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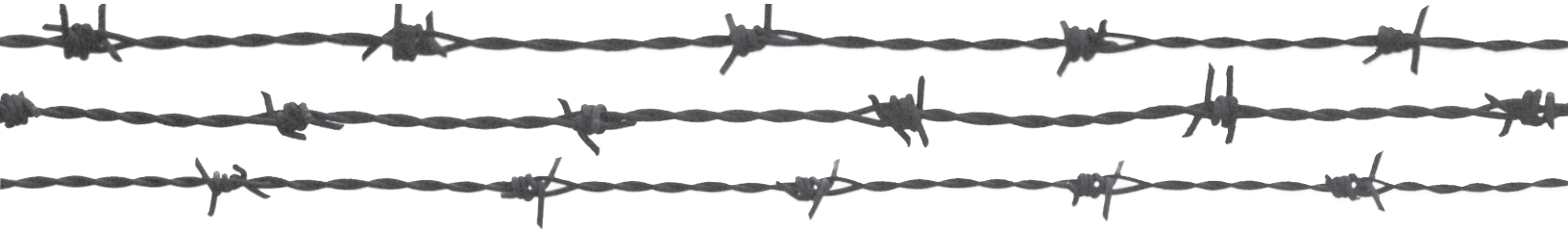
INTERNATIONAL CRIMINAL TRIBUNAL

A New System of Law and Order in the "War on Terror"

PAGE 6

In the new military justice system established to prosecute terrorism cases, suspected terrorist detainees will face, first, the interrogators who will investigate their alleged crimes and, second, the military prosecutors who will try their offenses.



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Will the new national space policy lead to weapons in space?

In October 2006, the United States issued a new national space policy which will guide various aspects of American activities in outer space, including those for commercial and scientific purposes. But many analysts say that its declarations concerning national security—including the possible development of space-based weapons—have caused concern among governments around the world. In contrast to the last national space policy issued by the Clinton administration in 1996, analysts say that the new policy "responds to a post-9/11 world of terrorist actions," and takes a more aggressive stance in guarding American interests in outer space. While supporters argue that this new policy will enhance American national security, others say that it will have the opposite effect.

For several decades, many nations have called for the creation of a new global treaty that would explicitly ban the deployment of any weapons (whether for defensive or offensive purposes) in outer space. But a few countries, mainly the United States, have withheld their support from these efforts. And in light of the terrorist attacks on September 11, 2001, political analysts believe that it has become even more difficult to convince the United States to support such plans. In fact, the new national space policy states that the "the United States will oppose the development of new legal regimes or other restrictions that seek to prohibit or limit U.S. access to or use of space." In addition, the new policy calls on the Secretary of Defense and the Director of National Intelligence to "develop and deploy space capabilities that sustain U.S. advantage and support defense and intelligence transformation," and also to "develop capabilities, plans, and options to ensure freedom of action in space, and, if directed, deny such freedom of action to adversaries."

Experts note that while the new national space policy does not explicitly call for the development and deployment of actual weapons in space, they also say that it does not "rule out these activities." Many foreign policy analysts worry that the new policy could increase tensions with both allies and adversaries because it will "reinforce international suspicions that the United States may seek to develop, test, and deploy space weapons." A government commission in 2001, for instance, concluded that the United States "must develop the means both to deter and to defend against hostile acts in and from space." A few months later, the chief of staff of the United States Air Force endorsed the deployment of space-based weapons. And just last year, a State Department official stated that the United States "will continue to consider the possible role that space-related weapons may play in protecting our assets."

Some say that the new national space policy builds upon positions taken by the Clinton administration in 1996. For example, one expert said that the 1996 policy had actually "opened the door to developing space weapons, but that [the Clinton] administration never did anything about it." One provision from that policy simply stated: "National security space activities shall contribute to U.S. national security by . . . deterring, warning, and, if necessary, defending against enemy attack." Furthermore, the former policy also said that American space-related programs would try to comply with international treaty obligations. In contrast, "Bush policy now goes further," said one commentator.

Many military analysts agree that the new national space policy takes a much more aggressive stance not only because of terrorist threats, but also because the United States—which has over 400 active satellites orbiting the planet—is "the dominant user of space for military and civilian functions." Civilian satellites, for instance, allow people to use cell phones and other electronic equipment. Others point out that emergency police services, search and rescue operations, parolee monitoring, train controls, and hurricane prediction all rely on satellites. Military satellites allow the United States to eavesdrop on foreign communications, track the movement and activities of foreign armies, and detect nuclear explosions. "Every technologically advanced land, sea, and air service already depends on space satellites," said one expert.

> "Arms control is not a viable solution for space," said a U.S. official. "For example, there is no agreement on how to define 'space weapon.' Without a definition, you are left with loopholes and meaningless limitations that endanger national security. No arms control is better than bad arms control."

Because the United States is highly dependent on the use of its satellites, some policymakers have called on the government to deploy and maintain actual weapons in space to protect these satellites from attack. (Technical experts say that no civilian or military satellites have their own defense systems to protect themselves against anti-satellite weapons launched from Earth or even large debris floating around in space.) But critics argue that deploying weapons in outer space will trigger an arms race. "It is virtually certain that deploying U.S. weapons in space will lead to the development and deployment of [anti-satellite weapons]," said an analyst. They also say that an arms race in outer space will provoke an outcry from private companies because it could lead to a substantial increase in "the cost of insuring satellites." A satellite that provides global positioning systems, for example, costs over $45 million. And launching that satellite into space costs between $20 to $50 million. One analyst said: "There appears to be no demand from the operators of commercial communications satellites for defense of their multibillion-dollar assets."

Others say that most countries hostile to American interests do not have the technical capability to destroy U.S. satellites. One expert pointed out that not a single satellite [from any country] had ever been destroyed in combat, and that it would be much easier for an adversary to attack, for instance, launch facilities

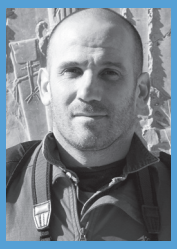
A CENTER DISCUSSION

IRAN: What Next?

March 21, 2007

Associate Professor Tai-Heng Cheng, who is Associate Director of the Center for International Law, will analyze the current state of affairs of Iran by drawing from his fact-finding mission in November 2006. He will also discuss the diversity of viewpoints among Iranians concerning the United States, Israel, and the Iranian government. He will then suggest proposals for adjusting U.S.-Iranian relations to benefit the peoples of both states.

Neda Shahidyazdani, a human rights lawyer at the Iran Human Rights Documentation Center, will discuss the importance of promoting a human rights culture inside of Iran through objective reporting of past human rights abuses. She will draw examples from a recent publication concerning the persecution of the Bahá'í religious minority.



George Billard, president of Do Diligence, and Miracle Media, will discuss the socioeconomic conditions of the Iranian people and the factors that have led to their current situation. He will also examine Iran's internal problems and the global implications of current Iranian policies. Mr. Billard will then analyze options to help diffuse the current political crisis between the United States and Iran.

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and ground-control stations that control the satellites. A major research organization declared: ". . . the threat posed by [anti-satellite weapons] is more hypothetical than real."

Before implementing the new space policy, the United States must determine whether the policy's various provisions comply with certain international treaties. Experts say that there is no single international treaty that regulates all activities conducted by nations in outer space. Instead, space-related activities are governed primarily by five different treaties adopted under the auspices of the United Nations (UN), each of which deals with a particular aspect of outer space. For example, some legal experts say that the "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space" (better known as the "Outer Space Treaty") provides "the basic framework on international space law." The treaty states that outer space shall be used for "peaceful purposes," and will also be "free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law." It also prohibits countries from claiming a particular area of space (including the moon and other celestial bodies) through actual physical occupation or by claims of sovereignty. The treaty also says that its States Parties will not "place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner." Technical experts say that, as of 2007, "no nation has deployed destructive weapons in space."

Other UN treaties concerning the use of space include agreements that deal with the rescue of astronauts, liability for damage caused by space objects, and activities carried out on the moon and other celestial bodies (also known as the "Moon Agreement"). Although signatory nations are legally bound to comply with the provisions in these treaties, their terms are not enforceable, according to legal analysts. (The United States ratified four of the five UN-sponsored treaties. It did not ratify the Moon Agreement.) In addition to these UN treaties, legal analysts point out that space law also encompasses "rules and regulations of international organizations, national laws, executive and administrative orders, and [even] judicial decisions."

With regard to deploying weapons in space, legal analysts believe that the existing space treaties do not prohibit the use of space for all military activities. For instance, while the Outer Space Treaty generally bans countries from "weaponizing" space (i.e., from stationing particular weapons in space), it does not prohibit them from "militarizing" space, which includes activities such as placing satellites in space for the purpose of, say, tracking enemy troops or simply providing communications. One analyst said that "although space is heavily militarized, it is not yet weaponized." Others note that while the Outer Space Treaty does not explicitly define the phrase "use of outer space for peaceful purposes," most nations "have accepte[d] that 'peaceful purposes' include military use." The Clinton and Bush administrations declared in their national space policies that their interpretation of the phrase "peaceful purposes" allowed them to pursue "defense and intelligence-related activities in pursuit of national security and other goals."

Beginning in the 1980s, many nations around the world began to call for the creation of a new international treaty—called the Treaty on the Prevention of an Arms Race in Outer Space or

United Nations Space Treaties

Space-related activities are governed primarily by five different treaties adopted under the auspices of the United Nations. The parentheses indicate the year that the treaty came into force.

- **Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space (1967):** prohibits, for instance, its signatory nations from stationing in orbit objects carrying weapons of mass destruction.
- **Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (1968):** provides that signatories "shall take all possible steps to rescue and assist astronauts in distress and promptly return them to the launching State."
- **Convention on International Liability for Damage Caused by Space Objects (1972):** provides that a launching State "shall be absolutely liable to pay compensation for damage caused by its space objects."
- **Convention on Registration of Objects Launched into Outer Space (1976):** provides that a launching State should provide to the UN information concerning, for example, the general function of an object launched into space and its registration number.
- **Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (1984):** advocates that an "international regime" should be established to govern the exploitation of the Moon's natural resources.

PAROS—which would specifically ban all weapons in space (including defensive weapons). While the Outer Space Treaty currently prohibits nations from placing nuclear weapons or any other kinds of weapons of mass destruction in outer space, it does not define the phrase "other kinds of weapons of mass destruction." Supporters of a PAROS treaty worry that because the Outer Space Treaty does not specifically prohibit the stationing of weapons in outer space that do not cause mass destruction, some countries may pursue the development of defensive weapons. Since 1982, delegates to the United Nations Conference on Disarmament—which describes itself as a "multilateral disarmament negotiating forum of the international community"—have proposed resolutions to begin negotiations on a PAROS treaty. But the United States had abstained on these measures, arguing that already-existing treaties addressed issues concerning weapons in space. During the last conference in 2006, one American delegate stated: "There is no—repeat, no—problem in outer space for arms control to solve."

But political analysts believe that the United States is currently opposed to an arms control treaty for space because such a treaty might include provisions that would prevent the United States from even planning defenses to protect its satellites. In fact, the new American national space policy announced that "proposed arms control agreements or restrictions must not impair the right of the United States to conduct research, development, testing, and operations or other activities in space for U.S. national interests." During a recent meeting at the Conference on Disarmament, an American official stated: "The high value of space systems has led the United States to study the potential of space-related weapons to protect our satellites from potential future attacks, whether from the surface or from other spacecraft. As long as the potential for such attacks remains, our Government will continue to consider the possible role that space-related weapons may play in protecting our assets."

