approximately 380,000 children are born in the United States to illegal immigrants each year. (Some critics have described these children as “anchor babies” because their parents allegedly use them as anchors attached to the United States in order to set the groundwork for bringing extended family members from other countries.)

Opponents of birthright citizenship allege that illegal immigrants have become a financial burden, overwhelming the educational and health care systems in the United States. They point out that children born within the United States to illegal immigrants qualify for some welfare aid and can generally attend public schools. Some believe that medical costs are increasing because illegal immigrants (who largely don’t have health insurance) can receive free medical care in emergency rooms under the Emergency Medical Treatment and Active Labor Act of 1985, which obligates hospitals to treat uninsured people, but does not automatically reimburse hospitals for these costs.

Critics of birthright citizenship also make several Constitutional arguments against automatic birthright citizenship to children born in the United States to illegal immigrants. Some have argued, for instance, that when a child is born in the United

Countries that grant some form of birthright citizenship

Country	Name of legislation regulating birthright citizenship	Major provisions of legislation
Canada	Citizenship Act	A person is a Canadian citizen if: <ul style="list-style-type: none"> • that person was born in Canada after February 14, 1977, and • at least one of that person's parents (at the time of birth) is a citizen of or lawfully admitted to Canada for permanent residence.
China	Nationality Law of the People's Republic of China	Citizenship by birth can be acquired in one of two ways: <ul style="list-style-type: none"> • Article 4 states that any person born in China to a parent who is a Chinese national shall have Chinese nationality. • Article 6 states that any person born in China whose parents are stateless or of "uncertain nationality," and have settled in China shall have Chinese nationality.
Mexico	Constitution of Mexico 1917	Article 30 states that "Mexican nationality is acquired by birth or by naturalization." Mexicans by birth are those born: <ul style="list-style-type: none"> • in the Mexican territory, regardless of the nationality of their parents; or • in a foreign country of Mexican parents; of a Mexican father and a foreign mother; or of a Mexican mother and an unknown father; or • on Mexican vessels or airships (either war or merchant vessels)
South Africa	South African Citizenship Act of 1995	Under this act: <ul style="list-style-type: none"> • a child born in South Africa at least one of whose parents is a South African citizen or South African permanent residence holder at the time of the child's birth shall be considered a South African citizen. • a foreign child born in South Africa and who is adopted by a South African citizen (and whose birth has been registered in South Africa) will be considered a South African citizen.
United Kingdom	British Nationality Act of 1981	<ul style="list-style-type: none"> • Prior to 1981, birth in the United Kingdom was sufficient <i>in itself</i> to confer British nationality regardless of the legal status of parents. • But under the terms of the Nationality Act of 1981, only a child born on or after January 1, 1983, in the United Kingdom to a parent who is a British citizen or who is "settled" in the United Kingdom is automatically considered a British citizen by birth. ("Settled" status means that the parent is a legal resident in the United Kingdom.)

Sources: See the specific legislation itself

States, he is not subject to its jurisdiction because his parents (who are citizens of another country) do not have an allegiance to the United States government. They say that the allegiance (i.e., citizenship) of the child's parents at the time of birth should determine the child's citizenship, not geography. Critics also claim that when the framers of the Constitution crafted the Citizenship Clause, they did not intend to grant citizenship to everyone born on American soil.

On the other hand, proponents of automatic birthright citizenship argue that children born to illegal immigrants should not be punished for their parents' wrongdoing because they had no control over their parents' entry into the United States, and, therefore, should not be penalized for these actions. Others believe that the economic effects of illegal immigration have been greatly exaggerated. Proponents also argue that restricting automatic birthright citizenship would unnecessarily overturn Supreme

Court precedents and undermine the reason why Congress passed the 14th Amendment, which was to give freed black slaves the same rights and privileges as other people born within the United States.

Recent efforts to restrict birthright citizenship

Over the past decade, several members of Congress have introduced legislation which would deny automatic birthright citizenship to children born in the United States to illegal immigrants or impose other requirements before such children were considered U.S. citizens. (In a recent poll, 50 percent of all respondents said they supported efforts to pass new laws to curb illegal immigration. But other polls indicate that almost 50 percent simply wanted the United States to enforce existing immigration laws.) The chart on page 18 is a sampling of legislation which would amend automatic birthright citizenship in the United States.

Selected legislation restricting birthright citizenship

Name of legislation	Major provisions of legislation	Current status
Optimizing Visa Entry Rules and Demanding Uniform Enforcement Immigration Reform Act of 2007 (Introduced in the House of Representatives in November 2007)	Under Section 201 of this bill, an individual “shall not be [considered] a national or citizen of the United States at birth under Section 301 of the INA unless at least one of the individual's parents is, at the time of birth, a citizen or national of the United States or an alien lawfully admitted for permanent residence.”	No action taken yet on bill.
Birthright Citizenship Act of 2007 (Introduced in the House of Representatives in April 2007)	For a person born in the United States, this bill would consider such a person “subject to the jurisdiction” of the United States for purposes of citizenship if that person is born to parents at least one of whom is: <ul style="list-style-type: none"> • a U.S. citizen; • a lawful permanent resident alien whose residence is in the United States; or • an alien performing active service in the U.S. armed forces. 	Referred to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law in May 2007.
Citizenship Reform Act of 2007 (Introduced in the House of Representatives in January 2007)	This bill would deny automatic birthright citizenship to children born in the United States to parents who are neither citizens nor permanent resident aliens. It would also amend the INA to limit automatic birthright citizenship to a child born: <ul style="list-style-type: none"> • in wedlock in the United States to a parent who is a U.S. citizen or is an alien lawfully admitted for permanent residence and maintains such residence; • out of wedlock in the United States to a mother who is a U.S. citizen or is an alien lawfully admitted for permanent residence and maintains such residence; or • out of wedlock in the United States to a father who is a U.S. citizen or national or is an alien lawfully admitted for permanent residence who maintains such residence, but only if a blood relationship between the father and the child is established by clear and convincing evidence, among many other requirements. 	Referred to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law in February 2007.
End Birth Citizenship to Illegal Aliens Act of 2006 (Introduced in the House of Representatives in September 2006)	This bill would have provided children born in the United States with the same citizenship or immigration status as their birth mothers.	Referred to the Committee on the Judiciary. Died when Congress adjourned.
Citizenship Reform Act of 2005 (Introduced in the House of Representatives in February 2005)	This bill would have limited automatic birthright citizenship to a child born in the United States who was born: <ul style="list-style-type: none"> • in wedlock to a parent either of whom is a U.S. citizen, or is an alien lawfully admitted for permanent residence and maintains such residence; or • out of wedlock to a mother who is a U.S. citizen, or is an alien lawfully admitted for permanent residence and maintains such residence. 	Referred to the Subcommittee on Immigration, Border Security, and Claims in March 2005. Died when Congress adjourned.

Sources: See the specific legislation itself

Although Congress has tried to curtail automatic birthright citizenship, political analysts say that such efforts have been largely unsuccessful. They note that all previous legislative efforts have failed, and they predict the same fate for pending legislation introduced in 2007. 🌐

Punishing human rights violations: First corporate jury verdict under the Alien Tort Claims Act

Legal experts say that one of the most difficult aspects of upholding human rights is punishing those individuals (including leaders and government agents) who violate those rights on a large scale through acts of torture, slavery, and genocide, among others. While most countries around the world already have domestic laws that criminalize human rights violations, observers point out that many of these states have refused to investigate allegations of wrong-doing, which could encourage more abuses to take place, they believe.

In recent decades, victims of human rights abuses from many parts of the world have filed lawsuits in the United States against the alleged perpetrators—mostly former government officials—using a federal statute called the Alien Tort Claims Act (or ATCA). Advocates say that several courts have already awarded many plaintiffs hundreds of millions of dollars in damages, which they hope will deter other officials from violating human rights. In the past decade, plaintiffs have used the ATCA to sue even corporations, some of whom, they believe, had knowingly assisted certain host governments in carrying out human rights abuses.

Recently, a jury returned the first verdict against a corporate defendant in an ATCA lawsuit. How did the jury decide the case? And what are the implications of this ruling?

A limited route: Criminal prosecution of human rights violations

Legal scholars say that a country has a sovereign right to initiate prosecutions of alleged violations of human rights (using its own domestic criminal laws) which had occurred within its jurisdiction. But they also note that many countries in the last few decades—especially those that have recently undergone serious domestic turmoil—have had neither the legal resources nor the political will to carry out such prosecutions. (In fact, many analysts say that some of the largest incidences of human rights abuses during the last century had taken place in countries that experienced some form of upheaval.) As a result, many alleged wrong-doers—whose victims, according to some estimates, number in the tens of millions—have escaped legal scrutiny for their apparent crimes. One U.S. court even said: “The victims cannot sue in the place where the [abuse] occurred. Indeed, in many instances, the victim would be endangered merely by returning to that place.”

To counter this trend, human rights advocates have used many different approaches in trying to hold these individuals accountable for their actions. The main approach involves criminal prosecution through outside parties. For instance, many countries have asked the United Nations to establish ad hoc criminal

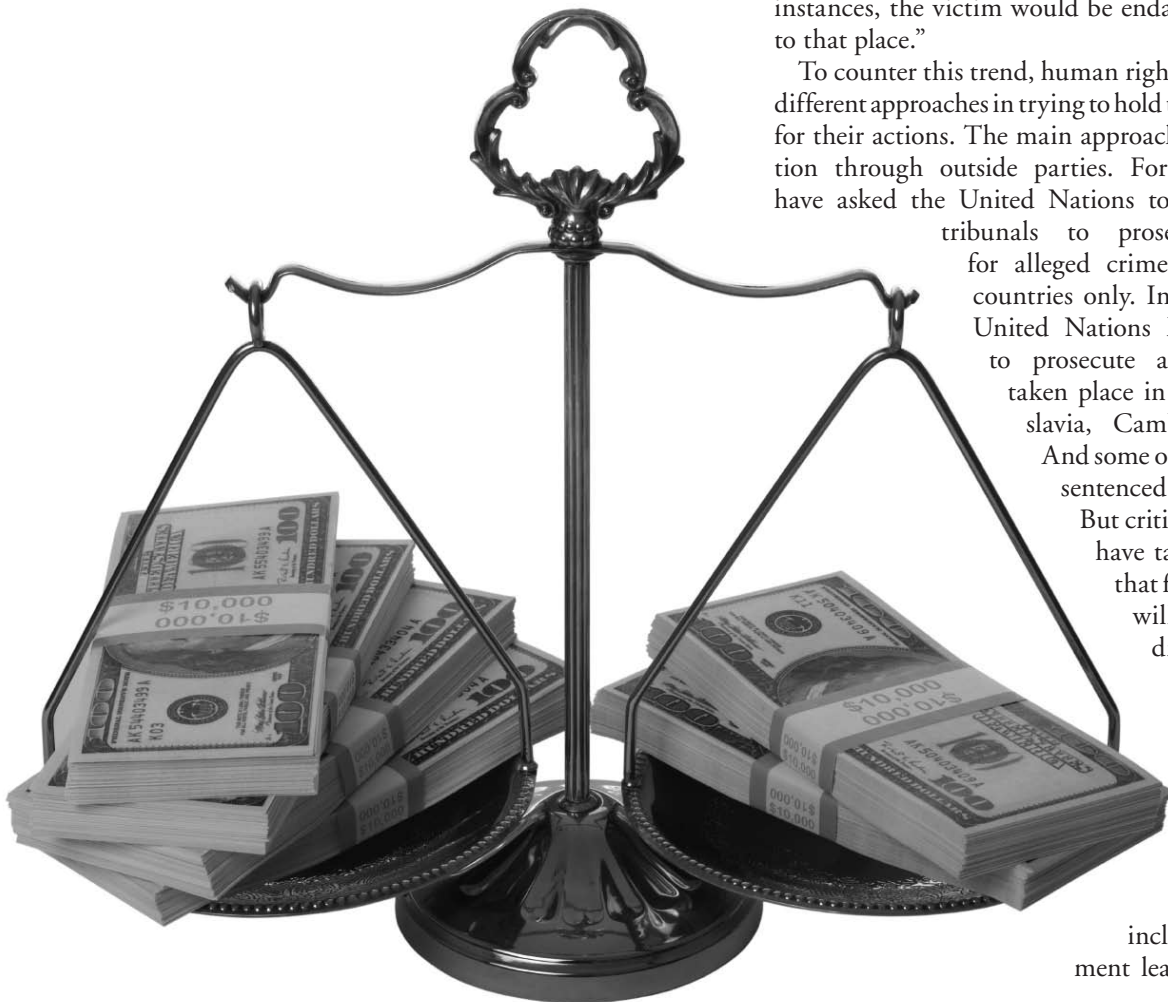
tribunals to prosecute certain individuals for alleged crimes committed in particular countries only. In the past decade alone, the United Nations has set up these tribunals to prosecute alleged crimes which had taken place in Rwanda, the former Yugoslavia, Cambodia, and Sierra Leone.

And some of these tribunals have already sentenced many defendants to prison.

But critics say that these proceedings have taken years to complete, and that finding cooperative witnesses willing to testify has been very difficult.

In addition, the world community established the International Criminal Court (or ICC) in 2003, which is a permanent tribunal with the authority to prosecute individuals—

including high-level government leaders—accused of genocide,



war crimes, and crimes against humanity. Furthermore, other nations have passed domestic laws that give their prosecutors so-called “universal jurisdiction” to file criminal charges against foreign individuals accused of human rights abuses even if the victims have no connection to the prosecuting country and the abuses did not involve any of its nationals (though the procedures of these laws vary widely from one country to the next). But critics point out that many countries where human rights abuses have occurred have not signed the treaty creating the ICC. They also note that universal jurisdiction laws are subject to political considerations which may block any investigations from taking place.

defendant may have to pay a fine directly to the government (and not the plaintiff) and even face imprisonment.

The development of ATCA litigation

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

Since the 1980s, many foreign nationals have filed civil lawsuits in American courts (under the ATCA) against other foreigners—mostly government officials—for alleged violations of international law committed outside the United States and that have no connection to the United States or any of its nationals.

An alternative approach:

Civil lawsuits against human rights abusers

Human rights advocates are also filing civil lawsuits against alleged perpetrators of human rights violations. In particular, they have filed these suits by using the ATCA, which the first U.S. Congress passed in 1789 and is now codified in 28 U.S.C. §1350. The ATCA simply states: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

In other words, the ATCA grants jurisdiction to an American court to hear only civil cases filed by a *foreign* plaintiff who claims that the defendant had injured him through a particular act that is prohibited by international law. (A plaintiff doesn’t need approval from the U.S. government to file such a claim.) In such cases, the plaintiff can seek only financial compensation and punitive damages from the defendant for those injuries. Since the 1980s, many foreign nationals have filed civil lawsuits in American courts (under the ATCA) against other foreigners (mainly government officials) for alleged violations of international law committed *outside* the United States and that have no connection to the United States or any of its nationals. One human rights group said that “no other country has a law quite like it.”

On the other hand, the ATCA does *not* grant jurisdiction to a court to undertake criminal proceedings. Therefore, a plaintiff cannot use the ATCA in trying to pursue criminal charges against a defendant for committing an alleged tort. In fact, under criminal statutes in the United States, a decision on whether to file criminal charges against a defendant for an alleged tort is made by government prosecutors only. Furthermore, unlike a civil case, a successful prosecution of a criminal case does not provide compensatory damages to a plaintiff. Instead, the

alleged action did, in fact, violate a generally accepted norm of international law; and under what standard a defendant may be held liable for his alleged actions.

In 1979, plaintiffs filed the first modern ATCA lawsuit (*Filartiga v. Pena-Irala*), which one legal expert said “represents the origin of [ATCA] litigation.” In that case, a Paraguayan woman filed a claim of wrongful death in New York against a Paraguayan police inspector (who later moved to Brooklyn) for the torture and murder of her brother years earlier in Paraguay. In that case, the plaintiff argued that, by murdering and torturing her brother under “color of state authority” (i.e., under the official authority of or assistance from the state), the police inspector violated international norms prohibiting such torture, and that the ATCA gave jurisdiction to an American court to hear her claims against the defendant. An appeals court ruled that the specific act of torture carried out by a government (and its agents) against its own citizens did, in fact, violate universally accepted norms of international law, and that a consensus of domestic and international legal experts supported this view. Therefore, said the court, such an action gave “rise to a claim under the ATCA whenever the perpetrator is properly served within the border of the United States.”

The case eventually went to trial, and a district court awarded a default judgment of \$10 million dollars against the defendant (who had failed to answer the complaint against him). Although the plaintiffs never collected the money, one human rights group said that the case was “meant to send a message to others that [human rights abuses] are unacceptable,” and that “winning damages is not the primary motivation of most victims.” (Analysts believe that most defendants won’t even have the financial resources to compensate their victims.) Instead, “what matters most to [plaintiffs] . . . is that their claims of injustice be believed and vindicated,” argued another advocate of ATCA lawsuits.

ATCA cases against former government officials

Case (Year filed)	Background and decision
In re Estate of Ferdinand Marcos (1994)	<ul style="list-style-type: none"> • Ferdinand Marcos ruled the Philippines until 1986 when he fled the country and went into exile in Hawaii. He died in that state in 1989. • Plaintiffs alleged that during his rule, Marcos had ordered the torture, execution, and disappearance of thousands of political opponents. • The plaintiffs (numbering close to 10,000 people) filed a class action lawsuit under the ATCA against the estate of Ferdinand Marcos in 1994 for carrying out various abuses which were prohibited by international law. • In 1995, a court awarded the plaintiffs over \$1 billion in compensatory and punitive damages.
Mehinovic v. Vukovic (1998)	<ul style="list-style-type: none"> • Beginning in the 1990s, Bosnian Serb military forces began a campaign to push out non-Serbian populations in many areas of Bosnia-Herzegovina. • The plaintiff alleged that the defendant (a guard at a detention facility used to hold non-Serbians) had tortured him and other detainees for six months. • The plaintiff then sued the defendant (who later moved to Atlanta, Georgia) for torture carried out under the color of state authority, and other acts prohibited by international law. • In 2002, a judge ruled that the defendant was liable for torture, among other acts, and ordered him to pay \$140 million.
Doe, et al. v. Lt. General Johny Lumintang (2000)	<ul style="list-style-type: none"> • In 1999, East Timor held a referendum on independence from Indonesia. Soon afterwards, human rights groups say that the Indonesian military carried out a campaign to suppress this movement. • The plaintiff alleged that the defendant (General Johny Lumintang) had authorized members of the Indonesian military to torture him and others through his chain of command. • The plaintiff sued the defendant—who was in Washington, DC, for meetings—for carrying out torture and other acts (under the color of state authority) prohibited by international law. • In 2001, a judge found that the defendant was liable for torture, wrongful death, and other charges, and awarded the plaintiffs \$10 million each.
Romagoza, Gonzalez, and Mauricio v. Garcia and Vides (2002)	<ul style="list-style-type: none"> • Beginning in 1979, the military government in El Salvador began a campaign of repression against its political opponents. • Plaintiffs claimed that they were tortured by members of the Salvadoran National Guard and Police, which were under the command of Generals Jose Guillermo Garcia and Carlos Eugenio Vides Casanova. Both generals later retired to the state of Florida. • Plaintiffs filed an ATCA lawsuit against the generals, arguing that torture carried out by the state against its own citizens violated accepted norms of international law. • A jury in West Palm Beach said that the generals should have known about the abuses being carried out by their subordinates, and unanimously awarded the plaintiffs over \$50 million in damages.

In the *Filartiga* decision, the court of appeals also developed criteria to help lower courts determine whether they had jurisdiction to hear a particular ATCA case. It stated that a federal court had such jurisdiction if a case satisfied three conditions: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e., international law). Since the 1980s, plaintiffs have filed other ATCA lawsuits, mostly against former government officials and even a former head-of-state.

Jurists now generally agree that certain acts, when carried by a government and its agents against its own citizens, violate international law, and that these state actors could be held legally responsible (under the ATCA) for damages arising from those acts. Some of these acts include genocide, slavery or the slave trade, the murder or disappearance of people, and torture.

Analysts say that while the *Filartiga* decision provided a roadmap for plaintiffs filing ATCA lawsuits against *state actors and their agents* (government officials, for instance), it remained silent as to whether the statute applied to private entities such as individuals acting in their own capacities and who

In recent years, plaintiffs have filed scores of ATCA lawsuits against corporations that were or are now working in conjunction with host governments on certain investment projects.

are not affiliated with any state authority. The then-prevailing view among many legal scholars was that only state actors were capable of violating international law since many experts defined international law as being applicable only to states and relations among states. (Therefore, international law could *not* apply to private entities, they reasoned.) So the actions of a purely private actor—such as someone committing murder, rape, and torture in his own personal capacity—could not be considered a violation of international law. (Of course, a private actor can be held responsible for his actions under the *domestic laws* of a country where the acts had occurred.)

But other courts soon allowed plaintiffs to file ATCA suits against private entities—but only if they first proved that a private defendant had acted under the auspices of the state, and also showed that an alleged act violated some universally recognized norm of international law. Still later courts ruled that particular acts (though not others) committed by a private actor could be considered a violation of international law even if they occurred in the absence of state authority. For example:

- In 1984, an appeals court ruled (in *Tel-Oren v. Libyan Arab Republic*) that a court did not have jurisdiction to hear an ATCA case where the plaintiffs were suing the Palestinian Liberation Organization (which was considered a non-state actor) for damages in a terrorist attack. It determined that the alleged acts (torture and terrorism) did not violate international law

when carried out by a non-state actor. One judge on the panel wrote that international law prohibited only “official torture” (i.e., torture carried out under the authority of a government only), and that this prohibition did not extend to torture carried out by non-state actors.

- In 1995, an appeals court ruled (in *Kadic v. Karadzic*) that a court did have jurisdiction to hear an ATCA case where the plaintiff sued a private actor (not acting under state authority) for damages resulting from genocide, war crimes, and slavery only. But it did *not* include acts such as torture, rape, and summary execution, which “are proscribed by international law only when committed by state officials.” (Yet the court further ruled that, under the ATCA, plaintiffs don’t have to prove that a private defendant had acted under state authority in carrying out crimes such as torture, rape, and summary execution if these crimes were “committed in furtherance of crimes like genocide, war crimes, and slavery.”)
- In 2004, the United States Supreme Court (in *Sosa v. Alvarez-Machain*) devised a two-part test that lower courts must use to determine whether they had jurisdiction to hear an ATCA case. It said that a claim of injury must first “rest on a norm of international character accepted by the civilized world” (which can be determined by considering treaties, legislative acts, and the customs of states, said one expert). Second, the norm must be defined with “specificity.” Therefore, “general or aspirational assertions of international norms are clearly insufficient under that standard,” said another expert. The court also acknowledged that some of these norms were still evolving, and that it would not automatically reject them outright. “The door is still ajar subject to vigilant door-keeping, and thus open to a narrow class of international norms today,” it said.

Despite the growing number of ATCA cases, legal analysts say that guidelines and procedures for adjudicating ATCA cases are still a work in progress. Even so, certain aspects are not in dispute. For example:

- The victims themselves do not need to be present in the United States to file suit. A family member or even a legal representative may file an ATCA lawsuit on behalf of a victim.
- Plaintiffs may sue for monetary damages resulting from “death, physical injuries, emotional trauma, lost income, and expenses for items such as medical care and property damage.” Experts also say that plaintiffs may seek punitive damages.
- A defendant who had carried out the alleged acts must be present within the United States so that a court may serve him notice of the lawsuit. Many defendants in past ATCA lawsuits had retired from office and were actually residing in or visiting the United States. The plaintiff may also sue individuals who did not directly commit these acts, but had “command or supervisory responsibility.”
- Plaintiffs generally cannot file a lawsuit under the ATCA against foreign leaders who are currently in office. Foreign sovereigns are generally immune from suit in U.S. courts under the Foreign Sovereign Immunities Act, which Congress passed in 1976 to prevent domestic lawsuits from straining diplomatic relations with other countries.

Shifting targets: From state actors to corporations

In past ATCA cases, plaintiffs had sued those parties (mostly former government officials) that had actually carried out or had directly ordered the alleged abuses against the plaintiffs. But in recent years, plaintiffs have filed scores of ATCA lawsuits against corporations that were or are now working in conjunction with host governments on certain investment projects. A majority of these lawsuits have claimed that the corporate defendant had knowingly provided financial and logistical support to the security forces of a host government in order to carry out certain abuses against the plaintiffs. Because the corporate defendants were complicit in these abuses, reasoned the plaintiffs, they should also be held legally responsible for them.

Legal observers say that plaintiffs may file ATCA lawsuits against American-based and even foreign corporations (with offices in the United States) for allegedly assisting a host government in carrying out certain prohibited acts under international law which don't require any connection to state authority. (One group said that "the case against Karadzic

[had] laid the groundwork for lawsuits against multinational corporations," which are generally viewed as private entities.) These acts include genocide, war crimes, crimes against humanity, and slavery.

For instance, in a ruling in 2002 (*John Doe I v. Unocal Corp.*) concerning a corporate defendant accused of helping the government of Myanmar in using forced labor in a joint investment project, an appeals court concluded that "forced labor is a modern variant of slavery to which the law of nations attributes individual liability," and, thus, *could* be considered (under certain circumstances) a violation of international law if carried out by a private actor in the absence of state authority. The following chart briefly summarizes some other ATCA cases involving corporate defendants:

But in order to win these cases, the plaintiffs must "begin the arduous process of proving links between company policy and [the alleged] abuses," said one legal expert. Another noted: "With actions against individuals [such as former government officials], the alleged injury can be traced [directly] to the

ATCA cases against corporations

Cases (Year filed)	Background and current status
Wiwa v. Royal Dutch Petroleum (1996)	<ul style="list-style-type: none">• The plaintiffs said that Royal Dutch Petroleum (a foreign company which has an office in New York) and its subsidiaries in Nigeria were complicit in the deaths of several activists who were protesting the company's oil operations in that country.• They alleged that the company knowingly gave monetary and logistical support to Nigerian police to suppress protests and also to carry out summary executions, torture, wrongful death, and other acts prohibited by international law.• The case is currently pending in court.
Bowoto v. Chevron (1999)	<ul style="list-style-type: none">• The plaintiffs alleged that Chevron (a U.S.-based company) and its subsidiaries in Nigeria were complicit in the deaths of several people protesting that company's operations.• They said that Chevron had knowingly provided Nigerian troops with monetary and logistical support in carrying out attacks against protestors, and had violated international norms such as prohibitions on extrajudicial killings.• The case is pending in court.
John Doe v. Exxon Mobil Corp. (2001)	<ul style="list-style-type: none">• The plaintiffs said that Exxon Mobil (a U.S.-based company) was complicit in the murder and torture of several individuals in connection with the operation of a natural gas extraction and processing facility in Indonesia.• They alleged that members of the Indonesian army had carried out attacks against the plaintiffs under the "direction and control" of Exxon, which had also provided them with monetary and logistical support.• The case is pending in court.

Sources: Center for Constitutional Rights, and Human Rights First

offensive conduct of the named defendant. Corporations, however, are frequently at a significant remove from any alleged violation of international norms.”

Given this difficulty, no plaintiff has yet claimed a victory in an ATCA lawsuit against a corporate defendant. According to one commentator, various plaintiffs have filed over 35 lawsuits against these particular defendants under the ATCA in the last decade. But, so far, “20 have been dismissed (three-quarters of these on substantive legal grounds and one-quarter on procedural grounds, three have been settled out of court, and 13 are ongoing).”

No plaintiff has yet claimed a victory in an ATCA lawsuit against corporate defendants. Although plaintiffs have filed numerous lawsuits against them in the past decade, none have gone to trial—until recently.

The first corporate ATCA jury verdict

Although plaintiffs have filed numerous lawsuits against corporate defendants in the past decade, none have gone to trial—until recently. In 2002, the families of deceased Colombian union leaders killed by paramilitary groups in Colombia sued the Drummond Company (a coal producer based in Alabama with operations in that country) under the ATCA for “equitable relief and damages.”

According to political analysts, the government of and rebel groups in Colombia have been fighting a civil war for several decades. (That war continues even today.) Experts say that the government protects the country’s foreign investment projects—such as the coal mines operated by a Drummond subsidiary since 1994—from rebel attacks by providing a range of security services. Hundreds of army soldiers, for instance, patrol the company’s mining compounds. Human rights groups contend that the army also works closely with paramilitary groups (which are not formally part of the government, but helps them fight rebel groups) in providing security.

In the midst of this conflict, commentators say that Drummond had become involved in a labor dispute with a mining union. Members of a paramilitary group later killed several union leaders in 2001. (Legal observers said that these facts were not in dispute.) In their lawsuit (*Estate of Rodriguez v. Drummond Company, Inc.*), the plaintiffs argued that the company should be held liable for these killings.

More specifically, the plaintiffs claimed that Drummond had committed a “war crime” by aiding and abetting the killings of the union leaders. Legal analysts say that, under the ATCA, the plaintiffs had to show that the defendant—in this case, a private company—was involved in a particular act that did not involve state participation and was also prohibited by international law. One of these acts (as established in *Kadic v. Karadzic*) is war crimes.

The plaintiffs argued that Drummond had knowingly assisted in war crimes because, by paying paramilitary groups who were actually involved in an on-going civil war, it essentially chose sides in that conflict, and then helped to carry out the killing of people (i.e.,


the union leaders) who were not soldiers or were involved in the civil war. In their complaint, the plaintiffs stated that “the extent of the civil conflict [in Colombia] is so pervasive that the country’s civil war necessarily must be governed by the rules of war . . . thus, non-combatants to the Colombian civil war, including plaintiffs herein, are protected from human rights violations and other war crimes committed by any parties to the conflict.”

The plaintiffs then argued that, although Drummond employees did not carry out the actual killings, the company was complicit in them. It claimed that the company’s employees or agents had knowingly hired and then aided and abetted the paramilitary forces “by providing [them with] financial support, supplies, access, and other substantial assistance” to carry out the killings. The plaintiffs also believed that company representatives were “aware of the relationship between the Drummond companies and the paramilitary forces,” but had “recklessly failed to do anything to cease this relationship.” As a result, the company was complicit in the deaths of the union leaders, and, therefore, should pay damages.

On the other hand, the company denied any involvement with paramilitary groups and said that no one in the company had contacted or paid these groups to carry out any killings. Lawyers for the company stated that “Drummond [had] never assisted outlaw paramilitary groups or was complicit in their activities.” A legal analyst also added that “the case against Drummond [was] based on circumstantial evidence,” and that some of the witnesses for the plaintiffs had credibility problems because they were once involved in paramilitary activities themselves.

During deliberations after a two-week trial, the federal jury had to decide whether the company had carried out war crimes by knowingly aiding in the killings of the union leaders. In July 2007, the jury decided that Drummond was not liable for the deaths of the union leaders because it did not believe (based on the presented evidence) that the company had actually hired and then assisted the paramilitary groups in those killings. One observer said that the plaintiffs “could not prove clear connections between the company and the paramilitary groups.” In December 2007, the plaintiffs filed an appeal of the jury verdict, arguing that the judge in the case had wrongly barred the testimony of three individuals who supposedly had “firsthand knowledge” of links between Drummond and paramilitary groups.