Commentators say that, despite some recent developments, the current administration is still opposed to a PAROS treaty. In January 2007, China announced that it had—for the first time—successfully launched an anti-satellite missile, which destroyed an aging weather satellite. Analysts say that the United States and Russia are the only other countries that have successfully tested anti-satellite weapons, though the last tests occurred over 20 years ago. Some political analysts speculate that China had conducted its test in order to push the United States to begin negotiations on a PAROS treaty. They note that the weather satellite had circled the Earth at a higher orbit than American spy satellites. But a spokesperson for the Chinese foreign ministry said: "This test was not directed at any country and does not constitute a threat to any country . . . China has never participated and will never participate in any arms race in outer space." Still, another Chinese official said that his government would raise the issue of a new space treaty banning all space weapons at a UN meeting.

A State Department official later responded that the Chinese test will not prod the United States to open negotiations on any treaty concerning weapons in space. "Arms control is not a viable solution for space," he said. "For example, there is no agreement on how to define 'space weapon.' Without a definition, you are left with loopholes and meaningless limitations that endanger national security. No arms control is better than bad arms control."

The Military Commissions Act of 2006: A New System of Law & Order in the "War on Terror"

The United States recently implemented a new system of military justice in its "war on terror." Under the Military Commissions Act of 2006 (or "MCA"), American interrogators will have more guidance on how to treat and the extent to which they can forcibly interrogate suspected terrorist detainees. The new law also allows the United States to use—for the first time since the end of World War II—military tribunals to prosecute detainees for allegedly carrying out war crimes. The United States Supreme Court had earlier struck down the legality of a previous military commission, stating that the President did not have the authority to create such commissions, and that its procedures and rules had violated the terms of certain international agreements.

Supporters argue that the new procedures authorized by the MCA comply, for instance, with various international standards for fair trial procedures. But critics believe that it is only a matter of time until the Supreme Court reviews the legality of several controversial measures contained in the MCA, including a provision which allows government prosecutors to introduce evidence obtained through coercion, and another which denies federal courts the jurisdiction to review habeas corpus petitions filed by terrorist detainees.

Policies concerning the INTERROGATION and TREATMENT of current and future detainees

Applying the laws of war before 9/11

As is the practice of many other countries during times of conflict, the United States and its armed forces routinely interrogate prisoners-of-war (POWs) captured during actual battlefield combat in order to gather intelligence about enemy operations and plans. But the treatment of and methods used to interrogate these detainees must largely conform to the provisions of the Geneva Conventions. Completed in 1949, the four Geneva Conventions (or the Conventions) remain the most comprehensive set of laws governing the treatment of armed combatants, prisoners-of-war, and civilians. Almost every nation in the world, including the United States, has ratified—and is, thus, bound to comply with—these treaties. While the Conventions themselves are long and exhaustive, their underlying principles are simple. They aim to protect the injured, vulnerable, and defenseless during times of conflict. The provisions of the third article in every Geneva Convention are identical, and are, hence, known as Common Article 3.

Under Common Article 3, signatories are prohibited from carrying out "at any time and any place whatsoever" the following acts, among many others, with respect to detainees captured in a conflict:

- "Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- "Outrages upon personal dignity, in particular, humiliating and degrading treatment; and
- "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."

The Conventions leave it to the signatory nations themselves to punish individuals within their jurisdictions—such as a captured soldier or even a member of its own armed forces—who violate the terms of the Conventions. According to Article 129 of the Third Geneva Convention, signatory countries must "enact any [domestic] legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention." Article 130 states that "grave breaches" involve any of the following acts:

- "Willful killing;
- "Torture or inhuman treatment, including biological experiments;
- "Willfully causing great suffering or serious injury to body or health; and
- "Willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention."

So when the armed forces of a country capture an enemy combatant, their treatment of this individual and the methods used to interrogate him must conform to the standards set out in the Conventions. But legal analysts note that while the text of the Conventions prohibits, for example, the use of "torture" and "inhuman treatment" as possible interrogation methods, it does not say what specific methods would violate these prohibitions.

In order to comply with these obligations and to establish the legal basis to prosecute violations of the Conventions, the United States, on its part, enacted Title 18 U.S.C. §2441 (also known as the War Crimes Act). This act makes it a felony for members of the armed forces and a national of the United States to commit "war crimes." Legal analysts say that the term "national" covers individuals such as CIA personnel, government and civilian officials, and civilian contractors working for the military. The act also covers captured, non-American individuals who are suspected of having committed war crimes against U.S. citizens (including victims who are members of the American armed forces). As amended in 1997, the War Crimes Act defines "war crimes" as:

- "Any conduct defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949 . . ."
- All violations of Common Article 3. Legal analysts say that someone who, for instance, subjects a detainee to "humiliating and degrading treatment" (which is prohibited under Common Article 3) could be prosecuted under the War Crimes Act.

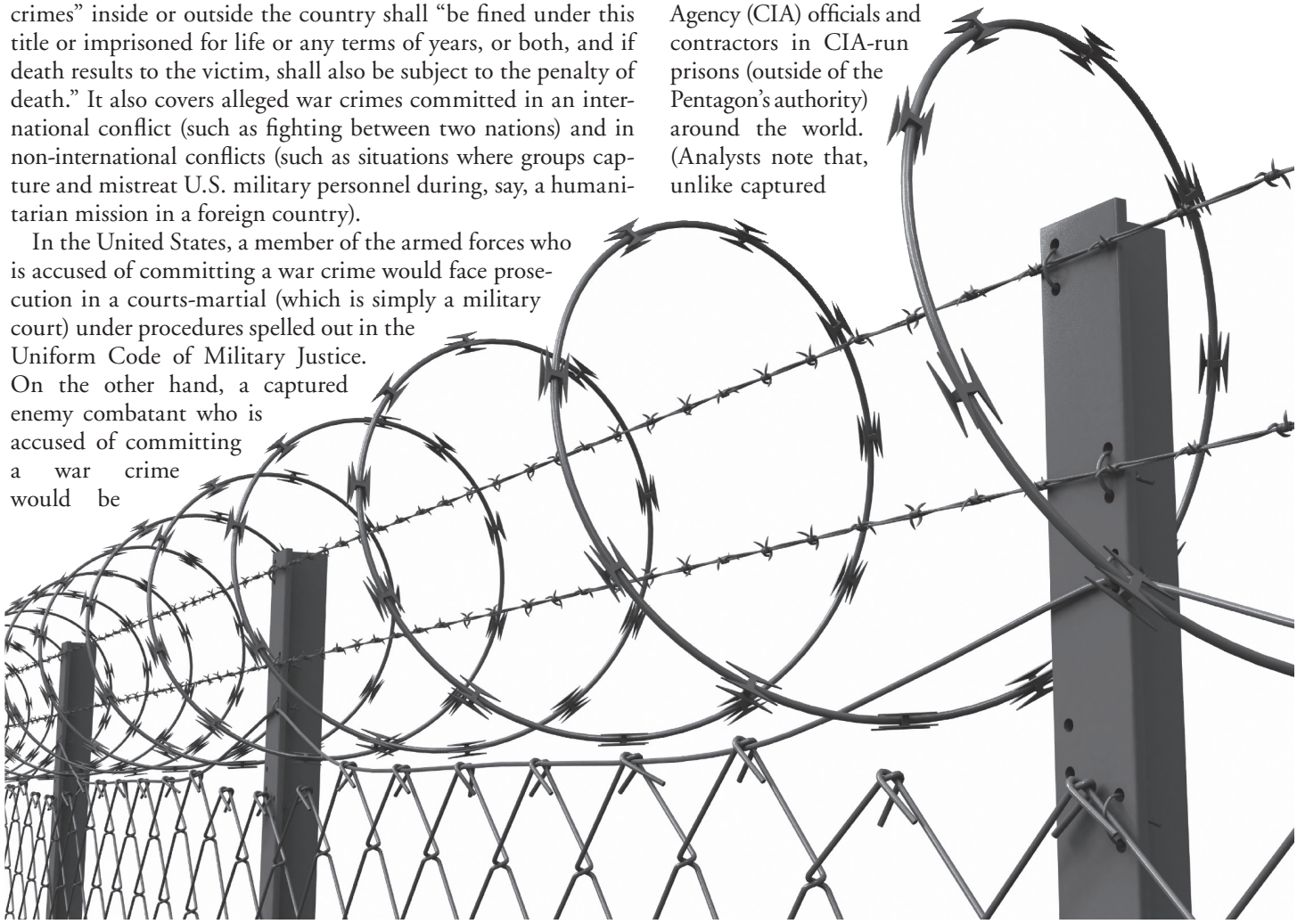
The statute states that those who commit these particular "war crimes" inside or outside the country shall "be fined under this title or imprisoned for life or any terms of years, or both, and if death results to the victim, shall also be subject to the penalty of death." It also covers alleged war crimes committed in an international conflict (such as fighting between two nations) and in non-international conflicts (such as situations where groups capture and mistreat U.S. military personnel during, say, a humanitarian mission in a foreign country).

In the United States, a member of the armed forces who is accused of committing a war crime would face prosecution in a courts-martial (which is simply a military court) under procedures spelled out in the Uniform Code of Military Justice. On the other hand, a captured enemy combatant who is accused of committing a war crime would be tried by an ad hoc military commission; these commissions are "[temporary] criminal courts run by the army during wartime." Historians note that the United States had employed military commissions during the American Civil War and both World Wars.

Analysts say that the armed forces of many countries have incorporated some of the language from the Conventions into their procedural manuals. For example, the United States Army's Field Manual 34-52 (Intelligence Interrogation) specifically stated that carrying out the following acts during interrogations violated the terms of the Conventions and could expose its perpetrators to criminal prosecution—electric shock; forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time; food deprivation; any form of beating; mock executions; and abnormal sleep deprivation. While the manual (which was released in 1992, and applies mainly to United States Army personnel) prohibited these acts during actual interrogations, it did not contain explicit language on how suspected terrorist detainees were to be treated when they were not being interrogated.

Updating the laws of war after 9/11

In the current "war on terror"—which does not involve, for instance, traditional battlefield combat against enemies who are part of a formal army—many suspected high-level terrorist detainees were being interrogated not by American military personnel, but, instead, by Central Intelligence Agency (CIA) officials and contractors in CIA-run prisons (outside of the Pentagon's authority) around the world. (Analysts note that, unlike captured



enlisted soldiers of past conflicts who were usually not privy to battlefield strategies, suspected high-level terrorist detainees are more likely to have intimate details of planned attacks, and that their interrogation thus requires specialists from the CIA in order to draw out valuable information.) But the media had reported that some CIA interrogators may have used what are now called "enhanced" techniques—such as waterboarding (which gives the sensation of drowning) and exposure to extremely cold temperatures—when questioning detainees. Many believe that these acts constitute torture or inhuman treatment under the Conventions, and, thus open its perpetrators to allegations of committing war crimes. These revelations eventually led to a national debate on whether the rights and protections under the Conventions applied to terrorists in the unconventional "war on terror."

The government argued that the Conventions did not provide any protections to terrorist groups such as Al Qaeda, which had publicly renounced these treaties. It also insisted that the various provisions of the Conventions did not create rights that individuals may enforce in a court, and that any violations of the treaty were "a matter of state-to-state relations." But opponents contended that the Conventions did grant detainees several enforceable rights, including "the right to be tried before the same tribunal as American services members charged with the same offense," and also protected them from coercive interrogation techniques.

In June 2006, the U.S. Supreme Court ruled—in *Hamdan v. Rumsfeld*—that the protections under Common Article 3 were applicable to terrorist groups. It stated that "Common Article 3 . . . affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a non-signatory 'Power' who are involved in a conflict 'in the territory of' a signatory." It also said that the Conventions provided judicially-enforceable rights (such as the right to be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples") to detainees in American custody. The defendant in the case, Salim Ahmed Hamdan, served as a personal driver and bodyguard for Osama bin Laden, the head of Al Qaeda. (See "More Limits on Conducting the 'War on Terror'?" in the Fall 2006 issue of *The International Review* for more details concerning the *Hamdan* decision.)

After the release of that decision, the Pentagon announced that it had updated its intelligence field manual to take into account the *Hamdan* decision and its application to suspected terrorist detainees. The new manual (FM 2-22.3) states that ". . . no person in the custody or under the control of the Department of Defense, regardless of nationality or physical location, shall be subject to torture or cruel, inhuman, or degrading treatment or punishment . . ." It also specifically prohibits many of the techniques that the CIA may have used to interrogate suspected terrorist detainees, which allegedly included forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner; placing hoods or sacks over the head of a detainee; waterboarding; using military dogs; inducing hypothermia or heat injury. But, as analysts have noted, these prohibitions applied mainly to the American military and not CIA personnel who operate outside the control of the Pentagon. (The CIA continues to be the primary agency which interrogates suspected terrorist detainees in the "war on terror.")

The Executive branch then began an intensive effort to continue and protect its CIA interrogation program, including individuals involved with that program. In the face of the *Hamdan* decision, officials feared that representatives for the detainees would file hundreds of lawsuits against the CIA and, possibly, other top government officials for violating the rights of their clients under the Conventions by allegedly subjecting them to cruel treatment and torture. One legal analyst said that, because the Supreme Court in its *Hamdan* decision had ruled the system of military commissions to be illegal, detainees could argue that the administration had failed to try them in a "regularly constituted court" as required by Common Article 3. Also, because the War Crimes Act defines a "war crime" as *any* violation of Common Article 3, such a lawsuit could also open up high-level government officials to charges of committing war crimes.

Top administration officials argued that because many terms in the Conventions are not explicitly defined (giving examples such as "torture," "inhuman treatment," and "outrages upon personal dignity, in particular, humiliating and degrading treatment"), CIA personnel needed clearer guidance on how aggressively they could treat their detainees, especially in the area of interrogations. One commentator said that, after the *Hamdan* ruling, the White House wanted to "provide a [more solid] legal framework for interrogations of terrorism suspects and protection of the CIA officers conducting the interviews." President George W. Bush said that "the standards [in the Geneva Conventions] are so vague that our professionals won't be able to carry forward the [CIA interrogation] program because they don't want to be tried as war criminals."

Beginning in September 2006, the Executive branch lobbied Congress to define more clearly some of the vague terms under the Conventions and then apply them retroactively. (Analysts say that this would specifically protect CIA officers and other government agents who may have violated the terms of the Conventions since the start of the "war on terror.") More specifically, the Executive branch wanted Congress to make these self-described clarifications by either (1) unilaterally defining on its own the vague provisions in the Conventions or (2) listing what specific acts would actually constitute grave breaches under the War Crimes Act, which, again, is the domestic statute that punishes Americans and other individuals under its jurisdiction for violating the terms of the Conventions.

Critics agreed that while many terms in the Conventions are broadly worded and open to interpretation, they worry that a unilateral effort on the part of the United States to define what specific acts would constitute violations of the Conventions by changing the actual language in the Conventions themselves would encourage other countries to do the same, and, thus, threaten the safety of American troops who could be captured abroad in future conflicts. One analyst said: "If Iran captures an American soldier and the U.S. re-jiggers the [Geneva Convention] on POW treatment to allow techniques like waterboarding, what's preventing Tehran from doing the same?" Another expert said that direct "U.S. reinterpretation of the Geneva Conventions sets a bad precedent and could spark other states to follow suit, which undermines the effectiveness of these conventions."

On the other hand, the second approach of listing specific "grave breaches" and then adding them to the War Crimes Act (a domestic statute) would not involve a unilateral re-interpretation of the Conventions themselves. Some critics have complained that either approach would ultimately change the interpretation

In the current "war on terror"—which does not involve, for instance, 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.

of the Conventions anyway. But one White House official said that the second approach would be considered the "scenic [and less direct] route" in bringing clarification to some of the provisions in the Conventions, and would also prevent other countries from saying that the United States had changed the actual language in the Conventions themselves.

The Military Commissions Act: New "legal" procedures to interrogate terrorists?

After wrangling with Congress in a highly publicized debate, President Bush—in October 2006—signed into law the Military Commissions Act of 2006 (or the MCA). Legal analysts say that the MCA "narrows the definition of prosecutable war crimes under the War Crimes Act." For example, while the War Crimes Act still currently defines "war crimes" as those acts considered "grave breaches" under Article 130 of the Third Geneva Convention, it no longer considers all violations of Common Article 3 as "war crimes." Instead, the War Crimes Act (as amended by the MCA) now criminalizes only a newly-created list of what it calls "grave breaches" of Common Article 3, including torture, cruel and inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages.

As a result of these changes, say many analysts, acts that were once but are no longer considered "war crimes" include carrying out "degrading and humiliating treatment" and "the passing of sentences . . . without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees." They believe that these changes will allow the CIA to continue its interrogation program and also protect that agency's personnel (along with other government officials) from allegations of violating the terms of the Conventions.

The MCA also makes these changes to the War Crimes Act retroactive to November 26, 1997, meaning that any American official or even those working for the government who may have broken the terms of the War Crimes Act since that date (by violating, for instance, a provision of Common Article 3) cannot be prosecuted for such violations in the United States. (But some legal experts say that if an individual who violated Common Article 3 travels to another country whose laws prohibit all violations of Common Article 3, then that person could be prosecuted in that jurisdiction.) Political analysts believe that the administration pushed for retroactivity because it would prevent the prosecution of cabinet-level officials (and even the President himself) whom they believe may have violated many prohibitions listed in Common Article 3 and, hence, committed a war crime under previous regulations. For example, they argue that by having created a military tribunal which had later been declared illegal by the Supreme Court, these officials may have violated the Common Article 3 prohibition against the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court."

In the realm of interrogation techniques, major human rights organizations say that the MCA does not in any way "authorize the use of torture or abusive interrogation practices" such as those allegedly used by the CIA in its interrogation programs. In fact, the MCA states: "No individual in the custody or under the physical control of the United States Government [which would include CIA employees], regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment." But there is substantial disagreement as to whether the MCA and its new prohibitions will truly prohibit the CIA from using questionable interrogation techniques in the future. One legal analyst pointed out that the new legislation "does not [even] lay out specific interrogation techniques that would be prohibited." Instead, under the MCA, the President will "retain substantial authority to define acceptable interrogation techniques" which fall short of constituting a "grave breach" of the Conventions. More specifically, the MCA states that "the President has the authority for the United States . . . to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions." But some analysts fear that, under such a standard, "the White House would push the limits on harsh [interrogation] techniques."

The MCA also prohibits courts in the United States from using foreign and international sources of law in interpreting the prohibitions contained in the War Crimes Act. It states: "No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441." Political analysts believe that this language will prevent courts in the United States from expanding the list of prohibitions under the War Crimes Act to include other prohibitions which can implicate former or current administration officials who are or were deeply involved in the creation of the CIA interrogation program.

Policies concerning the PROSECUTION of current and future detainees using military commissions

Shortcomings in the original military commissions

After the CIA finished its interrogations, they transferred many detainees to the American Naval Station in Guantanamo Bay, Cuba, where the President announced—in a military order issued in November 2001—plans to try them using military commissions, which one human rights group described as "criminal courts run by the U.S. armed forces." More specifically, the military order stated: "It is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals." The military order also called on the Secretary of Defense to issue orders and regulations "for the appointment of one or more military commissions." In March 2002, the Department of Defense released

After wrangling with Congress in a highly publicized debate, President Bush—in October 2006—signed into law the *Military Commissions Act of 2006* (or the MCA act) . . . Analysts believe that these changes will allow the CIA to continue its interrogation program and also protect that agency's personnel (along with other government officials) from allegations of violating the terms of the Conventions.

"Military Commission Order No. 1," which "implements policy, assigns responsibilities, and prescribes procedures . . . for trials before military commissions of individuals subject to the President's Military Order."

While the United States had, in the past, tried suspected terrorists in federal or criminal court (such as the individuals accused of carrying out the World Trade Center bombing in 1993), the President argued that the extent of recent terrorist acts had elevated the country into "a state of armed conflict," and, thus, justified the use of special military commissions. But legal and political analysts believe that "the White House [favored] military tribunals because the bar there is set lower for conviction than in courts-martial or criminal courts, which require more evidence to convict." In fact, in the military order itself, the President stated: "I find it consistent . . . that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."

But the Supreme Court also ruled in its *Hamdan* decision that President Bush did not have the legal authority from Congress to create military commissions to try terrorist suspects. Furthermore, the Court ruled that some of the procedures adopted by the original military commission to try Mr. Hamdan—such as possibly excluding him from his own trial—violated fair trial procedures required by American military justice codes and also the Geneva Conventions. For example, although Common Article 3 does not define such phrases as "judicial guarantees which are recognized as indispensable by civilized peoples," the Court decided that "it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law," including the right to be tried in one's presence. The majority decision concluded that "the commission that the President [had] convened to try Hamdan [did] not meet those requirements."

The President and his supporters in Congress then began to craft legislation which would explicitly authorize the United States to try terrorist detainees using military commissions. But the President and several others members of Congress argued over the procedures and rules on trying the detainees. While the Executive branch wanted to establish procedures that would limit the rights and protections afforded to detainees (and, some say, even retain some trial procedures that were largely struck down by the Supreme Court in its *Hamdan* decision), several leading members of the United States Senate argued that instituting trial procedures that could be perceived by other countries as being unfair could harm American troops captured in future conflicts and then put on trial by their captors.

A new system to prosecute terrorist suspects

The two sides later devised legislation (embodied in the MCA) to authorize explicitly and set the procedures for prosecuting terrorist detainees using military commissions. The chart on the following pages compares just some of the procedures used by the proposed military commissions before the issuance of the *Hamdan* decision with the procedures currently set out in the MCA. The chart also includes criticisms of several provisions of the MCA.

In January 2007, the Pentagon released a 238-page publication called "The Manual for Military Commissions," which it described as "a comprehensive Manual for the full and fair prosecution of alien unlawful enemy combatants by military commissions, in accordance with the Military Commissions Act of 2006." This manual lists the procedures and rules that military prosecutors and defense counsel must follow when prosecuting and defending suspected terrorist suspects. With the publication of this manual, legal commentators believe that military prosecutors may begin to issue formal charges against particular defendants (many of whom will most likely face the death penalty). Pentagon officials say that they will begin these war crimes trials—the first since the end of World War II—during the summer of 2007. (According to one analyst, of the 395 detainees currently being held in Guantanamo Bay, up to 80 could be tried by a military commission.) But others believe that the trials will not start until the following year.

Although Congress has explicitly given the Executive branch the authority to try detained terrorist suspects using military commissions, analysts say that several procedures (including those concerning habeas corpus and the use of hearsay evidence) will most likely face legal scrutiny by a court. For example, a legal rights group said that the "MCA contains a number of provisions that raise serious concerns about compliance with the Geneva Conventions and with fundamental due process principles." In December 2006, a federal judge ruled that Mr. Hamdan could not challenge his current detention because the MCA had clearly taken away jurisdiction from federal courts to hear habeas corpus petitions from Guantanamo detainees. "Hamdan's statutory access to the writ is blocked," wrote the judge, "by the jurisdiction-stripping language of the Military Commissions Act." Mr. Hamdan's lawyers vowed to appeal the decision. In February 2007, the United States Court of Appeals for the District of Columbia ruled in a 2-1 decision that the constitutional right to habeas corpus did not extend to foreign citizens held outside of the United States. Legal analysts expect the defendant (a detainee in Guantanamo Bay) to appeal the decision to the Supreme Court.

Another legal advocacy group has also challenged the legality of the MCA on the grounds that "the retroactive suspension of the [Guantanamo] detainees' right of habeas corpus does not apply to pending cases." Several other groups have filed lawsuits in Germany on behalf of the detainees against top American policymakers (including a former defense secretary), accusing them of violating their rights under the Conventions. Legal experts note that Germany applies a legal concept called "universal jurisdiction," which allows prosecutors from that country to try people outside of Germany for committing war crimes.