Many critics of these ATCA lawsuits argue that plaintiffs are discouraging foreign investments in countries where it is most needed. They also note that other countries don’t have similar laws allowing such lawsuits, and, as a result, U.S. companies could be put at a competitive disadvantage. But a prominent human rights group said that “it would be morally repugnant to promote the competitiveness of American companies by giving them license to participate in crimes.”

In the meantime, analysts say that corporations should take many precautions before they begin an investment project in another country where the government does not have a strong human rights record. For example, they say that a company should assess the country’s human rights practices to see whether potential problems could arise in the future. Another legal expert said that “partnerships with local governments and security providers should be subject to the highest scrutiny.” Furthermore, others say that companies should hire an independent advisory board “to ensure compliance with international norms.” 

Targeted killings in the war on terror: Legitimate or illegal?

Since the September 11 terrorist attacks, the United States has employed a wide range of measures during the current “war on terror.” It has, for example, passed laws to curb terrorist financing, increased its surveillance of suspected terrorists at home and abroad, detained and interrogated hundreds of suspected terrorists in military bases, and undertaken a massive military campaign in Afghanistan. Analysts also say that the United States has specifically targeted and killed suspected terrorist leaders. Some human rights groups have criticized these “targeted killings,” arguing that the United States has, for instance, violated the provisions of several international treaties in undertaking such actions. But supporters argue that targeted killings are a legitimate means for addressing terrorist threats. What is current American policy concerning targeted killings? Does international law allow such acts? And where does the issue stand today?

An undefined ban on assassinations

In 1981, President Ronald Reagan issued Executive Order (E.O.) 12333 concerning “United States Intelligence Activities.” This order clarified the specific roles and responsibilities of various intelligence agencies throughout the United States government, among many other provisions. Some of the more well-known provisions include the prohibition on assassinations. In particular:

- **Section 2.11 (*Prohibition on Assassination*)** states: “No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”
- **Section 2.12 (*Indirect Participation*)** states: “No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order.”

E.O. 12333, which is still in effect today, supersedes three previous executive orders prohibiting assassinations carried out by the government and its agents. The bans came about in response to allegations of U.S. involvement in failed assassination plots against certain foreign leaders during the 1960s and 1970s. Analysts generally agree that the ban prohibits the killing of foreign political leaders during times of peace and also helps to regulate the activities of the intelligence community. Even though E.O. 12333 directly applies to the activities of the American intelligence community, there is a general consensus that the assassination ban applies to the military as well.

Experts believe that the United States is the only country to have enacted a clear declaratory policy that prohibits its government and agents from engaging in or carrying out assassinations. But they point out that a clear definition for the term “assassination” does not exist in federal law. E.O. 12333, for instance, does not even define that term. Political analysts say that Congress and the President did not push for an exact definition because they wanted the government to retain some flexibility when deciding how to respond to unforeseeable and fast-changing situations abroad.

While the assassination ban currently applies to the government during times of peace, officials argue that there are exceptions. During times of armed conflict, policymakers say that the targeting and killing of enemy combatants (including regime leaders) is permissible as long as countries follow the laws of war. They worry that a clear definition for the term “assassination” (or even an absolute ban of that act) would constrain the United States from carrying out even legitimate military operations.

While there is no exact definition for “assassination” in federal law, political analysts generally define the term as “an intentional killing of a targeted individual for political purposes.”

Observers say that several other terms are used interchangeably with assassination. For example, some human rights groups instead use the term “extrajudicial executions,” which they have defined as “killings which can reasonably be assumed to be the result of a policy at any level of government to eliminate specific individuals as an alternative to arresting them and bringing them to justice.” These groups have argued that such killings are “unlawful” because they “take place outside of any judicial framework.”



Commentators say that, since the September 11 terrorist attacks, many groups are now using the term “targeted killings,” which is generally defined as “the intentional killing of a specific alleged terrorist or group of alleged terrorists undertaken with explicit governmental approval when they cannot be arrested using reasonable means.” In fact, many say that this specific kind of killing has increased over the years in response to the September 11 attacks and many other subsequent terrorist attacks.

Administration officials say that the United States has the legal authority to carry out targeted attacks against terrorists. The United States is currently engaged in an actual war against terrorists, and the assassination ban under E.O. 12333 applies only during times of peace.

Arguments for and against targeted killings

Political analysts say that targeted killings are not a recent phenomenon, and that such acts have taken place throughout history. But they say there has been a long-running (and unresolved) debate concerning, for instance, its legality and effectiveness. Both advocates and opponents of targeted killings cite various reasons to support their positions. Those in support say that targeted killings:

- **Are an inherent right to self-defense:** Nations have an inherent right to self-defense and to use those means they determine are necessary to protect themselves when attacked.
- **Prevent greater atrocities from occurring:** Killing a particular leader can spare civilians and innocent bystanders of needless suffering, torture, or serious injury. Some claim that if world leaders such as Adolf Hitler and Slobodan Milosevic had been killed, it would have saved millions of lives and ended conflicts more quickly. They also contend that carrying out a targeted killing with new technology such as precision-guided missiles will substantially reduce both military and civilian casualties (compared to a protracted conflict).
- **Disrupt and disable terrorist groups:** Some believe that a targeted killing of core individuals of, for example, a terrorist organization will hinder its effectiveness and lead to immediate confusion and a disruption in the flow of operations, including future terrorist attacks.

On the other hand, those in opposition say that targeted killings:

- **Violate principles of due process:** International human rights groups argue that under broad principles of due process, a detained individual should be given a fair trial where he will be able to defend himself, confront his accusers, and (if necessary) appeal his verdict. In a targeted killing, all aspects of due process are missing, they argue.
- **Are illegal and morally wrong:** Some believe that E.O. 12333 prohibits assassinations without, for instance, a formal declaration of war. Others say that, under evolving standards

of morality and decency, the targeting and killing of leaders (and other individuals) is unacceptable as a foreign policy tool. In addition, even if the targeted attacks were carefully carried out, it would inevitably lead to the death of innocent bystanders and could produce a great deal of collateral damage. (Foreign Affairs, Do Targeted Killings Work?)

- **Can make a situation worse:** Some experts say that carrying out a targeted killing without considering plans of succession could lead not only to instability and confusion within a particular state, but also neighboring countries. In addition, killing a particular enemy leader, some believe, may increase support for a terrorist organization and even lead to the installment of a new leader who could carry out even greater atrocities.

The international law of targeted killings

Currently, there is no single international treaty that expressly forbids or allows targeted killings. But, as mentioned earlier, legal experts say that nations generally have a legitimate right to target and kill enemy forces (and even members of their leadership) during times of armed conflict. Though countries have a right to protect themselves and carry out military operations during a conflict, a number of international treaties (collectively known as the laws of war) set limits on how states conduct defensive and offensive attacks. None of these particular treaties ban “assassinations” outright. But because targeted killings are more likely to take place during an armed conflict or similar situations, experts believe that these treaties can (and, some argue, should) guide when and how states carry out targeted killings. Analysts say that since there are no clear guidelines for carrying out targeted killings, many states have looked to these international treaties either to justify their targeted killings or to denounce other states engaged in such action.

Hague Conventions: According to legal scholars, the Hague Convention of 1899 and the Hague Convention of 1907 were among the first modern treaties to guide the conduct of nations during times of armed conflict. For example, they prohibit the use of weapons that could cause unnecessary suffering to the enemy. In addition, Article 23(b) of regulations annexed to the Hague Conventions forbids treacherous means of killing or wounding individuals belonging to the hostile nation or army. Treacherous behavior includes deceit (such as a breach of confidence) or a dishonest act against an individual who justifiably believed that he had nothing to fear from the attacker.

When trying to determine the legality of a particular targeted killing under the Hague Conventions, analysts try to assess whether one side employed treacherous methods in carrying out such an act. While the targeting and killing of members of hostile forces who are out in the open is not illegal, they say that targeting individuals at religious venues or in prayer, for instance, can be viewed as impermissible under the Hague Convention because these individuals have no means of defense and are under the assumption that they will not be attacked in such a setting.

Geneva Conventions: Completed in 1949, the Geneva Conventions are four treaties that represent the most comprehensive set of laws governing the treatment of armed combatants, prisoners of war, and civilians. While the Geneva Conventions

do not directly address targeted killings, many legal analysts argue that their provisions regulate certain aspects of carrying out a targeted killing. For example, using the concept of proportionality, Article 51 of the Second Geneva Convention prohibits attacks where incidental injuries to civilians or civilian objects would be excessive in relation to its military advantage. In other words, any given military action carried out by a state must be proportional to a given threat.

Using Article 51, analysts say they can assess the legality of a targeted killing by determining whether such an act was carried out in proportion to its threat. If less violent options realistically exist (such as making an arrest by deploying police or troops), some experts say that a targeted killing should not be carried out because such an act could be viewed as a disproportionate response. However, some analysts argue that making an arrest can be very difficult in certain lawless areas. In fact, they believe that employing soldiers or police to arrest a certain individual would likely put more lives in danger.

Other legal experts believe that the Geneva Conventions do not expressly prohibit targeted killings, and that some sections seem to permit their use under certain circumstances. For example, Article 51 of the Protocol Additional to the Geneva Conventions of 1949 (“Protection of the civilian population”) states that while “attacks against the civilian population or civilians by way of reprisals are prohibited,” it also says that “civilians shall enjoy the protection afforded by this Section, unless and for such times as they take a direct part in hostilities.”

As a result, some have used Article 51 to justify targeted killings against international terrorists. They say that international terrorists cannot be viewed as traditional combatants under the Geneva Conventions because they are neither (i) part of the armed forces of a state that is a party to the conflict nor (ii) part of another armed group belonging to a state that conducts their operations in accordance with the laws of war such as wearing a fixed distinctive sign and carrying their weapons openly. Therefore, they must be viewed as civilians—which is the only remaining category in the Geneva Conventions—who are open to attack (including targeted killings) if they engage in hostilities with the armed forces of another country.

In contrast, many legal scholars have argued that some provisions of the Geneva Conventions seem to prohibit targeted killings outright. They note that Article 3 in all of the Geneva Conventions prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” They argue that, under Article 3, a targeted killing would seem to deny a targeted individual a right to due process (i.e., an established course of legal procedures designed to protect the rights of an individual from certain government actions).

So, under such an analysis, every individual suspected of planning or carrying out, say, a terrorist attack should be arrested, detained, and—if necessary—tried for his alleged acts according to established legal procedures. But a targeted killing would end the life of a suspected individual without due process. (As a result, some groups have used the phrase “extrajudicial executions” to describe a targeted killing.) In addition, some point out that other

international treaties—such as Article 6(1) of the International Covenant on Civil and Political Rights—state that arbitrary execution is unlawful.

United Nations Charter: Some countries have justified their targeted killings, arguing that international law allows them to defend themselves from attacks. They point out that Article 51 of the United Nations Charter explicitly recognizes an inherent right to self-defense. It states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.” So in the case of American strikes beginning in February 2002 against Al Qaeda in Afghanistan, the United States argued, in part, that it was carrying out defensive maneuvers after that terrorist network had destroyed the World Trade Center and parts of the Pentagon.

Human rights groups argue that nations should never carry out targeted killings, and that a particular circumstance—such as a fight against international terrorism—did not justify using such an approach.

But several legal scholars argue that the right to self-defense in Article 51 is applicable only in cases of armed attacks carried out by other states (and not by particular individuals or groups). Because Al Qaeda is not a state entity, they say that the United States cannot use Article 51 as a justification for attacks against particular groups or individuals.

The use of targeted killings in the “war on terror”

In the months after September 11 terrorist attacks, commentators say that there was a growing debate on whether the ban on assassination applied to terrorist groups and even on the “war on terror.” According to one news report, policymakers were “considering several changes in United States rules to strengthen the effort to combat terror, including a reversal of the prohibition on assassinations.” While the United States never issued a formal and binding statement concerning these issues, analysts say that it began to carry out targeted killings in the following years. For example:

- In November 2002 in Yemen, missiles fired from a CIA-controlled Predator drone aircraft blew up a car carrying six men. Officials said that one of the passengers was alleged to be a senior member of Al Qaeda (Abu Ali al-Harithi), and the strike had been carried out with the corporation of the government of Yemen.
- In May 2005, a Predator aircraft killed a senior member of Al-Qaeda (Haitham al-Yemeni) in Pakistan.
- In December 2005, the government of Pakistan announced the death of a senior Al Qaeda operative (Abu Hamza Rabia), but did not say how he had died.



C.V. Starr Lecture

April 16, 2008

The European Union and Russia: Strategic Partners or Vexing Neighbors?



George L. Bustin,
Senior Counsel,
Cleary Gottlieb Steen
& Hamilton LLP;
and Lecturer,
Woodrow Wilson School,
Princeton University

In 1997, both the European Union and Russia used the rhetoric of “strategic partnership” and even “strategic union” in describing their relationship. However, the reality in early 2008 is quite different. Mr. Bustin will address several issues between the EU and Russia, including the widening values gap concerning democracy, state control over energy resources, and internal legal conflicts. Mr. Bustin will also speak about his own experience in advising the Russian Ministry of Finance on its sovereign debt restructuring within the Paris Club and insights gained from that time.

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- In January 2006, another Predator aircraft targeted a village in northern Pakistan where officials believed that one of the top commanders of Al Qaeda (Ayman al-Zawahiri) was meeting with other extremists. The attack killed 18 civilians. Pakistani officials say that Zawahiri was not in the village.

Administration officials have argued that the United States currently has the legal authority to carry out these targeted attacks. They say, for example, that the assassination ban under E.O. 12333 applies only during times of peace, and that the United States was currently engaged in an actual war against terrorists.

In addition, they point out that, shortly after the September 11 terrorist attacks, Congress had passed a joint resolution called the “Authorization for Use of Military Force,” which called on the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” While the resolution did not make any explicit reference to assassinations, administration officials argued that E.O. 12333 did not “inhibit the nation’s ability to act in self-defense.” In addition, on September 17, 2001, President Bush had reportedly signed an executive order giving the CIA broad authority to use lethal force in the “war on terror.”

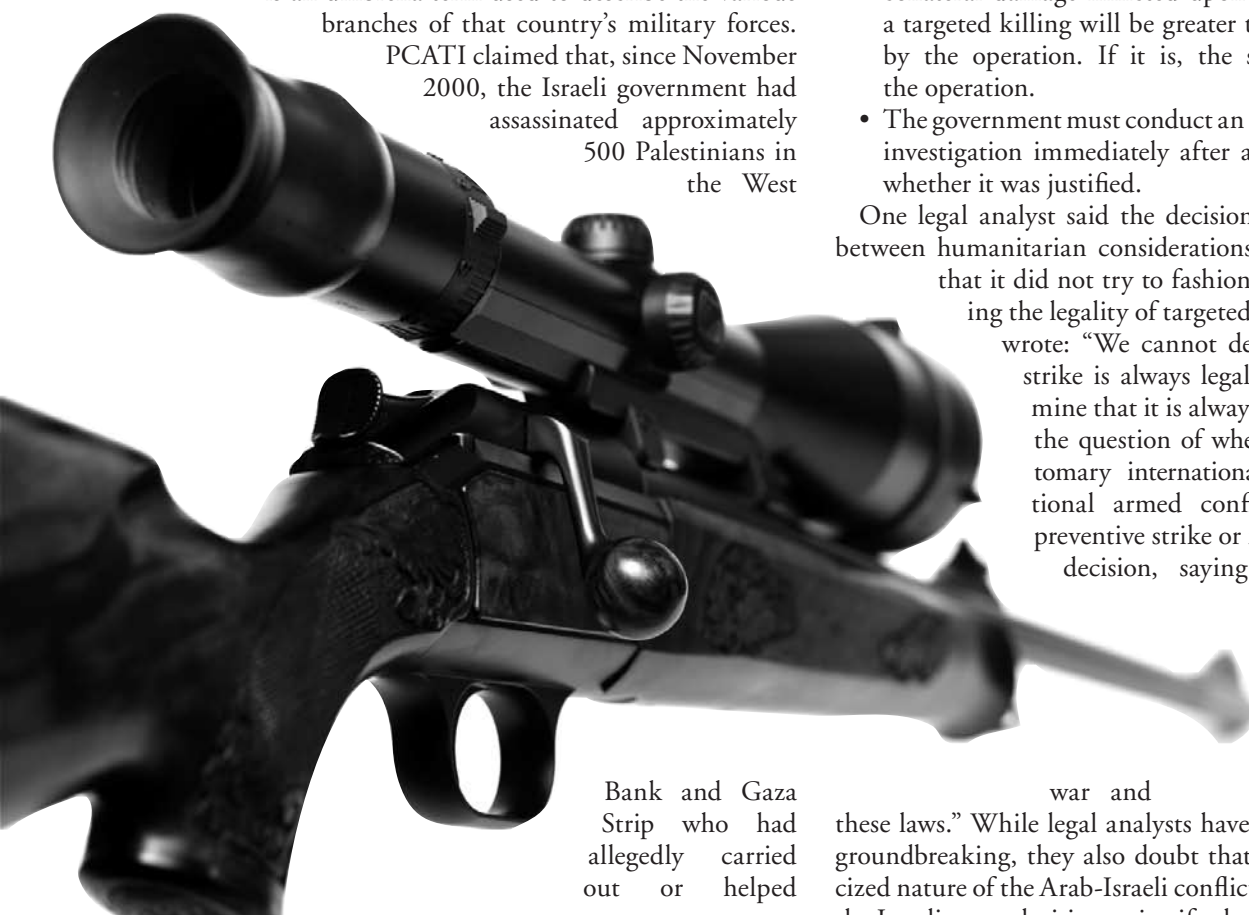
While some have argued that terrorists can be classified as civilians who have lost their protected status under the Geneva Conventions because they have engaged in unlawful combat (and are, hence, open to attack), other analysts point out that the current administration does not fully share this view. Instead, U.S. officials have interchangeably described terrorists with a wide variety of terms (including unlawful combatants, non-privileged combatants, battlefield detainees, and illegal combatants) and who do not have any protections under the Geneva Conventions. (They also point out that terrorist groups such as Al Qaeda have publicly repudiated the Geneva Conventions.) But legal experts note that none of the terms used to describe terrorist fighters is mentioned in the Geneva Conventions. And according to a prominent human rights organization, “no detainee can be without a legal status under the Conventions.” In June 2006, the U.S. Supreme Court ruled—in *Hamdan v. Rumsfeld*—that Article 3 of the Geneva Conventions afforded some protections to international terrorists. But another legal commentator noted that the Supreme Court did not determine whether terrorists should be classified as civilians or whether they were subject to targeted killings if they engaged in hostilities.

During the debate concerning the legality of targeted attacks, commentators have noted that no court had ever issued a decision concerning this practice. But in December 2006, legal analysts say that the Supreme Court of Israel became the first to do so.

The first judicial ruling on the legality of targeted killings

In January 2002, the Public Committee against Torture in Israel (PCATI) filed a petition against the Government of Israel, challenging the legality of that country’s targeted killings policy

carried out by the Israel Defense Force (or IDF), which is an umbrella term used to describe the various branches of that country's military forces. PCATI claimed that, since November 2000, the Israeli government had assassinated approximately 500 Palestinians in the West



Bank and Gaza Strip who had allegedly carried out or helped to carry out terrorist attacks against

Israel. But the group also said that these targeted killings led to the deaths of 168 innocent civilians. In its petition, PCATI argued that Israel's targeted killings policy violated, for instance, international law, Israeli law, and the basic principles of human morality. On the other hand, the government countered that, under international law, a state is permitted to defend itself against "armed attacks," including those launched by terrorist groups within Israel and neighboring territories such as the West Bank.

In a highly anticipated decision in December 2006, the Supreme Court of Israel unanimously rejected the PCATI's petition and ruled that international law—such as the Protocol Additional to the Geneva Conventions of 1949—permitted IDF to resort to targeted killings of Palestinian terrorists in the West Bank and Gaza Strip as long as the Israeli government satisfied four general criteria:

- The government must have strong evidence that the potential target has lost his protected status as a civilian under the laws of war (which say that civilians are protected against military attack unless they take a "direct part" in hostilities). The decision said that taking a direct part in hostilities included not only taking up arms, but also aiding terrorists by transporting them or servicing their weapons.
- If less drastic measures can be used to stop the potential target (such as making an arrest), the state must use these measures unless this alternative poses too great a risk to the lives of the soldiers.

- The government must also assess in advance whether collateral damage inflicted upon innocent civilians during a targeted killing will be greater than the advantage gained by the operation. If it is, the state must not carry out the operation.
- The government must conduct an independent and thorough investigation immediately after an operation to determine whether it was justified.

One legal analyst said the decision tried to strike a balance between humanitarian considerations and military needs, and that it did not try to fashion an absolute rule concerning the legality of targeted killings. In fact, the court

wrote: "We cannot determine that a preventive strike is always legal, just as we cannot determine that it is always illegal. All depends upon the question of whether the standards of customary international law regarding international armed conflict allow that [specific] preventive strike or not." PCATI criticized the decision, saying that the criteria were

"vague, and [did] not clearly define to the [IDF] forces the rules of what may or may not be done as defined in the laws of

war and the interpretation of these laws." While legal analysts have described this decision as groundbreaking, they also doubt that—given the highly politicized nature of the Arab-Israeli conflict—other countries will use the Israeli court decision to justify their own policies concerning targeted killings.

The debate concerning the legality of targeted killings continues today, and commentators believe that those who support and oppose such acts are no closer in resolving their differences. Despite these differences, legal experts and political analysts say that the international community will eventually have to address this issue sooner or later. They point out that the United States has adopted (though not officially) the use of targeted killings as a legitimate counterterrorism tactic in its "war on terror," and that a court has even provided the government of Israel with some guidelines to determine whether it should carry out a targeted killing. If targeted killings proved to be a successful tactic which leads to, for example, a decrease in the number of terrorist attacks, then other countries may be more likely to adopt such measures. In such a scenario, some legal analysts have proposed that nations adopt some minimum requirements—along the lines of criteria suggested by the Supreme Court of Israel—to help countries determine whether they should actually carry out such an attack.

But human rights groups argue that nations should never carry out targeted killings, and that a particular circumstance—such as a fight against international terrorism—still does not justify such an approach. In addition, they describe the entire process of deciding whether to carry out a targeted attack as illegitimate because it leaves "total discretion regarding the decision of who is to be executed without trial in the hands of the security forces." They also say that targeted killings, no matter how carefully planned, can lead to the deaths of innocent bystanders. 🌐

THE UNITED STATES IN IRAQ

A FIVE-YEAR REVIEW OF UNRESOLVED LEGAL ISSUES

The U.S. invasion, occupation, and current involvement in Iraq have created many complex (some say intractable) legal issues, many of which remain unresolved, and whose consequences are affecting American policy in that country today. For instance, many countries around the world (including allies) have strongly questioned the legality of the U.S.-led invasion under international law. Observers say that this debate has eroded the legitimacy of American involvement in Iraq.

Others claim that the United States (under the guidance of several international treaties) did not manage its occupation of Iraq very well, which has only encouraged a strong insurgent movement that has killed not only tens of thousands of Iraqi civilians, but also thousands of American troops as well. Legal analysts also say that the failure to implement a domestic oil law in Iraq (which would determine how to allocate oil revenues across the country) is another reflection of the inability of the Iraqi government—and its American sponsors—to reconcile competing interests among its many political and religious factions.

And in recent months, American involvement has grown increasingly unpopular when private security contractors were accused of killing many innocent Iraqi bystanders while carrying out their duties. There is now a growing debate in legal circles on whether these contractors can be held legally accountable for their actions.



IRAQ: Legal issues concerning the U.S.-led occupation

For the first time since the end of World War II and the Korean War, U.S. armed forces have invaded, occupied, temporarily governed, and are now providing security assistance to another country (Iraq) on a large scale. According to legal experts, the United States was obligated to carry out its invasion of Iraq in accordance with the “laws of war,” which are those treaties that provide a framework of accepted practices during armed conflict.

For instance, the 1907 Hague Convention (IV)—which legal scholars say is one of the first modern day treaties governing the conduct of war—forbids nations to “employ arms, projectiles, or material calculated to cause unnecessary suffering.” It also prohibits an army from attacking “towns, villages, dwellings, or buildings which are undefended.” The Geneva Conventions of 1949 (which comprise four treaties) provide certain protections for the wounded and sick (First Convention), prisoners-of-war (Third Convention), and civilians (Fourth Convention) during times of war. As a signatory to the conventions, the United States is legally bound to comply with their terms.

In addition to governing how nations carry out actual armed conflict, these treaties also provide guidelines for “belligerent occupation,” which occurs when the armed forces of a particular country secure effective control over another territory. Article 42 of the Hague Convention, for instance, says that belligerent occupation occurs when “territory is actually placed under the authority of the hostile army.” However, scholars say that the laws of war (in particular, the Fourth Geneva Convention) now recognize a broader view as to when “occupation” occurs, and includes cases where troops simply advance into foreign territory (whether they are fighting or not) and even in cases of partial occupation.

Specific obligations of the occupying power

Under the laws of war, an occupying power has many responsibilities and duties. The following is a list of some of the most critical duties, according to legal and political analysts:

Restore and maintain law and order:

During times of armed conflict, the armed forces of one nation may overthrow another government.

Other governments may collapse.

But all of these cases usually lead to a breakdown of public order.

Under the laws of war, an occupying power must restore law and order once a conflict comes to an end.

- Article 43 of the Hague Convention requires the occupying power to “take all measures in its power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” Legal analysts say that such measures could include setting up an interim government.

- Article 55 of the Hague Convention also delegates to the occupying power the responsibility to administer various functions of the former government on a temporary basis only. It cannot assume sovereignty and claim ownership over the occupied territory. In fact, Article 56 states that “the property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.”

Duty to provide food, medical care, and relief assistance:

- Article 55 of the Fourth Geneva Convention requires the occupying power to ensure food and medical supplies to the occupied population. Article 56 goes on to require the maintenance of hospitals and medical services. Furthermore, Article 59 requires the occupying power to establish relief schemes “should any part of the population be inadequately supplied.”

- Article 143.5 requires the occupying power to accept services from the International Committee of the Red Cross, give it free access to all detention facilities, and grant it free movement throughout the occupied areas.

General preservation of existing laws:

- Under the Fourth Geneva Convention, an occupying power should not mold the territory's laws after its own legal concepts and principles. For instance, under Article 64, the occupying power must preserve the existing penal laws of the territory unless they "constitute a threat to [the occupying powers'] security."
- While Article 68 permits the death penalty for serious offenses to those over the age of 18, some legal experts argue that this provision is outdated. They note that over 100 countries have abolished the death penalty, and that many international courts and tribunals do not impose such a penalty.
- An occupying power also has limited legislative power. Article 64.2 of the Fourth Geneva Convention states it may subject the population to "provisions which are essential to enable the occupying power to fulfill its obligations . . ." Legal experts say that these obligations are limited to areas such as child welfare, labor protections, public health issues, and penal provisions.

Prohibition on torture, coercion and brutality:

- Article 31 of the Fourth Geneva Convention states that "no physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."
- Article 32 prohibits an occupying power "from taking any measure [such as 'murder, torture, corporal punishments, mutilation, and medical or scientific experiments not necessitated by medical treatment'] of such a character as to cause the physical suffering or extermination of protected persons in their hands."

Prohibition on deportation and transfer:

- Article 49 of the Fourth Geneva Convention prohibits individual or mass forcible transfers and deportations of persons from occupied territory. While partial or total evacuation may be permitted for military reasons or in order

to protect the population, such evacuations "may not involve the displacement of protected persons outside the bounds of the occupied territory . . ."

- If anyone is evacuated, they must be transferred back to their homes as soon as hostilities in the area have ended.

American compliance with the laws of war during its occupation of Iraq

Analysts say that the United States has tried to comply with its various legal obligations during its occupation of Iraq to restore and maintain order, preserve existing laws, and create a working government. For instance, in April 2003, the United States formed the "Coalition Provisional Authority" (or CPA), which—under the authority of an American administrator—essentially served as the temporary government of Iraq, and assumed limited executive, legislative, and judicial functions.

In June 2004, the United States transferred its governing authority to the "Iraqi Interim Government," which took the place of the CPA. In May 2005, the "Iraqi Transitional Government" took the place of the Interim Government. Iraq later held elections, and a permanent Iraqi government assumed control of the country in May 2006. Since that time, U.S.-led occupation forces have been referred to as the "Multinational Forces" (or MNF), and is no longer been considered an occupying power.

While some analysts say that the United States has adequately carried out its duties in returning governing authority to Iraq, others have criticized certain decisions whose after-effects, they say, are still being felt today. They argue, for instance, that American policymakers should not have immediately removed all members of the ruling Ba'ath Party from government positions and dissolved the Iraqi army, and that doing so helped, in part, to create the current insurgency fighting against U.S. troops and government security forces.

Many critics said that the de-Baathification process was "politicized, arbitrary, and far too restrictive," and complained that "it only aggravated sectarian tensions." In order to promote political reconciliation, the current Iraqi government passed the Justice and Accountability Law in January 2008, which is supposed to ease some restrictions on allowing former Ba'ath party members to work for the gov-

ernment. But some believe that the law is "riddled with loopholes and caveats," and could actually "exclude more former Ba'athists than it lets back in."

There has also been a great deal of criticism toward other aspects of the American-led occupation. Some say that the United States had failed to prepare adequately for the post-invasion period, citing widespread looting and arson in the immediate aftermath of the invasion.

Many analysts have aimed some of their most pointed criticism at the operation of the Abu Ghraib prison (located west of Baghdad) where—according to a report issued by the U.S. Army Criminal Investigation Command—American military personnel had tortured, abused, or killed many prisoners. Legal experts say that such actions violated the Fourth Geneva Convention's prohibition on the use of torture. The United States later tried and convicted over 10 soldiers on various charges. On a related note, some legal experts have argued that holding suspected terrorist suspects in the detention facilities at the Guantanamo Bay Naval Base in Cuba violates the Fourth Geneva Convention's prohibition on the deportation or transfer of persons from occupied territory.

The legal basis for the U.S.-led coalition in Iraq

Although international public opinion had largely opposed the American-led invasion of Iraq, political analysts note that the UN has implicitly assisted the United States in its efforts to stabilize the security situation in Iraq (though many continue to say that the UN should not associate itself with what they believe was an "illegal" war and occupation). A UN undersecretary-general even said: "Whether you liked what had transpired [in Iraq] or not, whatever you thought of how things before the invasion or after were handled, we now have a large problem on our hands . . ."

Beginning in May 2003 (at the end of major combat operations), the UN Security Council passed many resolutions which, some say, granted a limited (and not direct) form of

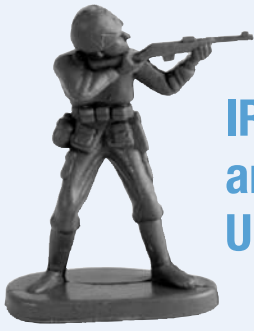
legitimacy to the U.S. occupation of Iraq. For example:

- Resolution 1483 passed in May 2003 supported the formation of an "Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the [Coalition Provisional] Authority."
- Resolution 1511 passed in October 2003 authorized "a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq."
- Resolutions 1637, 1723, and (most recently) 1790 extended the mandate of the American-led MNF until December 2008.