Military commission procedures and rules before *Hamdan v. Rumsfeld*	Procedures and rules under the Military Commissions Act of 2006 (MCA)
Legal authority to try suspected terrorist detainees using military commissions	
• Government officials argued that the President had the authority to convene military commissions as part of his inherent powers as President and Commander-in-Chief of the armed forces (even in the absence of congressional authorization). They also claimed that a resolution approved by Congress shortly after the September 11 attacks (called the "Authorization for Use of Military Force," or the AUMF) provided the President with the authority to establish military commissions. • In the case of *Hamdan v. Rumsfeld*, the United States Supreme Court ruled that "nothing in the text or legislative history of the AUMF even [hinted]" that Congress intended to allow the president to change the existing system of military law governing the prosecution of those captured in combat. • The majority decision also concluded that the rules and procedures of the military commissions set up to try suspected terrorist detainees did not meet requirements under customary international law for the conduct of a fair trial (such as allowing the accused to see all evidence presented against him). It also did not view the military commission as a "regularly constituted court" under the Geneva Conventions.	• The MCA explicitly authorizes the President to establish military commissions and legal procedures governing "the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission." • A provision in the act also states that "a military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of Common Article 3 of the Geneva Conventions." • But critics say that just because the MCA states that "a military commission established under this chapter is a regularly constituted court," it does not automatically make it so. One legal analyst said that this particular provision simply "attempts to preclude the possibility of a U.S. court finding that the newly authorized commissions were not such 'regularly constituted' courts."
Persons subject to military commissions	
• The military order issued by the President in November 2001 simply stated that "any individual who is not a United States citizen" would be subject to the jurisdiction of a military commission.	• According to the MCA, "any alien unlawful enemy combatant is subject to trial by military commission . . ." It defines the term "alien" as "a person who is not a citizen of the United States." • Critics say that, under these definitions, a permanent resident of the United States (i.e., a person holding a "green card") could be designated by the government as an "unlawful enemy combatant," and may be tried by a military commission. • The legislation also states that the United States may try these individuals for committing the offenses specified in the MCA or against the laws of war occurring "before, on, or after September 11, 2001."
Definitions of unlawful enemy combatant	
• In order for a nation to decide what rights and protections to give to a captured individual under the Geneva Conventions, it must first determine the status of that individual such as whether he is, for example, a prisoner-of-war (POW) or a civilian. According to a prominent human rights organization, "no detainee can be without a legal status under the Conventions." • Under the Third Geneva Convention (formally known as the "Third Geneva Convention Relative to the Treatment of Prisoners of War"), captured combatants are presumed to be POWs unless a competent tribunal determines otherwise on a case-by-case basis. In order for a combatant to receive POW status and the extensive protections that come along with that particular designation, he must, for instance, be: part of a regularly-constituted army or militia; wearing a uniform with insignias; and carrying his arms openly. A nation may not prosecute a captured soldier simply for fighting in a conflict. But it may prosecute that individual for committing an act considered a war crime under the Geneva Conventions such as genocide. • On the other hand, the Fourth Geneva Convention (formally known as "Protection of Civilian Persons in Time of War") does not give a civilian the same extensive protections given to a POW. But it requires an opposing army not to mistreat him. Legal experts say that, unlike a member of the armed forces, a captured civilian who had taken part in actual armed combat could face criminal prosecution. They can also be prosecuted for committing war crimes. Legal experts say that the terms of the Fourth Geneva Convention also cover individuals who are not part of a regular army, but take part in actual combat. • In the current "war on terror," government officials have interchangeably described terrorists with the following terms—unlawful combatants, non-privileged combatants, battlefield detainees, and illegal combatants. Legal experts note that none of these terms is mentioned in the Geneva Conventions. Instead, analysts believe that, although terrorists such as those belonging to Al Qaeda have public repudiated the Geneva Conventions, these individuals are protected under the Fourth Geneva Convention.	• The MCA extends the jurisdiction of a military commission to an "unlawful enemy combatant," which it defines as a "person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States . . ." • Critics say that, under this broader definition, prosecutors will be able to try not only individuals who had taken up arms against the United States and were captured in an actual combat zone, but also people far from a battlefield such as a "mother giving food to her combatant son, an individual who sends money to a banned group, or a U.S. resident who commits a criminal act unrelated to armed conflict." • A major human rights group said that the new definition of "unlawful enemy combatant" (along with other terms such as unlawful combatants, non-privileged combatants, battlefield detainees, and illegal combatants) have been "invented by the [current] administration and Congress," and that they have "no basis in international law and undermine one of the most fundamental pillars of the Geneva Conventions—the distinction between combatants (who engage in hostilities and are [hence, legally] subject to attack) and non-combatants."

Exclusion from trial

- Under the rules and procedures established by "Military Commission Order No. 1," the Commission may exclude the defendant in order to protect classified information, the physical safety of participants in Commission proceedings, and for other "national security interests."
- Critics say that this language would give the Commission too much leeway in excluding a defendant from his own proceedings.

- According to the MCA: "The accused shall be present at all sessions of the military commission . . . except when," for example, it is necessary "protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities."

Admission of hearsay evidence

- According to Military Commission Order No. 1, "the Commission may consider any other evidence including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports."
- Critics charge that such broad language would allow a commission to accept hearsay evidence (i.e., second-hand accounts) against a defendant.

- The MCA allows for the use of "all hearsay evidence so long as it is deemed 'reliable' and 'probative.'" According to the act: "Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the intention of the proponent to offer the evidence, and the particulars of the evidence."
- But critics say that the defendant has the burden to prove that the evidence is unreliable. According to the text of the legislation: "Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial shall not be admitted in a trial by military commission *if the party opposing the admission of the evidence* demonstrates that the evidence is unreliable or lacking in probative value."

Authority to try conspiracy

- Former procedures allowed a military commission to prosecute a defendant for offenses that were not traditionally considered a war crime such as conspiracy.
- Legal analysts note that acts of conspiracy had never been considered a violation of the laws of war, and that such charges had traditionally been tried in civilian criminal courts.
- The majority opinion in *Hamdan v. Rumsfeld* concluded that the single count of conspiracy filed against the plaintiff, Mr. Hamdan, did not constitute a war crime. It stated that "the crime of 'conspiracy' has rarely, if ever, been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in [the Geneva Conventions]."

- The act explicitly gives a military commission the authority to try offenses such as conspiracy. It states: "Any person . . . who knowingly does any overt act to effect the object of the conspiracy shall be punished . . ."

Admission of evidence gained through torture and other methods of coercion

- According to rules and procedures, "evidence shall be admitted if, in the opinion of the Presiding Officer . . . the evidence would have probative value to a reasonable person."
- Critics, including human rights organizations, said that this would allow the submission of evidence obtained through torture, cruel, inhuman, or degrading treatment.

- The MCA bars evidence obtained through torture, but allows a military judge to admit statements if he finds that "the totality of the circumstances renders the statement reliable and possessing sufficient probative value." Some analysts point out that the act does not specifically bar evidence gained through coercion. A judge may also allow such evidence if they are found to be "reliable" and were obtained before the passage of the Detainee Treatment Act of 2005.
- But critics say that statements obtained through such methods are "inherently unreliable." They add that "use of coerced testimony taints the trial and the whole justice system."

Claims invoking the Geneva Conventions

- In its *Hamdan* decision, the Supreme Court ruled that Common Article 3 of the Geneva Conventions provides rights (such as the right to be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples") to detainees in American custody that can be enforced by American courts.
- Advocates say that, under that ruling, detainees may, for instance, file lawsuits which claim that United States personnel had undertaken acts (such as subjecting detainees to "inhuman treatment") which are prohibited by the Geneva Conventions.

- Legal analysts say that the MCA takes away the right of Guantanamo detainees to invoke their rights under the Geneva Conventions in challenging their detention or filing a lawsuit. It states: "No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States . . . is a party as a source or rights in any court of the United States."
- According to one human rights group, the MCA "prohibits anyone from ever raising claims under the Geneva Conventions in lawsuits against the United States or U.S. personnel."

Habeas Corpus

- Under 28 U.S.C. § 2241, the writ of habeas corpus extends to prisoners who are "in custody in violation of the Constitution or laws or treaties of the United States." A writ of habeas corpus is a judicial order to bring a prisoner before a court to determine—through an established legal process—the legality of that prisoner's detention.
- Under the Detainee Treatment Act (DTA) passed in December 2005, suspected terrorist detainees held at the American Naval Station at Guantanamo Bay, Cuba, would no longer be able to challenge their detention by filing a petition for a writ of habeas corpus. Among other things, the DTA stated that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba."
- While administration officials argued that the DTA immediately removed from consideration all pending and current habeas corpus petitions before any court's jurisdiction (even the Supreme Court's jurisdiction over the then-pending *Hamdan* case), others contended that it applied only to petitions filed after the law's passage.
- In June 2006, the Supreme Court ruled that the DTA act did not strip the Court and lower courts of its jurisdiction to hear the *Hamdan* case and other *pending* cases.
- The MCA amends the federal habeas corpus statute and explicitly states: "No court, justice or judge shall have jurisdiction to hear or consider an application for a write of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant."
- The MCA would retroactively apply to all habeas corpus petitions filed by suspected terrorist detainees being held in Guantanamo Bay "since September 11, 2001."
- Critics say that, as a result, the MCA "could result in courts summarily dismissing more than 200 pending habeas cases brought on behalf of the Guantanamo."
- Opponents say that "despite the wording of the new law, Congress [cannot] take away the right to bring such habeas corpus lawsuits because that would violate the Constitution." They argue that the MCA purports to remove all methods which can be used to review a detainee's confinement, but that the Constitution allows Congress (under the Suspension Clause of Article I, section 9) to suspend the right of habeas corpus only in cases of rebellions or invasion, and that the current "war on terror" does not fit either description.
- On the other hand, the current administration argues that Congress may provide an "adequate substitute method for a detainee to challenge his confinement" in place of habeas corpus. It cited the existence of a Combatant Status Review Tribunal, which one supporter said "did not suspend habeas corpus, but instead provided a new way for it to be exercised." One commentator said: "The government is saying, 'Look, we're not denying anyone's chances to get habeas. We're just providing a different way.'"
- In February 2007, the United States Court of Appeals for the District of Columbia ruled in a 2-1 decision that the constitutional right to habeas corpus did not extend to foreign citizens held outside of the United States. It also held that denying habeas corpus to the Guantanamo detainees did not violate the suspension clause.

Appellate Review

- Only a defendant who is sentenced to death or given a sentence of more than 10 years may appeal his conviction.
- A defendant can appeal "all convictions to a civilian appellate court."
- According to the MCA: "The United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission."

A C.V. Starr Colloquy

NAFTA: National, Regional, and Multilateral Implications

April 11, 2007

Professor William Davey will discuss the problems that regional trade agreements such as NAFTA cause for the WTO multilateral trading system. He is the Guy Raymond Jones Chair in Law at the University of Illinois College of Law. Professor Davey served as the Director of the Legal Affairs Division of the World Trade Organization from 1995 to 1999. A former Supreme Court clerk, Professor Davey also worked in Brussels and New York for the law firm of Cleary Gottlieb Steen & Hamilton.

Professor Debra Steger will discuss the differences between the dispute settlement mechanisms for NAFTA and the WTO, and its implications for government strategies in bringing particular disputes in either forum. She is Professor of Law at the University of Ottawa. Professor Steger was the founding Director and first Chief Legal Adviser to the WTO Appellate Body from 1995 to 2001, and also a senior negotiator for Canada during the Uruguay Round trade negotiations, which created the WTO.

Ricardo Anzaldúa will discuss how Mexico has benefited from NAFTA, and has not had to resort to its reservations in the NAFTA Agreement. He is currently Director of Corporate Law at The Hartford Financial Group. He was a partner at Cleary Gottlieb Steen & Hamilton, and also represented Mexico during the NAFTA negotiations.