Despite the passage of these measures, political analysts note that the continued American-led presence in Iraq has become increasingly unpopular not only in Iraq, but also the United States. Even before the passage of Resolution 1790 in December 2007, commentators note that that members of Iraq's parliament had signed a petition in May 2007 calling for the United States to set a timetable for the withdrawal of its troops. Iraqi officials have also said that it would no longer support any further extensions of a UN mandate in Iraq. One commentator said that "many Iraqis view the United Nations mandate as a reminder that they cannot yet control their own destiny and must rely on outsiders."

Instead, they have called for a bilateral agreement with the United States concerning the continued American military presence in Iraq. In November 2007, the two countries announced that they had reached an agreement to begin negotiating what is called a "status of forces" agreement, which would "spell out specific legal responsibilities and protections for American troops in Iraq." (Analysts say that current UN resolutions don't address these specific issues.) The United States currently also has status of forces agreements with other countries such as Japan and South Korea where it has stationed tens of thousands of troops. 🌐

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IRAQ: The use of force and the legality of the U.S.-led invasion

In March 2003, the United States and its allies made the controversial decision to invade Iraq and overthrow its leadership without obtaining explicit authorization from the UN Security Council. While the United States continues to argue, for instance, that evolving security considerations permitted the invasion, a majority of other countries assert that it was unjustified under international law.

Self-defense under the UN Charter

The overarching goal of the United Nations (UN) is to increase cooperation among its 192 member nations in addressing various social, economic, and humanitarian problems. It also tries to mediate disputes before they become actual conflicts or, alternatively, tries to keep the peace once all sides to a conflict have agreed to cease hostilities. Article 2(4) of the UN Charter generally prohibits member nations from using force as a means of resolving conflict. (It states that “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . .”) However, the UN recognizes two instances where its member states may use of force.

Security Council authorization:

Article 42 of the Charter states that the Security Council may directly authorize its member states to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security . . .” It does so by passing a resolution (by a majority vote) calling on member states “to use all necessary means” in carrying out decisions made by the Security Council.

Self-Defense: Article 51 of the Charter states that “nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations . . .” While legal analysts generally agree that all states have an inherent right to self-defense, there is no clear consensus (or even rule) as to when a UN member state may actu-

ally begin to defend itself. Policymakers and legal experts have outlined three different approaches:

- **Self-defense in response to actual attacks only:**

Some analysts argue that self-defense is acceptable only after an actual attack is in progress or has already occurred. They say that allowing for self-defense before an actual attack may, for instance, allow countries to use self-defense as an excuse to attack a rival country. But other analysts respond that waiting for an actual attack may destroy a country’s ability to defend itself.

- **Anticipatory self-defense:**

Many scholars believe that a country may begin to defend itself when it determines that an attack is “imminent.” But experts have struggled to define this term. Some say an attack is imminent when the need for action is “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” But other experts argue that the perception of a threat is often subjective and unreliable.

- **Preemptive self-defense:**

Some governments have argued that a nation may defend itself even in the absence of an imminent attack to prevent, for instance, an enemy from even building a threatening military capability. But many legal experts argue that some nations may use such hypothetical possibilities for unjustified reasons.

Authorizing the invasion of Iraq under international law

Since the end of the 1991 Gulf War and up to the American-led invasion of Iraq in March 2003, the UN Security Council had passed several resolutions warning Iraq about its failure to comply with prior resolutions calling on that country to discontinue and dismantle its programs on weapons of mass destruction. (At the end of the first Gulf war, Iraq said that it would cooperate with the UN in carrying out these efforts.) In particular, Resolution 1441 (passed by

the Security Council in November 2002) stated that Iraq would be given a “final opportunity” to comply with UN disarmament efforts and also with the terms of past resolutions. It also stated that the Security Council would convene immediately if Iraq further breached its obligations.

Previous Security Council resolutions (including 660 and 678, which passed in August 1990 and November 1990, respectively) required Iraq to destroy all chemical and biological weapons, certain ballistic missiles, and to agree not to develop nuclear weapons. They also authorized UN member states to use “all necessary means to restore international peace and security in the area.” In addition, Resolution 1154 (passed in March 1998) stated that “any violation [of previous resolutions] would have the severest consequences for Iraq.”

In February 2003, a report issued by the UN weapons inspector concluded that Iraq’s weapons declaration (which spanned 12,000 pages) was inaccurate and incomplete. Iraq had, for example, failed to account for substantial chemical and biological stockpiles. The report also determined that it was impossible to confirm Iraq’s claim that it had destroyed its anthrax stockpiles because that country did not allow UN inspectors to witness their destruction. Once the report became public, policymakers generally agreed that Iraq had failed in its final opportunity to comply with UN disarmament efforts. Resolution 1441, they pointed out, stated that “false statements or omissions in the declarations submitted by Iraq shall constitute a further material breach of UN resolutions.” Still, there was a contentious debate as to how the UN should collectively respond to this final breach by Iraq.

The United States argued that Iraq’s failure to comply with Resolution 1441 justified an invasion of that country to remove its suspected stockpiles of weapons of mass destruction. It gave two reasons:

- **Automatic authorization by UN resolutions:** The United States argued that collectively viewing several Security Council resolutions allowed member states to use force automatically without the need of an additional resolution. It pointed out that Resolution 1441 gave Iraq a “final opportunity” to comply with previous obligations. Resolution 1154 stated that Iraq will face “severest consequences” for failing to comply with its obligations. It also claimed that Resolution 678 still provided continuing authority

for member states to use “all necessary means to restore international peace and security in the area.”

- **Right to preemptive self-defense:** The United States also asserted that it had a right to defend itself preemptively against Iraq because that country posed a major threat to American security. Weapons of mass destruction, argued policymakers, were one of the leading threats to global security. In light of technological advances, the United States could not wait until such threats were imminent. Waiting until such an attack actually began to unfold, they believed, would cause the needless deaths of many lives.

Opposing the invasion under international law

On the other hand, many critics (including the UN Secretary General) said that the U.S.-led invasion of Iraq would be “illegal” under international law unless the Security Council approved another separate resolution specifically authorizing the use of force. Resolution 1441, they point out, clearly stated that the Security Council shall remain “actively seized of the matter,” and that it would convene to decide what further steps should be taken if Iraq breached its obligations under previous resolutions. Allowing member nations to use force automatically and to make that decision among themselves, many argued, would go against the very ideals of the UN, which encourage collective decision-making and the use of force as a last option.

In addition, some legal experts say that previous resolutions (such as 678 passed in 1990) did not justify renewed use of force. They argued that the Security Council had passed these resolutions in direct response to Iraq’s invasion and occupation of Kuwait (and that the resolutions were, therefore, not relevant to Iraq’s possible development of weapons of mass destruction). Furthermore, many legal authorities said that there is no mention of preemptive self defense anywhere in the UN Charter, and that violations of UN disarmament resolutions should not constitute an actual “armed attack” by a particular country.

The United States eventually did introduce a second resolution which would have authorized the use of force against Iraq. But it chose not to bring the resolution to a vote because, according to political analysts, it lacked the votes to pass it. Analysts say that the debate concerning the legality of the U.S.-led invasion continues even today. 🌐



IRAQ: Accountability for private security contractors?

Since last year, the role of private security contractors (or PSCs) operating in Iraq has made major headlines. Media reports have focused mostly on certain incidents where PSCs are alleged to have killed many innocent Iraqi bystanders while carrying out their duties. There is now a growing debate in legal circles on how to hold PSCs legally accountable for their actions.

Accountability of U.S. armed forces

Currently, members of the U.S. armed forces who commit crimes while carrying out their duties in other countries are generally subject only to prosecution before a United States military tribunal. (Analysts say that bilateral treaties—signed between the United States and other nations—prevent the domestic authorities in other nations from prosecuting American military personnel.) U.S. military proceedings—also called courts-martial—usually take place on an American military base where prosecutors charge defendants for violating provisions in the U.S. military's basic criminal code (known as the Uniform Code of Military Justice or UCMJ) or provisions in various other laws.

Members of the U.S. armed forces now serving in Iraq are all subject to the UCMJ. Recently, U.S. military tribunals have convicted many soldiers involved in the abuse and torture of detainees in the Abu Ghraib Prison (located west of Baghdad) for violating provisions of the UCMJ.

The growing role of PSCs

In addition to members of the armed forces, PSCs are also carrying out substantial duties and responsibilities in Iraq where they currently serve as translators, interrogators, and security personnel for U.S. officials; provide military and police training for the Iraqi government; and protect infrastructure, among many other tasks. The U.S. government has come to rely on PSCs in Iraq because of what experts say is a strain on current military resources. They note that U.S. soldiers are serving in other

hotspots, including Afghanistan, and have substantial obligations in Japan and Korea.

Reports indicate that approximately 60 private security companies are currently working in Iraq, and that most of them have signed contracts directly with either the Department of State or the Department of Defense. While a majority of the individual contractors actually working for these companies are of Iraqi descent, a substantial portion comprises nationals from over 30 countries. Around 130,000 individuals in the PSCs are Americans. According to available statistics, the U.S. government has come to rely on a few privately-owned American companies to carry out security duties in Iraq. The State Department, for example, has largely used the services of Blackwater Worldwide, DynCorp International LLC, and Triple Canopy.

Media reports indicate that the private security contractor business is a multi-billion dollar industry with earnings around \$4 billion for Iraqi reconstruction efforts alone.

Jurisdiction in prosecuting PSCs

While there is little controversy on how to hold American military personnel accountable for committing crimes in other nations, observers point out a growing debate on how to do the same for PSCs. Legal analysts say that, under current regulations, PSCs are immune from prosecution by Iraq authorities for committing alleged crimes. They note that that under Coalition Provisional Authority Order Number 17 (or CPA Order 17, which is still in force in Iraq), "contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto." As a result of Order 17, American (and not Iraqi) authorities must initiate prosecutions of alleged wrongdoing committed by American private contractors. More specifically, the Military Extraterritorial Jurisdiction Act (or MEJA) states that the federal government has

jurisdiction to prosecute civilian employees and private contractors (*employed only by the Department of Defense*) who commit crimes abroad.

The most notorious allegation of criminal wrongdoing concerning a PSC involved Blackwater Worldwide, which is based in North Carolina. In September 2007, Iraqi officials said that Blackwater contractors (employed specifically by the State Department) traveling in a government security convoy in Baghdad had killed 17 Iraqi civilians and wounded 27 others during a shootout. After conducting an initial investigation, officials from the Federal Bureau of Investigation said that at least 14 of the shootings were without cause. But in its defense, Blackwater officials said that their employees were responding to an attack. Officials have been debating who exactly would initiate prosecutions (if any) in the Blackwater case. Some observers note that while the U.S. Department of Justice is examining at least 20 other cases of alleged criminal acts committed by American PSCs, it has not announced any prosecutions.

Some legal analysts believe that the Justice Department is handling these cases with caution because no American law explicitly states who would initiate a prosecution against a PSC employed *specifically by the State Department*, and under what circumstances these prosecutions would go forward. But others believe that the terms of various statutes would seem to apply to individuals working for PSCs (under State Department contracts), and that the U.S. government should pursue prosecutions against them if available evidence supports such a course of action.

- The U.S. War Crimes Act of 1996, for instance, states that U.S. nationals would face criminal prosecution by the federal government for committing a war crime. Many believe that "U.S. nationals" would include individual PSC contractors.
- The Federal Anti-Torture Statute states that a U.S. national would face criminal prosecution if he committed or attempted to commit torture outside of the United States.
- The UCMJ states that its provisions would apply to "persons serving with or accompanying an armed force in the field" during a "time of war" or persons serving on a "contingency operation."

But as of March 2008, the Department of Justice has not charged anyone involved in the Blackwater shootings for violating any of these statutes.

In order to hold U.S. contractors

employed by the State Department accountable for any alleged crimes committed abroad, the House of Representatives in October 2007 passed a bill (by a vote of 389-40) amending the MEJA. Under this bill, American criminal law would apply to all contractors working abroad for any government agency (and not just the Department of Defense). The bill's supporters say that it will eliminate any dispute as to whether U.S. law applies to the PSCs employed by the State Department. The Senate is currently considering the legislation but has not taken any action.

Legal status of PSCs under international law

International law experts have also examined the accountability of Blackwater contractors under international law. They say that if members of a PSC took direct part in combat operations (such as an actual military offensive), then they could possibly lose their protection as "civilians" under international treaties that regulate armed conflict. In recent months, media reports have alleged that some contractors had directly—and willingly—participated in actual combat with American forces against enemy targets in Iraq even though it is highly unlikely, according to analysts, that a PSC contract would allow such acts.

Experts believe that a contractor working for a PSC would be classified as a "civilian" under the Geneva Conventions of 1949, which require its signatory nations to provide certain protections for particular classes of people during wartime. The Fourth Geneva Convention, for instance, lists the protections for civilians. Although there is no definition of the term "civilian" in the Fourth Convention, observers say that such individuals are usually not part of the military and do not engage in active hostilities (unlike soldiers or members of a militia).

But a civilian who is taking or had taken part in actual armed combat against enemy forces could face criminal prosecution for violating the Geneva Conventions. Experts note that the Conventions require actual combatants to be part of a regularly-constituted army or militia; to wear uniforms with insignias; and to carry their arms openly. A civilian such as a PSC would not satisfy all of these requirements, legal experts say. 🌐



IRAQ: The proposed oil law and political reconciliation

After the U.S.-led invasion of Iraq in March 2003, several factions in Iraq—consisting mainly of Shiite, Sunni, and Kurdish political groups—have sparred over the long-term governance of that country after decades of authoritarian rule under Saddam Hussein. In the past few years, they had to draft and adopt a new constitution and create a representative government, among other tasks.

But tense relations and high distrust among these competing groups have led to political gridlock. Many analysts say that the failure (some say refusal) of these groups to reconcile their political differences on many issues continues to undermine the stability of Iraq. (They note that Iraq had proposed several measures in February 2008 to bridge political differences among competing political factions, including a broader amnesty for detainees held in Iraqi jails, most of whom are Sunnis. But they were later vetoed.) In the meantime, Shiite and Sunni militias are still carrying out attacks against the other side, which have led to the deaths of tens of thousands of civilians, and also thousands of American military personnel.

Legal experts say that Iraq's inability to pass and implement a new oil law is now a prime example of how political differences are preventing the country from building a more peaceful future. What are some of the provisions of the proposed oil law? What is its status today?

The importance of oil in Iraq

Analysts say that the importance of oil in Iraq's economy cannot be overstated. Sales of oil currently provide over 95 percent of that country's revenues. Researchers estimate that Iraq has the world's third largest source of oil, with approximately 115 billion barrels in reserves. After nationalizing the oil industry in 1972, Saddam Hussein's regime rigorously controlled the exploration, production, and sales of

oil (up through the 2003 invasion). It also determined how to distribute oil revenues within the country. During those years, the government did negotiate a few oil agreements with Russian and Chinese companies, but granted them only 10 percent of the profits. (Analysts note that these companies had received a much larger percentage of profits before nationalization came into effect.)

Before the 2003 invasion, experts said that Iraq produced 2.6 million barrels a day. The United States later predicted that production would increase to three million barrels a day after the invasion. However, not only did production fail to increase, it actually decreased to two million barrels a day. Experts believe that various factors have handicapped (and continue to handicap) oil production, including the continuing infighting within Iraq, poor maintenance, corruption within the oil ministry, lack of security, fuel smuggling, and sabotage. Furthermore, observers note that—since the 2003 invasion—Iraq has not developed its oil fields, mostly due to the flight of trained Iraqi technicians to other countries.