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Judgment at Baghdad: Justice served or a miscarriage of justice?

"[Saddam Hussein's] trial should have been a major contribution towards establishing justice and ensuring truth and accountability . . . but his trial was a deeply flawed affair . . . It will be seen by many as nothing more than 'victor's justice.'"
Amnesty International

"Saddam's trial is an important step towards establishing the rule of law in Iraq. And it is a historic event for the broader Middle East . . . [His] trial stands out as an exemplary model of fairness compared to the arbitrary 'justice' meted out by his own regime."
Heritage Foundation

In November 2006, a special tribunal convicted—and sentenced to death—former Iraqi leader Saddam Hussein for committing crimes against humanity when he authorized the imprisonment, torture, and execution of over 100 people from the Iraqi village of Dujail in 1982. After losing his appeal, Saddam Hussein was hanged in December 2006 in an execution now mired in controversy. But legal experts say that this trial marked the first time in recent memory where a tribunal had successfully prosecuted and executed a former head-of-state. One human rights advocate said: "It is rare for domestic tribunals to try leaders who perpetrated massive violations of human rights in the immediate aftermath of their rule." Another commentator simply said: "He was the first former leader to be tried by a domestic court for crimes against humanity . . . and put to death for it." In comparison to other trials where special tribunals are prosecuting ousted leaders of other nations for various offenses, this trial was marked by its relative swiftness (15 months from the trial's start to the execution, although the actual groundwork required nearly two years).

But the trial has also been noted for its many controversies. Critics contend that the proceedings were simply a show-trial carried out by the United States (which had toppled Saddam Hussein's regime in March 2003 and later helped to create the special tribunal), and that the verdict and execution were foregone conclusions. Others argue that the tribunal's rules and procedures fell short of international standards for conducting fair trials. But supporters have vigorously disputed these assertions, saying that the tribunal had effectively and judiciously carried out justice for the majority of Iraqi citizens who had indisputably suffered under the brutal rule of Saddam Hussein.

The rationale behind the creation of the IST

In the aftermath of the United States-led invasion, the interim government in Iraq passed a domestic statute in December 2003 creating a new judicial body called the Iraqi Special Tribunal (or "IST") specifically to try deposed leader Saddam Hussein and several high-ranking officials on charges of carrying out various offenses, including crimes against humanity, genocide, and war crimes from 1968 (the year Saddam's Hussein's political party took power) to May 2003 (when the United States announced the end of major hostilities in Iraq).

The IST is similar to other tribunals which were created in the past (and even during recent times) to try deposed leaders and officials accused of war crimes and other serious offenses. For example, the Allied countries at the end of World War II carried out a series of trials in the German city of Nuremberg to prosecute close to 200 Nazi officials for carrying out various offenses under the Third Reich. In modern times, there are several ongoing criminal tribunals which are trying leaders from Rwanda, Sierra Leone, and the former Yugoslavia for war crimes and crimes against humanity. Rather than using on their own legal systems, these countries had worked mainly with the United Nations (UN) to establish these international tribunals in order to prosecute large-scale human rights violations. Political analysts said that these nations had neither the legal and investigative resources nor the political will and stability to carry out prosecutions effectively.

Legal experts say that these conditions also existed in Iraq, which necessitated the creation of a new tribunal to prosecute Saddam Hussein. They say the country's judicial system had, in the words of one commentator, "virtually disintegrated" under the decades-long rule of Saddam Hussein, and that no existing legal body within the Iraqi criminal justice system had the capacity to investigate and prosecute mass violations of human rights and other large-scale crimes. One analyst said that, under Saddam Hussein's rule, hundreds of thousands of Iraqi political prisoners and other opponents of the regime were sent to prison or executed "with the barest pretense of a trial." Another official added that "the investigative infrastructure in Iraq has been virtually nonexistent for decades."

While some critics complain that it would be unfair to set up a tribunal to prosecute retroactively heinous acts that were not specifically illegal in a country where they were carried out, others reply that it would be inconceivable for former dictators to have put into place a legal system which would prosecute them for alleged crimes in the event they are overthrown.

The structure of the IST

The IST is not a single tribunal per se. Instead, there are two sets of five-judge panels and a nine-member appeals body which can "overturn, reverse, or revise decisions" if, for instance, a panel wrongly interprets a law. The IST also has a prosecutorial section, which tries cases against different defendants, and an investigative office to gather and present evidence and witnesses. The panels administer their criminal proceedings, in part, by using elements of "existing Iraqi criminal law and older codes of Iraqi law." In addition, the IST's rules of procedure "are modeled upon the UN war crimes tribunals for the former Yugoslavia, Rwanda, and Sierra Leone," according to one legal expert. The statute creating the tribunal also requires the IST to "follow the precedent of [other] UN tribunals." While regulations say that only Iraqi nationals may serve on the IST and its various offices, they also require the tribunal to appoint "international jurists" as advisors.

Some legal experts say that the IST's rules and procedures make its proceedings "more expeditious" when compared to the trials of other ongoing criminal tribunals sponsored by the UN. For example, judges have "wide powers" to select witnesses and direct prosecution and defense lawyers. In addition, under Iraqi law, defendants cannot represent themselves during proceedings unless they are actually lawyers. Some say that this prevented Saddam Hussein—

who is not a lawyer, but did study law for a brief time while in exile in Egypt—from using the tribunal to make political speeches. Procedural rules also include the principle of "command responsibility" in which high-ranking individuals who order certain criminal acts through a chain of command could also be held responsible for those acts. Furthermore, the statute creating the IST states that "no one shall have immunity from criminal responsibility, for instance, because of any official position, including head-of-state."

Unlike, say, the United States, which uses a jury system in most of its criminal proceedings, the judges sitting on an IST panel make final determinations on the guilt or innocence of defendants. The Iraqi criminal justice system does not use juries. While this may seem unusual to the general public in the United States, the U.S. Department of Justice points out that "most countries do not try criminal cases in front of juries." Furthermore, legal analysts point out that other criminal tribunals, including those for the former Yugoslavia and Rwanda, also use benches of judges to determine the guilt and innocence of the defendants.

Under Iraq's current criminal code (which was drafted under the rule of Saddam Hussein), the IST may impose a wide variety of penalties, including execution. Even though the United States had suspended the death penalty under its occupation of Iraq, the new Iraqi government later restored this punishment. Officials say that Iraq did seek advice from UN judges and lawyers working on existing war crimes tribunals, but that the UN Secretary-General had barred their participation. He noted that the UN "had no legal mandate to assist the tribunal," and also argued that the UN should not assist tribunals (such as the IST) which have the legal authority to impose the death penalty.

In contrast to the establishment of the IST, other present-day criminal tribunals—such as those for the former Yugoslavia and Rwanda—were created under the auspices of the UN. More specifically, the members of the UN Security Council had passed resolutions creating these tribunals. Unlike the composition of judges and prosecutorial staff on the IST, the judges and other personnel overseeing these other tribunals come from many different countries and also have experience in conducting war crimes trials. Furthermore, none of the currently existing tribunals—which are holding almost all of their proceedings far from the actual countries where the alleged atrocities had occurred—has the legal authority to impose the death penalty on defendants who are found guilty.

Problems with the IST

Even with a new tribunal and procedures in place, the IST faced and continues to face many problems which many believe may have already undermined its legitimacy and support around the world.

The IST judges and prosecutors lack experience, knowledge, and competence: While the IST judges and prosecutors had worked in the Iraqi criminal justice system, they did not have sufficient experience in trying cases of massive human rights violations using modern concepts of international law, argued some analysts. In fact, they had to attend training sessions in London, where one observer said, the Iraqi judges "were unacquainted with the complexities of international law used to deal with mass killing and genocide." Also, others point out that Iraq is still in the process of modernizing its various laws and court procedures, which could take years to update.

In order to bolster the reputation of the IST, one human rights group said that Iraq should amend its regulations to allow non-Iraqis to work directly for the IST. "The capacity of future domestic courts [in Iraq] can be strengthened," it said, "by having national staff work alongside international [personnel] with expertise in prosecuting these types of cases." Another human rights advocate argued that "the involvement of the Iraqis [in prosecuting Saddam Hussein] is desirable and right, but in our judgment, there needs to be an international component both for the expertise and to ensure the independence of the tribunal."

IST procedures fall short of international standards: Critics say that the rules and procedures established by the IST apparently do not meet international standards for conducting fair trials. For example, they say that the IST allows the admission of confessions obtained through various methods of coercion, including torture. Others also say that, under tribunal rules, guilt does not have to be proved beyond a reasonable doubt (making convictions more likely), and that defendants have limited access to defense attorneys during initial investigations.

But supporters insist that the prosecution rules and procedures—which were crafted by the Iraqi government with substantial assistance from American officials—largely comply with international legal standards, and also give criminal defendants many procedural safeguards such as a right to legal representation (including court-appointed lawyers) and a right to appeal decisions. (According to American officials, the wife of Saddam Hussein had hired close to 35 Iraqi and foreign lawyers to defend him. He had later dismissed most of them.) One legal expert added that the Iraqi government "fully incorporated the most modern standards of international criminal law into its system and implemented the full range of international legal procedural standards as well."

The statute creating the IST guarantees, for example, many due process rights, including: the presumption of innocence, the right to be informed promptly of charges, entitlement to a public hearing, and a right to a fair and impartial hearing. Defenders also say that the IST "offers safeguards that compare well with those at the international tribunal in The Hague, and exceed by a wide margin anything previously seen in a politically-sensitive trial in the Middle East."

Legal experts say that [Saddam Hussein's] trial marked the first time in recent memory where a tribunal had successfully prosecuted and executed a former head-of-state . . . One human rights advocate said: "It is rare for domestic tribunals to try leaders who perpetrated massive violations of human rights . . . "

The IST lacks independence: Many have questioned the independence of the IST because the United States had played a substantial role in creating that body. In fact, there is a unit of dozens of American lawyers and investigators—called the Regime Crimes Liaison Office—operating in the U.S. Embassy in Baghdad, which continues to aid the IST in its work. In addition, the IST had received substantial funding (over $75 million) from the United States in order to uncover and store evidence, carry out extensive investigations, protect witnesses, and provide courtroom equipment and support, which critics believe provides further ammunition to those who question the IST's independence.

And while the IST is a supposedly independent entity that does not report to (or is subsumed under) a particular government agency, political analysts note that the Iraqi prime minister has the legal authority to replace the IST's chief administrator (which he actually did three times), and that the judges were appointed by high-ranking political figures. Critics cite one instance where at least one judge resigned from the tribunal due to constant criticism from political leaders. But supporters of the IST say that its judges had "frequently ignored [the advice given by the United States], and generally insisted on sticking with familiar procedures from the Iraqi justice system."

Many say that the new Iraqi government should have created a UN-administered tribunal to prosecute Saddam Hussein. But political analysts believe that countries such as the United States would have likely vetoed any attempt by the UN Security Council to create a UN tribunal for Saddam Hussein. Others have argued that existing bodies such as the International Criminal Court (ICC) should have prosecuted the former Iraqi leader. But many others have pointed out several shortcomings in pursuing a case against Saddam Hussein at the ICC. For example, that body may only prosecute crimes committed after July 1, 2002. Yet most of the serious crimes allegedly committed by Saddam Hussein had occurred before that date. In addition, the ICC does not have jurisdiction over those countries that have not ratified the international treaty creating the ICC, which currently includes Iraq.

Furthermore, legal analysts said: "International criminal law in its modern evolution puts the primacy on domestic forums [in] conducting cases when they are willing and able to do so." To make their point, they note that the ICC may exercise its jurisdiction only in instances where a signatory nation is unable or unwilling to prosecute alleged violations of international human rights. But in the case of Saddam Hussein, the Iraqi government clearly indicated that it wanted to prosecute Iraq's former leader. Also, political analysts say that an overwhelming majority of countries that have signed the ICC treaty have long had in place a domestic criminal justice system to prosecute serious wrongdoing on the part of leaders and high-ranking officials, and that the use of the ICC would be used only as a "last resort."