Given the importance of oil in Iraq's economy, the new Iraqi Constitution (passed in October 2005) has several sections that address oil production. Article 109, for instance, defines oil as the "property of all Iraqi people," and calls on the federal government as well as regional and provincial governments to manage its production. Article 110 discusses oil revenue distribution among the various regions and provinces.

A new framework in regulating oil

In February 2007, Iraq also released a draft of a proposed Iraq Oil Law—formally known as the "Iraq Hydrocarbon Law"—which establishes a legal framework in regulating various aspects of its oil sector. It creates, for instance, several new institutions to oversee the Iraqi oil sector, and lists their primary duties and responsibilities. An Oil Ministry will be authorized

to sign contracts with foreign oil and service companies, and will also be responsible for proposing federal laws for the oil sector. A Federal Oil and Gas Council will review these government contracts, although it will have a limited ability to reject them. And an Iraqi National Oil Company will have exclusive control over 17 out of the 80 known oil fields. The remaining oil fields will be left open to foreign investors.

Also under the law, the central government will distribute revenues throughout the country on a per capita basis (with larger provinces receiving more revenues). And like the Iraqi constitution, the proposed oil law emphasizes that Iraq's oil wealth belongs to its citizens (but foreign investors will have a greater say once the oil is actually extracted from the ground). Drafters of the law say that it will also help to increase oil production by allowing greater foreign investment in that industry (which was strictly controlled by the government before the 2003 invasion). They say, for example, that greater foreign participation will bring more modern equipment, which will then allow the country to develop its oil resources.

On the other hand, critics depict the law simply as an attempt by the government to privatize the oil sector and give major foreign oil companies much greater access to Iraq's oil reserves. They note that the United States—along with some of the world's largest oil companies (including Exxon Mobil, Chevron, Shell, and British Petroleum)—are pushing Iraq to sign "production sharing agreements" (or PSAs), which grant long-term contracts (ranging from 20 to 35 years) to foreign oil companies and give them more operational control over developing, extracting, and distributing oil, and also a greater share of profits. Some political analysts say that most Middle Eastern countries with oil reserves have rejected PSAs. Iran, Kuwait, and Saudi Arabia, for instance, have nationalized oil systems and outlaw foreign control over development.

Observers note that companies generally prefer PSAs when there is a high risk of not finding oil or in cases where they may encounter difficulty extracting it. As a result, scholars say that PSAs are useful in less developed countries or in countries whose petroleum resources are well below the surface. However, some analysts believe that PSAs are inappropriate for Iraq because the cost of extracting one barrel of oil is not expensive (generally costing between 50 cents and \$1). They believe that the

companies are pushing for PSAs in order to receive a greater share of the profits over a long period of time.

Problems in passing the oil law

So far, the government has been unable to pass and implement the proposed oil law because Shiite, Sunni, and Kurdish political groups believe that it contains many shortcomings. They especially point to the important sections that address revenue distribution from oil sales. Currently, the proposed law simply states that the government must submit a draft proposal showing specifically how oil revenues will be distributed. Analysts also point out that the Iraqi constitution also doesn't provide further details. It only states that the distribution of oil revenues will be done "fairly."

Iraq's competing groups also have different views regarding authority over the oil sector. The Sunnis, for example, want the central government to control that sector because their population dominates the oil-poor areas of western Iraq. They also oppose greater regional autonomy, fearing that they won't receive a fair share of the country's oil wealth since those resources are concentrated in the Shiite south and the Kurdish north. On the other hand, the Kurds want regional governments to have a greater say in oil development. (In fact, the Kurdish regional authority has already signed several oil investment projects with foreign companies.) They fear that the central government may steer exploration and development contracts to the Shiite-dominated south.

The Shiite position falls somewhere in between these preferences. They believe that the law should allow each region to negotiate its own oil contracts with foreign investors, but that such contracts should be subject to the approval of the proposed Federal Oil and Gas Council. Analysts say that this position represents a mixing of central and regional governmental control of the oil sector.

Political commentators predict that the Iraqi parliament will eventually ratify the proposed oil law, but expect several changes. But because the oil law will directly affect a group's political power and even economic well-being within Iraq, observers say that the parliament is handling the negotiations slowly. Observers believe that if any one side believes that their concerns were marginalized on this important topic, it will further polarize the nation and could lead to more infighting. 🌐

International Law News Roundup

GLOBAL CLIMATE CHANGE

On the road to a new climate agreement?

In December 2007, representatives from 187 nations reached an agreement in Bali, Indonesia, to begin negotiations on a successor agreement to the Kyoto Protocol, which expires in 2012 and is currently the world's only international treaty requiring its signatory nations to reduce emissions of greenhouse gases. Scientists say that the accumulation of such gases is affecting the earth's climate, which, in turn, could lead to serious consequences. While there is a growing consensus that the world must address climate change, analysts say that reaching a consensus on how to do so remains difficult.

The Bali agreement itself is not a new climate treaty. Instead, it specifies some of the topics that the parties will discuss during actual negotiations for a new treaty, which will begin later this year. (Commentators have described it as a "roadmap" to guide future talks.) Analysts generally say that the agreement—which was produced under the auspices of the United Nations Framework Convention on Climate Change—did not produce significant progress on addressing climate change. In fact, negotiators had crafted the agreement with vague and broadly-worded language in order to gain support among all of the meeting's participants.

Several countries, for instance, wanted the agreement to impose mandatory reductions of greenhouse gas emissions by 25 to 45 percent below 1990 levels by the year 2020. But many of the world's largest emitters—including the United States, China, and India—had opposed such targets. Instead, the agreement simply says that the meeting participants recognize the fact that "deep cuts will be required" to control climate change. In addition, it said that developed nations should consider emission reducing actions that are "measurable, reportable, and verifiable." Furthermore, a footnote in the agreement refers only to the page numbers of a United Nations climate report which lists some aspirational targets in reducing emissions. Political analysts say that this was done to avoid the impression that the agreement itself endorsed certain numerical targets.

Developing countries also wanted the Bali agreement to commit industrialized countries to sharing and financing new technologies to make their industries and power plants more efficient. But other nations worried that immediate access to such technology without proper compensation would undercut any incentives to create it in the first place. To reach a compromise, the parties at the Bali conference agreed to take "enhanced action" to promote the use of "affordable, environmentally sound technologies." It also urged nations to provide more access in financing the use of new technologies to reduce carbon emissions.

Political analysts note that while many countries described the agreement as "watered-down" and not ambitious in its scope, its various topics will be subject to extensive negotiations headed by an "Ad Hoc Working Group on Long-term Cooperative Action under the Convention." Under the agreement, this group will have its first meeting by April 2008 and will conclude its work on the text of a new climate treaty sometime in 2009 so that its signatories

will have enough time to ratify the agreement in their respective legislatures before the expiration of the Kyoto Protocol.

Scientists say that emissions of industrial gases and pollutants—such as carbon dioxide—trap heat in the atmosphere and cause temperatures to rise around the world in a so-called "greenhouse effect." They claim that without a sustained and coordinated international effort to reduce the emissions of these gases, temperatures could rise further in the next decade and lead to catastrophic natural disasters such as rising ocean levels and the expansion of deserts.

Analysts generally say that the Bali agreement—which was produced under the auspices of the UN Framework Convention on Climate Change—did not produce significant progress on addressing climate change.


Efforts to control the effects of global warming culminated in the Kyoto Protocol in 1997. State parties to this treaty are legally bound to reduce total emissions of industrial gases to five percent below 1990 levels. Experts note that these emission cuts apply only to the 39 industrialized nations that have ratified the protocol. (For instance, many countries of the European Union—which is the second largest emitter of greenhouse gases—have already imposed mandatory limits on emissions from their industries and power plants.) On the other hand, the 119 developing countries that signed the treaty were not legally-bound to these reductions.

But the protocol faced many difficulties, which limited its effectiveness in reducing the emission of greenhouse gases. Although the negotiations for the protocol ended in 1997, it did not come into force until 2005. Many countries had also failed to meet their own targets in cutting emissions. One expert noted that emissions were above the 1990 baseline by more than 12 percent in Italy, 8 percent in Japan, and more than 35 percent in Canada. In addition, the protocol expires in the year 2012, which, experts say, does not give the world community enough time to make meaningful reductions in their greenhouse gas emissions. Furthermore, one observer noted that total worldwide emissions have increased since 1997, in part, because developing countries are exempt from reducing their own emissions.

Scientists say that, in order to address climate change effectively, any new agreement will probably require developing countries—including China and India—to cut their emissions. They point out, for instance, that China will overtake the United States as the largest emitter of greenhouse gases in only a few years. And a UN agency estimates that China could also be responsible for as much as 25 percent of all emissions by the year 2030. But developing countries have argued that, historically, the industrialized nations were mainly responsible for much of the greenhouse gas emissions, and that any reductions could hurt their growing economies. Still, one observer said that "whatever happens, China and India have to be part of the equation."

In the meantime, political analysts predict that future negotiations will be difficult because "there is no consensus among the nations [that had assembled] in Bali about what to do next."

They believe that there will be several competing ideas. “Should there be a global cap-and-trade system? Smaller regional agreements? Or an agreement among a core group of big emitters?”

Other experts also predict that major negotiations on a new climate treaty will begin after the American presidential elections in November 2008 because a new administration might change the U.S. stance on ways to address climate change. The United States—which is currently the largest producer of greenhouse gases—did sign the protocol, but refused to ratify it. (It participates in climate negotiations as an observer nation.) The current administration—which refuses to impose mandatory cuts in emissions—believes that voluntary initiatives and market-based measures can help to reduce greenhouse gas emissions. It also says that any new climate treaty will be ineffective if developing nations refuse to reduce their own emissions 

EUROPEAN UNION

Adopting a failed constitution as a treaty

Last year, the member nations of the European Union (or EU)—one of the world’s largest political and trading blocs today—celebrated its 50th anniversary of closer cooperation and integration. But behind the scenes, its leaders had struggled to pass what they called a “reform treaty,” which experts say would allow the EU to make decisions more quickly and also present itself as a united front in world affairs. A similar effort—embodied in a single, EU-wide constitution—had failed two years earlier. What are some of the terms of the reform treaty and what is its current status?

As it stands today, the EU is a political and economic union of 27 nations (encompassing over 490 million people) bound together by a series of complex international treaties. These treaties created common institutions—such as the European Commission, the European Parliament, and the European Council—to manage only certain political and economic areas of mutual concern such as trade, finance, environmental protection, and agricultural policy.

As the EU increased its membership, its leaders called for the creation of a single, all-encompassing constitution to streamline its decision-making processes, which one commentator described as “creaky and cumbersome.” (For instance, under the existing system, certain legislation is created through a process of consensus, which would allow a single nation to block its passage.) In January 2005, the EU member nations approved a draft constitution which was almost 500 pages in length. Although referred to as a constitution, the draft text was actually a treaty. Legal experts say that much of the draft constitution was simply a combination of the various EU treaties, and that—in practical terms—would have little effect on the daily lives of Europeans.

But supporters say new provisions in the proposed treaty would help to streamline decision-making. For example:

- The proposed constitution would have implemented a “qualified majority voting” system whereby the EU will adopt legislation if it receives the support of at least 55 percent of all EU member nations (15 out of 27 nations) representing 65 percent of the EU population.
- Instead of having an EU presidency that rotates from one member state to another every six months, the constitution would institute a term of five years so that issues can be treated with more depth and continuity.

- The constitution would create a single foreign minister to represent the interests of the EU at various international forums.

Although individual EU member states would have retained sovereignty in important policy areas (including taxation and defense), the constitution would have superseded domestic laws in areas such as immigration, criminal justice, and asylum procedures.


Beginning in January 2005, the EU constitution began a ratification process whereby all member nations (through public referendums) had to approve that document in order for it to come into force. After voters in France and the Netherlands had rejected the document, the EU postponed the ratification process. Political analysts say that a variety of problems had prevented the passage of the constitution. A stagnant European economy, for example, had created fears that the EU constitution would allow a more generous immigration policy. Others added that the document itself was viewed with suspicion and mistrust because the public had little input during its drafting. And smaller EU nations worried that the constitution would give too much voting power to larger members.

In order to avoid the perception that the EU was going to create a single state operating under one constitution, its leaders publicly began to refer to that previous document as a “reform treaty” and also deleted any references to an EU anthem and flag.

Over the following two years, the EU amended the proposed constitution in order to address several concerns voiced by critics. For instance, in order to avoid the perception that the EU was going to create a single state operating under one constitution, its leaders publicly began to refer to the previous document as a “reform treaty” and also deleted any references to an EU anthem and flag. (In fact, one head of state suggested that EU leaders should refer to the constitution using “different terminology without changing [its] legal substance.”) In addition, several nations had demanded various changes to the text to make it more acceptable to the general public. France, for example, demanded that negotiators remove any reference to the establishment of an “internal market where competition is free and undistorted,” which France feared would prevent it from supporting inefficient industries with state subsidies. But experts say that such changes—which have been described as “window dressing”—won’t have any legal effects on the actual operation of the treaty.

In December 2007, leaders from the EU member nations signed what is now called the Lisbon Treaty (which is formally known as the “Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community”), which runs approximately 256 pages. Analysts generally say that over three-quarters of its contents are similar to the content of the failed constitution. In fact, “most European leaders acknowledge that the main substance of the constitution will be preserved,” according to one observer. But the treaty also contains some new provisions. The following is a summary of some of those provisions:

- The treaty will still implement a “qualified majority voting” system requiring the same percentage of votes mentioned in the failed constitution. For instance, in 50 major policy areas (including terrorism, crime, immigration, and justice issues), the EU member states will decide European-wide policies by a majority vote. On the other hand, issues such as taxation, social security, and defense policies must be decided unanimously.
- To address the concerns of smaller EU nations, the new voting system will come into effect in 2014.
- The EU presidency will rotate among its member nations every 2-½ years. While analysts say that the office will have “few formal powers,” they note that the president can set the EU’s agenda.
- Rather than having a single foreign minister, the interests of the EU will be represented by a “High Representative of the Union for Foreign Affairs and Security Policy,” which will include a diplomatic corps. But this office will answer directly to EU leaders.
- Several EU nations, including Ireland and the United Kingdom, will be able to opt-out of requirements concerning immigration, asylum, and justice issues. One commentator said that the treaty is “riddled with opt outs for countries skeptical of more EU integration.”
- Also, under the terms of the treaty, member nations will, “for the first time, get the right to group together [representing at least one-third of total membership] to block EU laws they consider unnecessary or better decided at the national level.”
- Member nations will also, for the first time, have the right to secede from the EU.

In order to make its passage more likely, EU leaders say that they will ratify the reform treaty in their respective parliaments rather than holding public referendums. (But only Ireland will hold a referendum because its constitution requires it to do so.) Every EU nation must ratify the treaty so that it can come into force on January 1, 2009. 

COMPARATIVE CRIMINAL LAW

Jury duty back in Japan

For the first time since the end of World War II, Japan will re-introduce a jury system in trying serious criminal cases. Advocates believe that a jury system will increase the legitimacy of and enhance citizen participation in that country’s system of legal governance. Others say that this development could even have an impact on the legal systems of neighboring countries and promote democracy across the region. But some critics argue that it won’t address deeper problems in Japan’s criminal justice system. How does Japan currently try its criminal cases? What are some of the features of the new jury system? And what are some of its perceived shortcomings?

Currently, Japan’s criminal justice system does not use juries. Instead, judges are the sole fact-finders and the final arbiter of the guilt or innocence of defendants. Most cases are deliberated and decided by one judge only, though a court can allow more than one judge to participate in hearings and judgments in cases where, for instance, the alleged crime is punishable by imprisonment for more than one year. Legal historians say that Japan,

beginning in 1923, had used a jury system to try its criminal cases, but phased it out by 1943.