In supporting the work and legitimacy of the IST, one defender said that the new body "gives an opportunity for Saddam Hussein to be tried in Iraqi courts for his crimes against the Iraqi people." Another legal expert added: "The most illegitimate form of law enforcement . . . would have been to demand that [the Iraqi people] ignore their [own] suffering and apply only a [judicial] process externally imposed [by non-Iraqis]." Others believe that Iraq has the sovereign right and prerogative to prosecute its former leaders, and that the existing body of international law in no way requires Iraq to transfer legal custody of Saddam Hussein to an international criminal tribunal.

While critics of the IST have pointed to UN-sponsored tribunals as models for prosecuting former heads-of-state, analysts point out that even these tribunals have had recurring problems. A commentator pointed out, for example, that "poorly trained and sometimes corrupt defense lawyers" in the criminal proceedings against former leaders of Yugoslavia and Rwanda had tainted proceedings. Some have even accused these lawyers of "slowing the proceedings in order to bill the United Nations for more work or splitting their fees with defendants." Furthermore, a prominent human rights group stated that while these UN tribunals "have generally performed capably . . . they have been very expensive and trials have progressed slowly."

IST proceedings are marred by heavy violence: The progress of the trial was also delayed by grave security concerns. For example, after assassins had killed three defense lawyers, Saddam Hussein's defense team boycotted the trial and demanded that the United States and the Iraqi government provide more "robust security." American and Iraqi officials replied that they had previously offered security to Saddam Hussein's defense team, but that their offers had been rejected.

The Dujail trial and other possible trials

The prosecution of Saddam Hussein during the IST's very first trial (which began in October 2005 and was called "Case Number 1") did not cover all of the alleged crimes authorized by the former dictator during his decades-long rule. Instead, prosecutors charged him specifically with committing "crimes against humanity" for approving the execution of 148 men and teenage boys from the city of Dujail after an alleged assassination attempt there in 1982. (But some investigators believe that the assassination attempt had been faked by the regime.) Although the Iraqi Revolutionary Court had handed down the death warrants, legal experts say that none of the condemned individuals from Dujail

were ever brought before that court to answer the charges. The IST prosecutor said that there were "no defense lawyers [present], no presentation of evidence, few written records, no appeals . . ."

Prosecutors also claimed that the former regime—in an act of retribution after the alleged assassination attempt—had forcibly deported almost 400 people (composed only of women, children, and the elderly) to desert detention camps. The government also executed ten boys almost seven years after their detention once they reached legal age. Furthermore, 46 detainees had already died from torture even before the Iraqi Revolutionary Court had sentenced them to death, according to official documents. Defense lawyers justified the crackdown against the residents of Dujail by arguing that Saddam Hussein could not be tried for acts carried out as part of his official duties. They noted that, at the time of the executions, Iraq was at war with its neighbor, Iran, and claimed that the detained prisoners were agents for that enemy country.

According to customary international law and the treaty establishing the ICC, "crimes against humanity" are those specific acts "committed as part of a widespread or systematic attack directed against any civilian population." Some of these acts include murder, deportation or forcible transfer of population, imprisonment in violation of fundamental rules of international law, and torture. Prosecutors say that many of the acts carried out by the regime against the residents of Dujail had clearly fit the definition of crimes against humanity as also defined in recently-passed Iraqi law.

Officials say that the IST had chosen to prosecute this particular case against Saddam Hussein and six other co-defendants because—when compared to other alleged atrocities—there were fewer victims in the Dujail case. Investigators had also gathered compelling evidence purporting to show the defendant's direct knowledge and involvement in the alleged acts, including the signed order authorizing the executions. (A commentator said that investigators had spent an entire year "sifting through tons of seized documents, interviewing witnesses, and reviewing evidence gathered by forensic teams from at least 12 mass graves.") According to court testimony, Saddam Hussein later admitted that he had signed the death warrants for the 148 individuals "with only a cursory glance at the evidence against them." Prosecutors also claimed to have established "a clear chain of command between Mr. Hussein and those who carried out the executions," which included military commanders and intelligence agents.

On the other hand, experts say that prosecuting Saddam Hussein for a series of alleged crimes involving, for instance, other mass violations of human rights would have been much more complicated and risky for the IST's first case. In such cases, investigators had to gather much more evidence (such as unearthing thousands of human remains from mass grave sites) and also find many more witnesses who would corroborate testimony against officials of the former regime. For instance, investigators are currently gathering evidence to show that Saddam Hussein had authorized the violent suppression of a Shiite uprising in southern Iraq in 1991 after the Gulf War, which some human rights advocates say claimed the lives of over 100,000 people. Other officials have also said that the former Iraqi leader could be tried for carrying out war crimes during the 1980-88 war with Iran and the 1990 invasion of Kuwait.

The verdict, appeals process, and execution

"The [IST] court's conduct . . . reflects a basic lack of understanding of fundamental fair trial principles, and how to uphold them in the conduct of a relatively complex trial . . . Under such circumstances, the soundness of the verdict is questionable." Human Rights Watch

"Reading the Dujail Opinion, one can only conclude that Saddam Hussein and the other defendants were convicted on the strength of their own records, much like the Nazis were at Nuremberg." Professor Michael Scharf

In November 2006, the IST panel trying Saddam Hussein found him guilty of authorizing acts which constituted crimes against humanity, including the willful killings, unlawful imprisonments, and forced deportations of the residents of Dujail. The panel concluded, for instance, that the action taken in Dujail "was not necessary to stop an immediate and imminent danger." The panel then sentenced Saddam Hussein to death by hanging. (Article 406-1-A of the Iraqi criminal code allows for the death penalty for premeditated killings—usually by hanging for civilians or firing squad for members of the military.) The panel also sentenced to death two co-defendants, including the head of Iraq's most notorious intelligence agency and the chief judge of the Iraqi Revolutionary Court who had originally sentenced the 148 residents of Dujail to death. Of the five other co-defendants, one was sentenced to life in prison, three received shorter prison terms, and one was acquitted for lack of evidence. Under Iraqi law, the nine-member IST appellate body must automatically review all death sentences. If the appeals body upholds a death sentence, its decision must be confirmed by Iraq's presidential council (which is composed of the Iraqi president and his two vice presidents). The execution must then be carried out within 30 days after this confirmation.

Human rights groups noted what they believed to be several shortcomings committed by the IST panel during the actual proceedings and final verdict, which they say tainted the legitimacy of the trial. For example, they note that the IST had failed to issue an actual written opinion at the time it announced its verdicts and passed its sentences (as required under procedural rules). Instead, it issued the written decision two weeks later. Others asserted that prosecutors had failed to disclose evidence to the defendants in a timely manner. Another analyst pointed out that the judges had, on several occasions, cut-off defense presentations.

But other legal experts said that the IST panel had rebutted several of these claims in its written decision, which, for instance, stated that the defense counsel had, in fact, received the entire "referral file"—which contains the evidence complied by an investigative judge—at least 45 days before the start of the trial (as required by the rules of procedure). Another expert noted that the opinion stated that the panel had stopped defense presentations when they "focused on the character of the defendants rather than on proving or disproving material facts." Furthermore, the opinion noted that the prosecutors and defendants were each given an equal number of trial days to make their presentations, and that "nearly three times as many defense witnesses testified as prosecution witnesses."

While many human rights groups rightly pointed out that that tribunal rules do not require the judges to use a "reasonable doubt" standard during its deliberations, the opinion itself did, in fact, use that standard, and even mentioned that phrase several

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times. For example, the ruling stated: "This court firmly believes—without any reasonable doubt, and as the only logical, acceptable and reasonable conclusion—that the accused Saddam Hussein issued his orders, directly or indirectly . . . to attack the town of Dujail after the unsuccessful attempt on his life by a few individuals, and that large-scale attack was 'not necessary nor appropriate' for that 'very limited attempt.'"

The opinion also addressed whether it was unfair to try Saddam Hussein retroactively for acts which were explicitly declared illegal only after they had been carried out. The panel responded: "The [IST] tribunal law took over what was included in international penal law which incriminates the acts that form international crimes and transferred them to domestic law, based on the theory of reception which is well known in the field of international law." In addressing the defense contention that the government did not provide adequate security, which it claimed led to the assassination of several defense lawyers during the actual trial, the opinion stated that "the defense attorneys refused to comply with the security procedures in addition to their continuous appearing on TV despite the objection of the court on such act, and that they risked the lives of the attorneys delegated by the court through spreading their names and identities on the Internet and addressing accusations to them . . ." One legal expert concluded that "reading the Dujail Opinion, one can only conclude that Saddam Hussein and the other defendants were convicted on the strength of their own records, much like the Nazis were at Nuremberg."

Legal analysts note that even before the IST panel had rendered its verdict and passed its sentences, another IST panel had already started a second trial (in August 2006) where Saddam Hussein and others had been charged with genocide. According to prosecutors, Saddam Hussein had ordered a series of military operations in 1988 (dubbed "Anfal," meaning "the spoils" in Arabic) specifically against Iraq's Kurdish population. Investigators say that the Anfal campaign had killed over 50,000 people (in part, by using chemical weapons) and forced thousands of others to flee to other parts of Iraq and even to neighboring countries. Defense lawyers for Saddam Hussein said that the military operations were a legitimate response against local militias that were supposedly working with Iran. Investigators said they had uncovered several mass grave sites, which were used to hide victims of the campaign.

After the IST appellate body refused to overturn the panel's conviction and death sentence, the Iraqi government decided to proceed with the execution Saddam Hussein. But legal analysts say that several problems further tainted Saddam Hussein's trial and verdict. For example, the three-member presidential council could not certify the appellate panel's ruling, which, say some experts, is required by law before the government executes a defendant. (One of its members was opposed to the death penalty while another did not endorse plans for an execution.) But, according to the Iraqi prime minister (who favored a quick execution), another legal provision stated that once a tribunal's decision was upheld by the appellate body, it could not be subject to a presidential review. U.S. officials said that they had failed to get a written ruling from Iraq's Supreme Judicial Council "saying that the uncompleted legal procedures . . . were not necessary to the lawfulness of [Saddam Hussein's] hanging." Others note that Saddam Hussein's execution would take place during Iraqi holidays, and that Iraqi law did not allow any executions during holidays. Without completely resolving these particular issues, the Iraqi government executed Saddam Hussein in late December 2006.

Some political analysts believe that the prime minister wanted to carry out the execution quickly because he feared that "if the procedural wrangling over the execution were protracted," then insurgents in Iraq could possibly carry out mass kidnappings in order to free Saddam Hussein. According to analysts, "when plans for the trials were laid in 2004, American and Iraqi officials envisaged a series of trials at which the full range of brutalities committed during [Saddam Hussein's] 24 years in power would be laid out in court." But in the face of continuing and worsening violence in Iraq, many officials believed that the former dictator would remain a "potent rallying point for Sunni insurgents fighting American troops," and that his quick execution could help to dispel further violence. But others believe that his execution will only have the opposite effect.

After the Dujail verdict and execution of Saddam Hussein, critics of the tribunal continued to assert that the proceedings fell short of international standards. (Some also speculated that the tribunal had deliberately announced its verdicts and sentences just two days before the American congressional midterm elections in order to increase public support for the fight against insurgents.) But many also conceded that the IST trial judges had "made a reasonable effort to conduct a fair trial." For example, one human rights advocate said: "This was not a sham trial. The judges are doing their best to try this case to an entirely new standard for Iraq." Another legal analyst said that while he thought that the trial procedures fell short of international standards, he added: ". . . to look at the ultimate verdict, it certainly is consistent with the evidence presented." But because of the unresolved circumstances surrounding the execution of Saddam Hussein, international legal scholars believe that it is unlikely that future tribunals would cite the proceedings of the IST.

Others supported the panel's decision, however. One defender said that even in the face of surging violence, the trial process had been well administered: "The Baghdad trial, though far from exemplary, must receive a passing grade, especially considering the circumstances in that city blighted by violence." Responding to critics who questioned the fairness of the trial, another legal analyst responded: "Perfect justice is an illusion. Perfect injustice is a reality."

Where Are They Now? The Fate Of Other Dictators

ADOLF HITLER
Position: Leader of the Nazi party in Germany from 1933 to 1945, and known as "the undisputed, all-time world champion of killers."

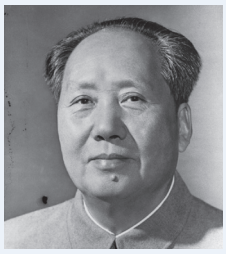
Alleged atrocities: Hitler sought to rebuild Germany through policies of anti-Semitism, nationalism, and anti-communism. Historians say that, under Hitler's rule, Germany helped to trigger World War II, which killed over 30 million people, including six million Jews.

Last days: Before Germany surrendered unconditionally to the Western Allies in 1945, Hitler apparently committed suicide in a bunker.

BENITO MUSSOLINI
Position: Fascist dictator of Italy from 1922 to 1943.

Alleged atrocities: Mussolini turned Italy into a police state. In 1937, two years after Italy invaded of Ethiopia, Mussolini authorized the execution of 30,000 Ethiopians, and, in 1938, he consented to Hitlerian measures against Italian Jews. Mussolini sided with Germany and Japan during World War II. More than 400,000 Italian soldiers died during that conflict.

Last days: In 1945, Mussolini attempted to flee to Switzerland, but was shot to death by Italian partisans. His corpse was hung upside-down in a public square.



MAO ZEDONG
Position: Founding member of the Community Party of China and leader of the People's Republic of China from 1945 to 1959, and from 1968 to 1976.

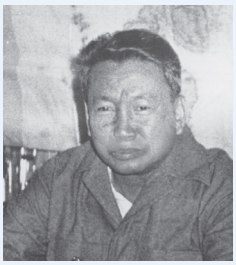
Alleged atrocities: Mao initiated the Great Leap Forward (a plan to decentralize labor intensive industries), which led to the mass starvation of more than 20 million people. From 1966 to 1976, Mao started the Cultural Revolution where student supporters (called the Red Guards) killed tens of thousands of political enemies and displaced millions of people.

Last days: Mao died of Lou Gehrig's disease in 1976 and was never investigated or tried for his alleged atrocities.

IDI AMIN
Position: President of Uganda and chief of its armed forces from 1971 to 1979.

Alleged atrocities: Amin authorized the deaths of half a million Ugandans and foreigners, and wiped out entire villages. Former U.S. president Jimmy Carter declared that Amin's policies "disgusted the entire civilized world."

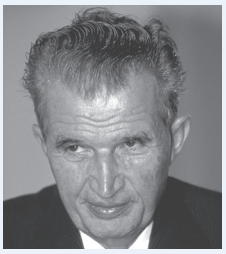
Last days: In 1989, Amin went into exile in Saudi Arabia. In 2003, after evading trial for his alleged crimes in Uganda, he died of multiple organ failure.



POL POT
Position: Leader of the Khmer Rouge government in Cambodia from 1975 to 1979.

Alleged atrocities: Pol Pot sought to transform Cambodia into an "agrarian utopia," but, instead, caused "one of the worst genocides of the 20th century." Close to two million people died from execution, starvation, and disease.

Last days: In 1997, a so-called "people's tribunal" convicted Pol Pot of treason and sentenced him to life under house arrest. Before he died of a heart attack in 1998, Pol Pot declared to interviewers: "My conscience is clear."



NICOLAE CEAUSESCU
Position: Communist president of Romania from 1965 to 1989.

Alleged atrocities: His "New Agrarian Revolution"—which exported all of the nation's agricultural and industrial products in exchange for a third of the market price to the producers—led to drastic shortages and the death of 15,000 people per year.

Last days: After he tried to flee the country, a "military kangaroo court" convicted Ceausescu and his wife of mass murder and other alleged crimes in December 1989. A firing squad executed them on the same day.

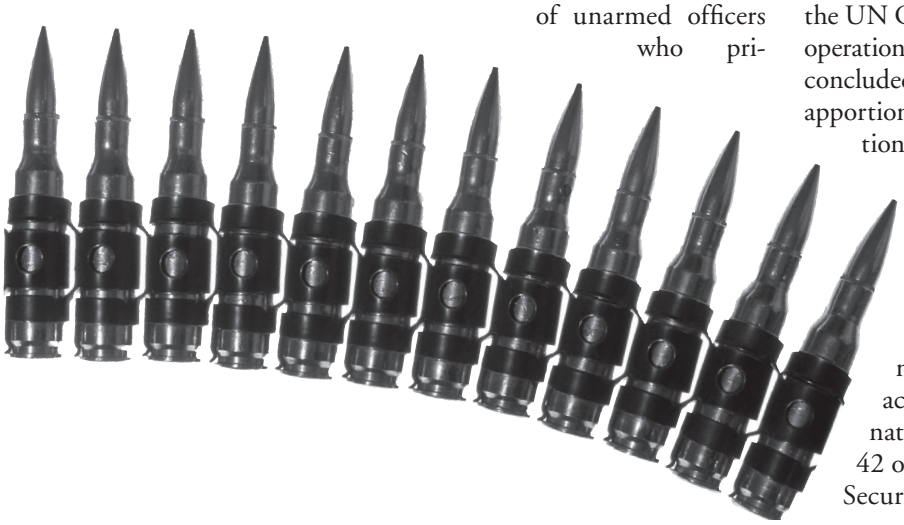
Peacekeeping: Possible adjustments in the face of continuing limitations?

The United Nations (UN) recently announced that its peacekeeping operations are at their highest levels ever—today there are nearly 81,000 peacekeeping troops working in 18 missions all over the world. Officials estimate that the peacekeeping budget will climb from $4.75 billion in mid-2006 to $6 billion in 2007. While the world community has come to rely on UN peacekeepers to separate warring parties, critics note that several legal and political limitations continue to constrain the effectiveness of peacekeeping, and that current and proposed missions (in countries such as Lebanon and Sudan) serve as stark reminders of these very limitations. But political analysts note that there is also a growing call for the UN to become more forceful in using peacekeeping missions to stop humanitarian crises around the world. What limitations have constrained UN peacekeeping and what new approaches can help to keep the peace in the 21st century?

Uses and limitations of UN peacekeeping

The UN is an international organization created in 1945 whose 192 member nations collectively try to address a variety of global problems that transcend national borders. While much of its resources are used on various humanitarian projects around the world, the UN is also well-known for its efforts to maintain international peace and security. The UN often 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. One way in which the UN tries to mediate international and even civil disputes is through the creation and deployment of peacekeeping missions. The UN created its first peacekeeping mission in 1956 after the Suez War. The primary purpose of peacekeeping is not to impose a settlement upon warring parties, but to de-escalate tensions between them, to alleviate human suffering, and to build conditions for a self-sustaining peace that will not require the long-term presence of UN peacekeepers.

The work carried out by UN peacekeeping missions has evolved over the decades. During the Cold War, peacekeeping missions were composed of small numbers of unarmed officers who primarily monitored ceasefires, patrolled borders, and acted as a buffer between hostile parties. But in the post-Cold War era, peacekeeping has taken on much broader tasks. Nowadays, peacekeepers try to maintain political institutions, provide emergency relief, demobilize fighters, and organize and conduct elections, among other things. While the United States pays over 25 percent of the costs of all peacekeeping missions, other countries—such as Bangladesh, Pakistan, India, Jordan, Nepal, and Nigeria—provide the bulk of the actual peacekeeping troops deployed on the ground. (The UN does not have its own standing army and must rely on voluntary contributions from its member nations.)



When deciding whether to create a specific mission, the UN primarily follows an ad hoc process, meaning there are no set rules or even established criteria that it takes into account. In fact, the UN states that "each time the Security Council calls for the creation of a new operation, its components must be assembled 'from scratch' or reconfigured to meet the new mandate." While the Security Council—which is the main organ at the UN responsible for maintaining international peace and security—must vote to create a peacekeeping mission, its actual deployment rests upon the consent of the warring parties in a particular conflict. In fact, Article 2(4) of the UN Charter states: "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, or in any other manner inconsistent with the Purposes of the United Nations." Under this particular article, legal experts say that deploying a peacekeeping mission without the explicit consent of a particular country or group of countries would violate a country's sovereignty, even in cases of humanitarian emergencies.

While peacekeeping is not explicitly mentioned or clearly articulated in the UN Charter (which is the principle treaty that sets forth the rights and obligations of each member state), peacekeeping gained a legal basis in a 1962 decision issued by the International Court of Justice called *Certain Expenses of the UN*. The *Expenses* case had to determine whether it was appropriate for the UN General Assembly to fund expenditures for peacekeeping operations in the Congo and Middle East. In its decision, the court concluded that the General Assembly had the legal authority to apportion funds among its member nations to expend on operations needed to maintain peace and security. Peacekeeping, the court held, fell into this category.

Peacekeeping is often confused with another method that the UN uses in dealing with threats to international peace and security—namely, peace enforcement. Under that approach, the Security Council authorizes UN member nations to use all means necessary (including the use of military force) to achieve and maintain peace and also to deal with aggressor nations. Peace enforcement has a clear legal basis in Article 42 of Chapter VII of the UN Charter, which states that the Security Council "may take such action by air, sea, or land

A Peace with No End in Sight?

There are currently 18 peacekeeping missions directed and supported by the United Nations Department of Peacekeeping Operations. Some of these missions have stayed in place for years or even decades. The parentheses indicate the year that the UN deployed a particular mission.

- **United Nations Military Observer Group in India and Pakistan (1949):** is supervising the ceasefire between India and Pakistan within the state of Jammu and Kashmir. When India and Pakistan became independent in 1947, both sides disagreed on which country would lay claim to Kashmir. While India claims that the mission's mandate had already lapsed, Pakistan believes otherwise.
- **United Nations Peacekeeping Force in Cyprus (1964):** seeks to "prevent a recurrence of fighting between the Greek Cypriot and Turkish Cypriot communities" on that island nation. Greek Cypriots say that Turkey intervened in the internal affairs of Cyprus while Turkish Cypriots claim that their Greek counterparts tried to nullify their rights.
- **United Nations Interim Force in Lebanon (1978):** was established to "confirm the withdrawal of Israeli forces from Lebanon" and assist the Government of Lebanon to establish authority over its territory. Israel invaded that country when terrorists launched attacks against Israel from Lebanon.
- **United Nations Interim Administration Mission in Kosovo (1999):** is promoting "the establishment of substantial autonomy and self-government in Kosovo" by monitoring elections and setting up a government. The UN described this mission as "unprecedented in both its scope and structural complexity."

forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

Many people have praised the work carried out by UN peacekeeping forces. In 1988, the Norwegian Nobel Committee awarded them the Nobel Peace Prize, saying that "the Peacekeeping Forces of the United Nations have, under extremely difficult conditions, contributed to reducing tensions where an armistice has been negotiated, but a peace treaty has yet to be established." But others point out that some peacekeeping missions have stayed in place for decades (in countries such as Cyprus) without helping to resolve the underlying conflicts. Many say that other missions do not have clearly defined goals, which have sometimes caused confusion not only among the peacekeepers themselves, but also among the warring parties who will interpret the provisions of a particular UN resolution to their benefit only. Still, other analysts argue that the role of peacekeeping is limited simply because, under its Charter, the UN needs the explicit consent of the warring parties to deploy an actual mission.