In 2004, Japan enacted legislation that will implement a *saiban-in* (or “lay jurist”) system. Beginning in May 2009, jurors will join professional judges in trying cases involving serious crimes only, including homicide, bodily injury resulting in death, unsafe driving resulting in death, robbery resulting in bodily injury or death, arson of an inhabited building, kidnapping for ransom, abandonment of parental responsibilities resulting in the death of a child, and serious cases involving rape, drugs, and counterfeiting.

Each trial court will consist of three professional judges and six jurors. Each individual is entitled to one vote of equal weight (regardless of whether you are a judge or a juror), and final verdicts are decided by majority vote. However, at least one juror and one judge must be included in the majority verdict. Both jurors and judges will also be able to question and cross-examine witnesses and participate in the sentencing process. Legal analysts say that the judges will also assist (and not lead) jurors during deliberations.

Some say that implementing a system of lay jurors in Japan could help reduce an unusually high percentage of convictions. More than 99 percent of defendants in Japan today are convicted of their alleged crimes.

Each court will be responsible for creating a list of jury candidates, which will come from voter registration lists. Any citizen who is 20 years old or older and also has the right to vote for a member of the Japanese House of Representatives is eligible to serve as a juror. Prospective lay jurors will be selected through a lottery system and will then be asked to appear for “jury duty.” The courts must screen prospective jurors to see whether they have any relationship to the case and its parties, and to determine whether they will be able to render impartial judgments. Prospective jurors can be excused from jury duty if they have served as a juror within the last five years, appeared for “jury duty” within the past year, or have “unavoidable circumstances” such as a death in family or illness that will prevent them from serving.

The courts are preparing Japan for the new system by publicizing it through media outlets, conducting courtroom tours, and even carrying out mock trials nationwide. In 2012, the government will review the workings of its jury system.

Analysts cite various reasons why Japan decided to implement jury proceedings in some of its criminal cases. First, experts believe that using juries will help to reduce inefficiency in Japan’s criminal justice system, which is plagued by delays in its proceedings. Analysts say that a shortage of available attorneys to conduct trials on consecutive days generally leads to considerable time gaps within a particular hearing or trial, lasting from several weeks to even months. All of this, in turn, causes a backlog of cases. But with actual jurors in place, analysts say that there will be more pressure on courts and attorneys to keep on schedule.

Second, a jury system will help to increase citizen participation in legal governance. Implementing a lay jury system, political analysts believe, will increase public understanding of and involvement in legal governance, which, in turn, will lead to more trust in the criminal justice system. Scholars say that Japan’s

deeply ingrained system of hierarchical authority—where people are generally reluctant to assert their own opinions in public or question authority—has contributed to the lack of interest among Japanese citizens in politics and legal governance, which they view as obscure and largely irrelevant to their lives.

Third, implementing a system of lay jurors could help reduce what they believe is an unusually high percentage of convictions—more than 99 percent of defendants in Japan today are convicted of their alleged crimes. (By comparison, the United States has a conviction rate of 89 percent.) Scholars believe that Japan's conviction rate is high because it probably includes a large number of wrongful convictions.

What are some of the causes of this high conviction rate? Legal analysts say that a very close working relationship between judges (who determine the law, facts, and render judgment) and prosecutors (who are responsible for the initial fact-finding and draw their own legal conclusions) leads the judges to give greater weight to prosecutorial findings and adopt the prosecutor's legal conclusion of guilt. In addition, many critics believe that the police use questionable interrogation techniques against accused defendants—such as prolonged periods of questioning—which they say result in forced confessions (though the police have described them as “voluntary”). Prosecutors then present these confessions at trial where they are usually accepted by the judges. Analysts say that without live testimony from and extensive cross-examination of witnesses, defendants are more likely to get convicted of their crimes.

Legal experts note that Japan had studied two dominant jury systems currently in operation around the world—the Anglo-American jury system and the Continental (or European) mixed court jury system (after which Japan modeled its saiban-in system). Under the Anglo-American jury system, 6 to 12 lay jurors are randomly selected from the local population and also have no connection to the criminal justice system. Only the jury (and not the judge, under most circumstances) can convict or acquit defendants based on majority or unanimous verdicts through a process of group deliberation.

On the other hand, the Continental mixed court jury system is made up of lay people and professional judges who deliberate together and decide on the verdicts, and, if necessary, sentence the defendants. The number of jurors deciding a case depends on the seriousness of the alleged crime. For less serious offenses, three jurors may decide a case. For more serious crimes, there are usually five jurors. (Each country using some form of the Continental system sets the specific number of jurors in deciding a case.) At the conclusion of a trial, the most senior professional judge leads deliberations by posing particular questions in order to prevent the lay jurors from making decisions not based on the law. He also takes a vote count.

Analysts say that Japan decided to adopt the Continental system because it believed that jurors could make more informed decisions with professional judges deliberating alongside them. Although many nations use juries, the U.S. Department of Justice noted that “most countries do not try criminal cases in front of juries.”

Critics say that the new saiban-in system has what they believe are two major shortcomings. First, they argue that implementing a lay jurist system will not begin to address what they say are the most basic problems in the current criminal justice system—a

heavy reliance on confessions (which critics say are sometimes forced); the absence of discovery, which can allow prosecutors to withhold information; and a high conviction rate that stems from a general presumption of guilt. Second, political analysts believe that the very idea of serving on a jury and rendering a judgment will intimidate many people in Japan due to their lack of knowledge of the penal code and their preference to defer to authority such as judges.

Analysts say that several other countries in Asia are closely watching Japan's reforms in deciding whether to implement their own jury systems. South Korea, for instance, used a jury for the first time in February 2008. But it only played “an advisory role to the judge” in a case involving armed robbery, according to a commentator. Because many of these countries share similar cultural values, say political analysts, the success or failure of the proposed saiban-in system could influence whether they will even create a jury system. Reformers in China, Taiwan, and Thailand also believe that the creation of a jury system will lead to greater citizen involvement in legal governance, which, in turn, can promote democracy. 🌐

WAR ON TERROR

Showdown on harsh CIA interrogation techniques

In recent months, members of Congress have criticized the Central Intelligence Agency (or CIA) for destroying videotapes of interrogations where its personnel and contractors had allegedly used highly coercive techniques in questioning suspected terrorist detainees. When viewed in a broader context, analysts say that this criticism represents a continuing clash between the Executive and legislative branches of government over whether the CIA should engage in such practices. While the public debate has swung wildly in both directions over the past several years, political analysts say that a recent presidential veto has only hardened the debate.

Since the 2001 terrorist attacks in New York and of the Pentagon, it is claimed that using coercive interrogation techniques against suspected terrorist detainees has provided the United States with vital information on pending attacks and also prevented others. But critics—including officials from the Federal Bureau of Investigation—believe that such practices have yielded little useful intelligence information, are counterproductive, and have, instead, hurt the United States' standing in world affairs.

The debate has specifically centered on a CIA interrogation program which allegedly uses tactics such as exposure to extreme temperatures, head slapping, and waterboarding (where interrogators hold an individual lying down at an angle and then pour water into his mouth and nose to give the sensation of drowning).

Legal experts say that interrogations of battlefield detainees must largely conform to the provisions of the Geneva Conventions. Completed in 1949, the Geneva Conventions remain the most comprehensive set of laws governing the treatment of armed combatants, prisoners-of-war (or POWs), and civilians. Almost every nation in the world, including the United States, has ratified these treaties. The provisions of the third article in every Geneva Convention are identical, and are, hence, known as Common Article 3. Under that article, signatories are prohibited

from carrying out various acts against detainees, including murder of all kinds, mutilation, cruel treatment and torture, outrages upon personal dignity, and humiliating and degrading treatment. Violations of Common Article 3 are punishable by fines, imprisonment, and even death under federal law.

In the past several years, Congress has tried to restrict the use of coercive interrogation techniques used by the CIA. But the Executive branch responded by garnering support to protect that agency's interrogation program.

During past armed conflicts, American military personnel were largely responsible for interrogating POWs and other battlefield detainees. Experts note that these interrogations were regulated, for example, by the Army Field Manual and other legislation. The field manual mostly complies with international treaties (including the Geneva Conventions) by prohibiting military personnel from using coercive techniques when interrogating POWs and other detainees.

But in the current “war on terror,” which does not involve traditional battlefield combat against enemies who are part of a formal army, many suspected high-level terrorist detainees are being interrogated not by American military personnel, but, instead, by CIA officials and contractors in CIA-run prisons (outside of the Pentagon’s authority) around the world. While the president has acknowledged the existence of these prisons and interrogation programs, there is little publicly available information about them. Experts note that regulations such as those contained in the Army Field Manual do not apply directly to CIA personnel.

In the past several years, Congress has tried to restrict the use of coercive interrogation techniques by the CIA. But the Executive branch responded by garnering support to protect that agency’s interrogation program. All of this resulted in what analysts describe as an on-going tussle between the two branches of government. For instance:

- In February 2002, the president declared that Common Article 3 (along with its protections for various detainees) did not apply to terrorists. The Department of Justice later argued, in an August 2002 internal memo, that under its interpretation of domestic and international law, prohibitions against torture covered only those acts where the resulting physical pain was “equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function, or even death.” It concluded that the CIA may use certain harsh interrogation techniques that did not produce such pain.
- When the 2002 memo was made public in June 2004, critics argued that the Department of Justice’s definition of torture seemed to allow for many highly coercive techniques that others (including allies) would plainly view as torture. After a public outcry, the Justice Department rescinded the memo. In December 2004, the Department of Justice issued a statement saying that “torture is abhorrent both to American law and values and international norms.” But it also added that it did not determine whether the CIA’s past interrogation practices were illegal.
- In December 2005, Congress passed the Detainee Treatment Act, which stated that “no individual in the custody or


under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.” Legal analysts said that this presumably applied to CIA personnel.

- In June 2006, the United States Supreme Court ruled (in *Hamdan v. Rumsfeld*) that the Geneva Conventions afforded suspected terrorist detainees “some minimal protections,” a decision which many say repudiated the president’s statement in February 2002.
- In response to the Supreme Court decision and also at the urging of the president, Congress passed the Military Commissions Act in October 2006, which prohibited all government employees from subjecting any person under their custody in any part of the world to “cruel, inhuman, or degrading treatment or punishment.” But, under the act, the president retained “substantial authority to define acceptable interrogation techniques,” which some human rights groups feared would allow him to authorize practices that fell just short of torture. One analyst also noted that the act had “left a loophole allowing the CIA to use aggressive techniques barred by” the act.
- In July 2007, the president signed an Executive order which specifically prohibited any CIA interrogation program from using, for instance, “acts of violence serious enough to be considered comparable to murder, torture, mutilation, and cruel and inhuman treatment.” But the order allowed the president to determine which techniques the CIA would use during its interrogations, and that these techniques would remain classified. A spokesperson for the president claimed that the techniques would be “tough, safe, necessary, and lawful.”
- In October 2007, the media revealed that the Justice Department had—in 2005—written secret legal opinions supporting the use of coercive interrogation techniques by the CIA even though it had previously stated that “torture is abhorrent.” According to some officials, the opinion was “an expansive endorsement of the harshest interrogation techniques ever used by the CIA,” including waterboarding, head slapping, and exposure to extreme temperatures. Another secret opinion claimed that these harsh techniques did not even violate standards established under the Detainee Treatment Act. “The opinion found that, *in some circumstances*, not even waterboarding was necessarily cruel, inhuman, or degrading if, for example, a suspect was believed to possess crucial information about a planned terrorist attack,” added other officials.

In response to the revelation of these undisclosed legal opinions, a high-ranking member of Congress said that the Executive branch had “reinstated a secret [interrogation] regime by, in essence, reinterpreting the [Detainee Treatment Act] in secret.” Another senior member added that Congress had voted to pass the Detainee Treatment Act “without knowing that the Justice Department had already decided that the CIA’s [interrogation] methods did not violate” standards in that act.

In December 2007, the House of Representatives passed legislation (by a vote of 222-199) which would specifically prohibit the CIA from using various coercive techniques (including waterboarding) by requiring its personnel to follow standards

set in the Army Field Manual, which forbids the use of force during interrogations. One observer said that the bill “would make it clear that waterboarding or any other use of physical pressure against a prisoner being questioned is illegal.” The Senate also voted to pass legislation in February 2008 forbidding the CIA from using coercive interrogation techniques such as waterboarding by a vote of 51-45.

In March 2008, the president vetoed the bill, which the House of Representatives later failed to override because it fell short of the two-thirds votes needed to do so. In the meantime, one commentator said that the 2005 secret legal opinions remain in effect today, and that the Executive branch had succeeded “in preserving the broadest possible legal latitude for harsh [interrogation] tactics.” 

UNITED NATIONS

Birth of a nation: Legal issues in Kosovo's independence

When can a territory proclaim itself a sovereign nation? Recently, the province of Kosovo declared itself independent of Serbia and sent out letters to 192 countries requesting diplomatic recognition. While several nations said that they would recognize Kosovo, other major powers argued that the province's declaration had violated international law and could even destabilize regional security in the Balkans and other parts of the world. What is Kosovo's current legal status?

In 1999, the United Nations Security Council passed Resolution 1244 which placed Kosovo under the temporary protection of the United Nations Interim Administration Mission in Kosovo (or UNMIK). Kosovo had—in 1990—declared independence from and started a guerilla insurgency against Serbia, which, in turn, led a violent crackdown to protect what it called its “medieval heartland.” Political analysts said that while Kosovo was legally a part of Serbia, it had exercised some measure of autonomy. It had, for instance, its own assembly, which Serbia later dissolved to suppress any further moves toward independence. (Ethnic Albanians make up over 90 percent of Kosovo's population. The remaining 10 percent are Serbian.)

During the 1990s, Serbia had also supported ethnic Serbs living in neighboring countries such as Bosnia-Herzegovina, which plunged into a civil war after the fall of communist rule. Analysts say that Serbia provided arms to Bosnian Serb militias, which later displaced and killed hundreds of thousands of Bosnian Muslims and Croats. (Observers believe that Serbia wanted to create a pan-Serbian nation with contiguous borders.)

NATO intervened militarily to stop the fighting in Bosnia-Herzegovina and Kosovo in 1999. After Serbian forces withdrew from the province, they were replaced by tens of thousands of NATO troops. Under Resolution 1244, UNMIK had the authority to create provisional institutions of self-governance in Kosovo. UN officials also added that “the UN was never meant to stay in Kosovo forever,” and pointed out that Resolution 1244 required UNMIK to facilitate “a political process designed to determine Kosovo's future status.”

Under the auspices of the UN, Serbia and Kosovo began negotiations in 2005 to determine the province's political future. Serbian authorities had offered Kosovo more autonomy by allowing the creation of its own parliament and other government

institutions. But leaders in Kosovo insisted on full independence. (They had even elected their own president in 2001.) These negotiations soon reached an impasse.

In 2007, several countries—including Britain, France, Germany, and the United States—sponsored a Security Council resolution which called on the European Union (or EU) to replace UNMIK and carry out a plan of “supervised independence” for Kosovo, which one observer described as a “phased-in statehood overseen by an international civilian body with military capabilities.” The plan included legal protections for the Serb minority, and also gave the EU “the power to annul laws [in Kosovo] or dismiss [its] officials” violating the plan's provisions. But its supporters never introduced the resolution for a formal vote because Russia—Serbia's main ally—had threatened to veto it.

High-ranking Serbian officials said that “international recognition of Kosovo's independence risked undermining the sovereignty and territorial integrity of UN members.” They also claimed that it would fan secessionist movements in other parts of the world.

After further UN-mediated negotiations between Serbia and Kosovo failed to produce any progress, Kosovo unilaterally declared independence in February 2008. Britain, France, Germany, and the United States quickly recognized Kosovo as an independent state. EU officials also announced that they would send a “European Union Rule of Law Mission” to the province to begin its transition to statehood. Kosovo's supporters justified their decision to recognize the province's independence and also to send an EU mission on the following legal grounds:

- Resolution 1244 did not set any limits on how Kosovo's legal status would be determined. They point out that the resolution called only for a “political solution to the Kosovo crisis,” and that a declaration of independence was actually one way to resolve this crisis.
- Resolution 1244 gave implicit legal authority to the EU to send a mission to Kosovo without an additional Security Council vote because it only mentions that “international civil and security presences” would be involved in Kosovo. Hence, an EU mission fit this criterion.

But many other nations, including Brazil, China, India, Spain, and Russia had strongly denounced or criticized Kosovo for various reasons:

- Resolution 1244, they said, called only for “substantial autonomy and meaningful self-administration for Kosovo,” and did not mention independence. Thus, any such move would violate international law (as embodied in Resolution 1244). An observer noted that “the lack of United Nations endorsement is consistently cited by the Serbian government . . . as proof that Kosovo's declaration of independence was illegitimate.” Critics also point out that even individual EU member states are split on Kosovo's statehood. Cyprus, Greece, Romania, and Spain, for instance, have refused to recognize Kosovo without an agreement from the Security Council.
- High-ranking Serbian officials said that “international recognition of Kosovo's independence risked undermining

the sovereignty and territorial integrity of UN members.” They also claimed that it would fan secessionist movements in other parts of the world. Analysts point out that many of the nations protesting Kosovo’s independence have active secessionist movements.


Observers say that there is currently no formal international agreement regulating when a territory may secede and declare independence from another sovereign entity. But Prof. Christopher Borgen of St. John’s Law School points out that a collection of “state practice, court opinions, and other authoritative writings” provides some legal criteria which may be used by a territory to justify secession. (“While international law does not foreclose on the possibility of secession, it does provide a framework within which certain secessions are favored or disfavored, depending on the facts,” concluded Prof. Borgen.) Some of the criteria include the following:

- “The secessionists are a ‘people’ (in the ethnographic sense);
- “The state from which they are seceding seriously violates their human rights; and
- “There are no other effective remedies under either domestic law or international law.”

But others point out that there are no guidelines on how to determine whether a territory claiming independence has satisfied each criterion. So whether a territory ultimately secedes from another country may be determined through other means such as political negotiations.

Legal experts also note that there is no international treaty or even a broad agreement on when countries may recognize the government (or even statehood) of another territory. (In recognizing Kosovo, the president of the United States simply sent a letter to the province stating: “On behalf of the American people, I hereby recognize Kosovo as an independent and sovereign state.”) Currently, a treaty called the Montevideo Convention on the Rights and Duties of States lists several criteria which guides nations in determining whether a state actually *exists* (including having a permanent population and a defined territory). But these criteria do not explicitly require states to recognize a particular government.

Nations have, instead, taken into consideration many other factors. For instance, one legal expert said that “in practice, states more often recognize other governments as a matter of political expedience or to further their diplomatic and economic agenda.” Some analysts also argue that gaining the approval of the Security Council (though not explicitly required by any treaty) “would provide legal and international legitimacy for [a territory’s] recognition.” But even within the Security Council, there are no set procedures which guide its members on how to determine whether a territory should gain independence and recognition. So, in the meantime, “individual countries have the right to recognize Kosovo on an individual basis,” concluded an expert. But others have noted that this will make it harder for Kosovo to gain membership in various international organizations. Russia, for instance, will most likely block any attempt by Kosovo to become a UN member.

Shortly after Kosovo declared independence, Serbia called an emergency meeting of the Security Council. But its members could not agree on any further resolutions or even a joint statement concerning the province’s recent actions. In the meantime, the UN announced that it would continue to oversee Kosovo and would also seek an “enhanced role” for the EU in governing the province. 

UNITED NATIONS

Better treatment for indigenous peoples?

In February 2008, Australia issued an official (and symbolic) apology to its indigenous Aborigine population for decades of mistreatment under past government policies, including the assimilation of Aborigine children who were forcibly removed from their families. While many have applauded this act (which did not involve any restitution), human rights advocates point out that other indigenous populations around the world continue to face greater rates of unemployment, poverty, and even shorter life spans in their respective countries.

To improve their situation, the United Nations last year adopted its first comprehensive declaration (or statement) regarding the rights of indigenous peoples. Supporters say that this declaration will help guide UN member states when they address a variety of issues affecting their indigenous populations. But critics and opponents worry that many terms in the document are too broadly defined and open to varying interpretations, which could ultimately undermine its effectiveness and standing.

Political analysts estimate that there are over 370 million indigenous people worldwide, and that most of these groups live in countries where they represent a minority of the population. Some popular examples of indigenous groups include the Aborigine in Australia, and the Native American populations in the United States and Canada. While several of these groups have adapted or are adapting to their surrounding communities, others still practice their unique customs and traditions. Social scientists say that indigenous peoples are generally not treated well in their respective societies because of simple discrimination, and that many countries have not initiated efforts to prevent it.

According to its supporters, the United Nations Declaration on the Rights of Indigenous Peoples—which was adopted by the General Assembly in September 2007 after more than two decades of debate—establishes a framework of rights and protections for indigenous peoples in areas such as cultural preservation, education, employment, health, land ownership, and language, among others. (One official described the declaration as a series of “recommendations” and not a formal treaty.) For example:

- According to Article 2, indigenous peoples and individuals “are free and equal to all other peoples and individuals, and have the right to be free from any kind of discrimination . . . based on their indigenous origin or identity.”
- Under Article 8, they also “have the right not to be subjected to forced assimilation or destruction of their culture.” Article 10 further states that indigenous peoples “shall not be forcibly removed from their lands or territories,” and that “no relocation shall take place without the free, prior, and informed consent of the indigenous peoples concerned.”
- The declaration says in Article 11 that indigenous peoples “have the right to practice and revitalize their cultural traditions and customs,” but still (under Article 14) “have the right to all levels and forms of education of the State without discrimination.”
- To improve workplace conditions, Article 13 states that indigenous peoples “have the right not to be subjected to any discriminatory conditions of labor and, inter alia, employment and salary.”

Advocates say that as countries become more aware of their responsibilities towards (and the rights of) their indigenous populations under the declaration, they may work toward ending discrimination and mistreatment against them, and also promote policies to improve their well-being. While 143 countries voted in favor of the declaration, four countries (Australia, Canada, New Zealand, and the United States) voted against it, 11 abstained, and 34 were recorded as “absent.”

But other observers believe that while the declaration is noble in its goals, it has shortcomings. Critics point out, for example, that it does not provide a definition of the term “indigenous peoples.” In fact, analysts say that there are no agreed upon legal criteria to determine whether a particular people is “indigenous.” One religious group described them as “people who inhabited a land before it was conquered by colonial societies and who consider themselves distinct from the societies currently governing those territories.” A United Nations official defined indigenous peoples, in part, as “those which [have] a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, [and] consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them.”

But these definitions are not legally binding and are broad and vague, say analysts. Because a legal definition of indigenous people does not exist, some worry that various groups around the world could falsely claim such an identity to demand, for instance, better treatment from government authorities.

Critics also worry that because several other terms remain undefined, the declaration may be opened to various (and perhaps unintended) interpretations. For example, Articles 3 and 4 state that indigenous peoples not only “have the right to self-determination,” but also “the right to autonomy or self-government in matters relating to their internal and local affairs.” Furthermore, Article 6 goes on to say that “every indigenous individual has the right to a nationality.” But the declaration does not define the terms “self-determination,” “autonomy,” and “nationality.” One analyst said that these articles as a whole could provide a basis for an indigenous population to secede from an existing territory. One American official complained that the text was “confusing, and risked endless conflicting interpretations and debate about its application.”

Others believe that the declaration’s provisions concerning land rights could violate existing national laws and property rights. According to Article 26, indigenous peoples “have the right to the lands, territories, and resources which they have traditionally owned, occupied, or otherwise used or acquired.” The declaration goes on to state in Article 28 that if these natural resources had been “confiscated, taken, occupied, used, or damaged” without the informed consent of indigenous peoples, then they “have the right to redress by means that can include restitution or (when this is not possible) just, fair, and equitable compensation.”

But legal analysts say that it would be very difficult to determine with precision whether certain indigenous peoples had, indeed, owned some property in dispute, and that confiscating such lands could violate the property rights of their current owners (some of whom can even include indigenous individuals). Like his American counterpart, a Canadian ambassador said that “the provisions in the declaration on lands and territories were overly broad, unclear, and capable of a wide variety of interpretations.”

Still other provisions, some believe, could hurt established democratic procedures in various countries. Observers point out, for instance, that Article 18 gives indigenous peoples “the right to participate in decision-making in matters which would affect their rights,” and that, under Article 19, States must “consult and cooperate . . . with indigenous people . . . before adopting and implementing legislative or administrative measures that may affect them.” One official said that these articles “implied that indigenous peoples had rights that others did not have” such as a veto over legislation passed through established legal procedures.

Some legal experts believe that these concerns may be overstated because, unlike an actual treaty, the declaration is not a legally binding text, and simply provides “political and moral force” in matters concerning the treatment of indigenous peoples. Its provisions, they say, are “aspirational,” meaning that nations may choose (or not choose) to follow its various provisions. An official added that the document “did not provide a proper basis for legal action complaints or other claims in any international, domestic, or other proceedings.” But if enough states followed the declaration’s provisions, said one observer, it could become a part of customary international law. Other critics have responded in the negative, noting that the declaration specifically did not create any new rights for indigenous peoples only. 🌐

UNITED NATIONS

The end of the death penalty?

In December 2007, the United Nations General Assembly for the first time passed a non-binding resolution calling on countries that allow capital punishment to suspend further executions and eventually work toward its abolition. In the final tally, 104 nations supported the resolution, 54 voted against it (including the United States, China, India, Japan, Singapore, and many Caribbean nations), and 29 abstained. Political observers note that the resolution’s supporters had expected a much higher vote count beyond the 97 minimum needed for passage, which led one ambassador to conclude that “the global community [remains] divided” on the use of the death penalty.

The resolution (A/RES/62/149) also calls on countries with the death penalty to continue following international standards that protect the rights of individuals facing the death penalty, and also “progressively [to] restrict the use of the death penalty and reduce the number of offenses for which it may be applied.” Analysts note that Italy had introduced this resolution (on behalf of the European Union), and had also done so in 1994 and 1999. The 1994 resolution failed to garner enough support in the General Assembly, and the latter was later withdrawn.

Analysts say that the death penalty has, since ancient times, been used as a deterrent to prevent people from committing a wide range of offenses. Described as the “most severe of legal punishments,” the death penalty has been carried out through lethal injection, hanging, firing squad, and beheading, among other means. In recent memory, it has been used to punish serious and otherwise exceptional crimes such as murder and war crimes, though legal observers point out that 69 nations still have laws that allow them to apply the death penalty for ordinary crimes.

In 2006, almost 1,600 people were put to death in 25 countries. But human rights groups say that the figure is probably much higher due to under-reporting by various nations. Observers say that China, Iran, Iraq, Pakistan, Sudan, and the United States had carried out 91 percent of these executions. While the United States executed 53 of the total number of individuals sentenced to death worldwide, China was responsible for more than 1,000, or more than 60 percent.

Opponents of the death penalty say that it does not, for example, significantly deter crime. On the other hand, supporters argue that the application of the death penalty is a matter of criminal justice and judicial rules, and not human rights.

A prominent human rights group said that there seems to be a growing international consensus against using the death penalty. This group points out that, while only 16 countries in 1977 had “abolished the death penalty for all crimes,” by 2008 this number had increased to 88 countries. (At least 40 countries still impose the death penalty for exceptional crimes or retain the right to impose that punishment.) Other rights groups also say that every international criminal tribunal created by the UN in recent times—including the tribunals for Rwanda and the former Yugoslavia—prohibits capital punishment and, instead, imposes a life sentence as the harshest penalty, “even for the most heinous crimes such as genocide.”


They also say that countries that impose the death penalty are restricting its use. The U.S. Supreme Court ruled, for instance, that executing people under the age of 18 was unconstitutional. It is also reviewing the legality of lethal injections, which is “the main method of execution in the United States,” said one observer. Still, 75 percent of all U.S. states allow the death penalty.

Opponents of the death penalty in the United States—who have described it as an “inhuman, degrading, and irreversible form of punishment”—say that it does not significantly deter crime. One survey claimed that states with the death penalty had a higher homicide rate than states without it. They also believe that the practice is not administered in a fair manner. Human rights groups say that people sentenced to death are disproportionately poor and usually a member of a racial minority group, and that a U.S. government study found a “pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty.” They also note that “95 percent of death row inmates cannot afford their own attorney.” And since 1973, more than 125 people sentenced to death were later exonerated.

On the other hand, supporters argue that the application of the death penalty is a matter of criminal justice and judicial rules, and not a matter of human rights. In addition, several nations assert that they have the sovereign right to establish their own domestic criminal laws, and that only individual countries (given their history, customs, and even current domestic circumstances) are able to ascertain whether a certain penalty is appropriate for a particular crime. To support their case, they point out that the UN Charter does not “authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.” The use of the death penalty, they believe, is such a matter.

Legal scholars say that no single, all-encompassing international treaty prohibits or regulates the use of the death penalty. But they note that its supporters and opponents usually cite certain treaties (and may diminish the importance of others) to bolster their positions. For example:

- Opponents say that, under their interpretation, various provisions in the 1948 UN Declaration of Human Rights implicitly prohibit the death penalty. They point out that Article 3 states that “everyone has the right to life,” and that Article 5 prohibits cruel, inhuman, or degrading punishment. Capital punishment would seem to violate these provisions. But supporters respond that the declaration is simply a non-binding statement of the UN concerning various human rights practices, and is not even an international treaty whose terms can be enforced in a court of law.
- Supporters say that some treaties allow the death penalty. The 1966 International Covenant on Civil and Political Rights, for example, provides guidelines concerning its administration. Article 6 says that the death penalty “may be imposed only for the most serious crimes,” and must be carried out “pursuant to a final judgment rendered by a competent court.” It also forbids all states from executing pregnant women and people under the age of 18. But opponents point out that an optional protocol to the convention adopted in 1989 says that “each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.” Nevertheless, many countries, including the United States, have not signed this protocol, and there are exceptions for certain crimes committed during war.
- In 1984, the UN Economic and Social Council passed a non-binding resolution (“Safeguards guaranteeing protection of the rights of those facing the death penalty”), which did not prohibit the death penalty but, instead, restricted its application. For instance, it states that “capital punishment may be imposed only for the most serious crimes,” and “only when the guilt of the person charged is based on clear and convincing evidence.”
- In 2002, the Council of Europe adopted Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which applies mainly to European nations. It abolishes the death penalty for countries that sign the protocol, explicitly stating that “no one shall be condemned to such penalty or executed.”

International law scholars agree that the General Assembly resolution does not have the force of law. But supporters say that the resolution carries political and “powerful moral authority” because it reflects an opposition to the death penalty from at least a majority of UN member states. One observer said that its passage also won’t directly affect the outcome of current cases in the United States concerning the legality of the death penalty. While the Supreme Court has sometimes cited international agreements, foreign court decisions, and international polls to support and confirm its conclusions (as in *Atkins v. Virginia* in 2002, which held that executing mentally retarded individuals violated the Eighth Amendment’s prohibition on “cruel and unusual punishment”), legal experts say that U.S. courts are required to base their decisions only on “controlling authority” such as the Constitution and judicial precedents. 

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