Recent missions in Lebanon and Sudan have demonstrated these limitations with UN peacekeeping. But others believe that the concept of peacekeeping could be evolving to the point where the UN may deploy a mission even without permission from the warring parties themselves.

The current UN mission in Lebanon: an ambiguous mandate?

In 1978, after a series of attacks by fighters of the Palestine Liberation Organization (PLO) against Israel, the Israeli army invaded and occupied parts of Lebanon. (These two countries continue to have hostile relations to this very day.) In response to the increasing violence between Israel and Lebanon, the UN Security Council passed Resolution 425 in March 1978 and created the United Nations Interim Force in Lebanon (UNIFIL) whose main purpose is to "restore international peace and security and assist the Lebanese government in restoring its effective authority in [its] area." (Analysts say that the Lebanese government had—and still has—great difficulty in controlling various groups operating within Lebanon, such as the PLO, which uses the country as a staging ground to attack Israel.) UNIFIL's role was limited to patrolling certain areas and also providing humanitarian assistance such as supplying medical treatment and water to the Lebanese people. Analysts say that by separating the warring parties, UNIFIL hoped to create conditions whereby the Lebanese government would be able to assert its authority within its sovereign territory and disarm unauthorized militias. That resolution also called for Israel to respect the "territorial integrity" and sovereignty of Lebanon, immediately cease its military action, and immediately withdraw its troops.

Political commentators note that Israel did not completely and immediately withdraw from Lebanon after the creation of UNIFIL. They also note that Lebanon did not disarm the various militias operating within its territory. After a partial withdrawal, Israel again invaded Lebanon in June 1982 and surrounded the capital (Beirut), and remained there for three years. By 2000, Israel had completely withdrawn its forces from Lebanon in accordance with Resolution 425, and Lebanon soon re-established its authority in the area. Over the years, the UN extended and prolonged UNIFIL's mandate several times. Even with the withdrawal of Israeli troops, the UNIFIL mission stayed in place.

But since 2000, there have been many more conflicts between Israel and groups within Lebanon. Analysts say that one of the most

prominent groups attacking Israel has been Hezbollah, which was founded after the Israeli invasion of Lebanon in 1982. Hezbollah (which means "party of God") is an "umbrella organization" of what they describe as radical Shiite groups seeking to create a Muslim fundamentalist state. As a long-running civil war in Lebanon began to weaken the government beginning in the 1970s, Hezbollah effectively began to control much of Lebanon's border area with Israel. It is currently a significant force in Lebanese politics, occupying 14 seats in the 128-member Lebanese parliament. Experts also say that Hezbollah provides extensive social and hospital services for Lebanese Shiites, and also receives significant aid (including weapons) from countries such as Iran and Syria.

[UN officials] stated that their primary duty under Resolution 1701 was to "help strengthen the Lebanese Army" . . . Under [the Israeli] interpretation of Resolution 1701, UNIFIL forces were required to locate and identify Hezbollah weapons and ammunitions, and, when encountering Hezbollah members, to disarm them completely.

In July 2006, Hezbollah fighters launched attacks against Israel, killing several soldiers and capturing two others. In response, Israel invaded southern Lebanon in an effort to drive out and destroy Hezbollah. An extensive Israeli bombardment campaign soon caused mounting civilian casualties in Lebanon and drew protests from around the world. For its part, Hezbollah fighters launched thousands of rocket attacks against Israeli cities. In response to an escalation of fighting, the UN Security Council, in August 2006, passed Resolution 1701, which called for a "full cessation of hostilities" between the two sides and the disarming of militias as required under earlier resolutions and agreements. The resolution also expanded UNIFIL's powers under Resolution 425 by giving that peacekeeping mission the authority to accompany and support Lebanese forces deployed throughout the southern portion of the country to monitor cessation of hostilities. It also authorizes a deployment of an additional 15,000 troops to UNIFIL to carry out these duties. (Previously, the highest number of troops deployed in a UN peacekeeping mission in the Middle East stood at 6,973 troops in 1974.) Analysts also note that UNIFIL peacekeepers were authorized to take "all necessary action" to reduce hostile activities.

Some say that Resolution 1701 gave UNIFIL a "very robust" mandate. But others argued that the aims and goals were actually "vague and unrealistic," and that the text contained "ambiguous" language. They point out that Israel and the UN have conflicting interpretations of certain provisions in Resolution 1701. UNIFIL officials say that, under their interpretation of the resolution, they must first receive authorization from the Lebanese Army in order to undertake any action in Lebanon. They also stated that their primary duty under Resolution 1701 was to "help strengthen the Lebanese Army" and make sure that all Israeli forces withdrew from Lebanon.

On the other hand, Israel said that, under its interpretation of Resolution 1701, UNIFIL forces were required to locate and identify Hezbollah weapons and ammunitions, and, when encountering Hezbollah members, to disarm them completely. To support their particular interpretation, Israeli officials note that a UN resolution (in this case, 1701) had, for the first time, referred to Hezbollah by name and blamed that group for the current crisis. They also point out that the resolution called for the unconditional release of the captured Israeli soldiers and for the immediate cessation by Hezbollah of all attacks upon Israel. Looking at these "vital elements" in their totality supported its interpretation of Resolution 1701 that UNIFIL forces were required to take more aggressive measures, argued Israel.

Analysts say that while Resolution 1701 called for the "full cessation of hostilities," it did not explicitly specify which parties were to carry out this function. Critics say that it was unrealistic to expect UNIFIL forces and the Lebanese army to disarm Hezbollah. Giving UNIFIL the authority to take "all necessary action," they observe, would place UNIFIL peacekeepers in a situation of having to confront Hezbollah and take sides in the long-running Arab-Israeli conflict. Others say that because Hezbollah has very close links to both Syria and Iran, the UN would need the support of those two countries in order to carry out the aims and goals of Resolution 1701. However, when faced with the possibility of UN peacekeepers patrolling the border between Syria and Lebanon, the Syrian president stated that "such deployment would constitute a hostile act."

A future mission in Darfur: the lack of consent

The limitations facing peacekeeping also presented themselves in the current situation in Darfur. Political analysts say that long-standing conflicts in Sudan between the Arab-dominated north and the non-Arab (and mostly African) south have plagued the country for decades and have even led to several civil wars. This long and violent history has also spilled into the western region of the country called Darfur where the African and Arab populations have constantly vied for the area's limited natural resources. In 1983, Sudan's head of state declared an "Islamic revolution." After he announced that Sudan would be governed by Islamic law and dissolved the southern regional government, another civil war broke out between the African and Arab populations.

In 2003, two African insurgencies—the Sudan Liberation Movement (SLM) and the Justice Equality Movement—engaged in a series of raids that killed hundreds of government troops. In response, the government began to arm nomadic Arab militias known as the janjaweed, which unleashed what human rights groups have called a systematic campaign of destruction and terror against African civilians in Darfur. While political analysts say that the janjaweed militias are not formally part of the Sudanese government, they are essentially fighting on its behalf as a proxy. According to one commentator, "because Sudan's large army is mostly made up of non-Arab foot soldiers who are unwilling to carry out brutal counterinsurgency tactics on fellow non-Arabs, the government has used Arab militias as ground troops in Darfur, paying them in cash and loot from the villages they raid." Human rights groups say that, since 2003, the janjaweed—which one translator said means "devil on a horse"—have not only attacked and destroyed many African villages, but have also raped and killed tens of thousands of their inhabitants while leaving neighboring

Arab villages untouched. These groups estimate that at least 200,000 people have died as a result of what they have described as "ethnic cleansing" carried out by the janjaweed, and that the conflict has displaced over two million Darfurians.

In order to contain the growing violence in Darfur, the member nations of the African Union (AU) agreed to dispatch peacekeepers to that region in 2003. Formed in 2002, the AU is a regional organization comprising of 53 African countries. One of its many goals is to protect the security of the entire continent rather than the sovereignty of individual states. Political experts also say that the AU is the world's only regional organization that "explicitly recognizes the right to intervene in a member state on humanitarian or human rights grounds." After receiving explicit consent from and agreeing to a restrictive mandate placed by Sudan, AU peacekeeping troops entered Darfur in 2003 and helped to broker a cease-fire agreement between rebel groups and the government. Initially starting with 3,000 troops, the AU soldiers in Darfur now number 7,000. But some critics note that the AU operation lacked a defined mandate and a stable supply of troops and funding.

In April 2004, the UN sent two fact-finding missions to Darfur to look into allegations of ethnic-cleansing and genocide. In presenting its report in January 2005, a UN commission concluded that it was "clear that there is a reign of terror in Darfur" with "massive human rights violations," all of which may constitute crimes against humanity. But it also said that while the scale of atrocities was immense, it did not amount to a policy of genocide. The commission stated: "The crucial element of genocidal intent appears to be missing." Legal experts define genocide as "the intent and subsequent action of destroying in whole or in part, a national, ethnic, racial or religious group." On the other hand, the United States disputed these findings and continues to accuse the Sudanese government of carrying out genocide. Khartoum described reports of killings in Darfur as "fictions."

In the face of continuing international pressure, the Sudanese government and the largest rebel group (the SLM) negotiated and signed the Darfur Peace Agreement in May 2006. But political analysts note that other rebel groups—"at least half a dozen factions and splinter groups"—did not sign the agreement whose terms called for the Sudanese government to demobilize the janjaweed militia by mid-October 2006 and also give rebel signatories the fourth highest position in the Sudanese government. The peace agreement effectively fell apart in September 2006.

But even before the peace agreements fell apart, the United Nations Security Council, alarmed by escalating violence, passed several resolutions concerning Sudan. In March 2005, it passed Resolution 1590, which established the United Nations Mission in Sudan (UNMIS). Acting under Chapter VII of the UN Charter, the Security Council exercised its authority to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." According to the resolution, the peacekeeping mission would "support implementation of the Comprehensive Peace Agreement" ending that country's decades-long civil war. UNMIS would also facilitate and coordinate the voluntary return of refugees, provide humanitarian assistance, and coordinate international efforts in protecting civilians. But political analysts point out that Resolution 1590 did not single out the need to dispatch UN peacekeeping troops specifically to Darfur. Instead, it said that the Security Council "underscored the immediate need to rapidly increase the number of human rights monitors in Darfur." Despite passage of the resolution, Khartoum did not give the UN permission to deploy UNIMIS to Sudan.

Although the UN "invited" Sudan's consent for the deployment of peacekeeping troops, its president, Omar al-Bashir, "vigorously resisted" . . . [Analysts] say that any attempt to insert a peacekeeping force into Sudan without that country's express consent would violate the Charter.

As violence in Darfur worsened, the Security Council, in August 2006, passed resolution 1706, which expanded the mandate of UNMIS to include its deployment specifically to Darfur in order to "prevent disruption of the implementation of the Darfur Peace Agreement." A representative of a Security Council member said that "the tragedy in Darfur had gone on far too long and the transition [from an AU peacekeeping force] to a United Nations operation was the only viable solution to the crisis." Many observers have charged that the AU mission—which they have described as "under-equipped and over-stretched"—has failed to shield civilians from escalating violence. Although the UN "invited" Sudan's consent for the deployment of peacekeeping troops, its president, Omar al-Bashir, "vigorously resisted." In fact, according to media reports, President al-Bashir apparently believes that the UN wants to use the peacekeeping mission as a cover to colonize Sudan and take control of its oil fields. But, in November 2006, the UN and Sudan reached an agreement in principle where the UN would strengthen the AU mission by deploying "scores of military officers, UN police, and other international staff members, as well as much-needed military equipment" to stop the violence in Darfur. But other analysts have pointed out that Sudan still resisted the idea of any large-scale deployments of UN troops. In the meantime, Sudan's government recently extended the AU's operations until the end of May 2007.

Although the Security Council determined that it had the legal authority, under Chapter VII, to create the UNMIS mission in order to maintain international peace and security, political analysts say that it also had to respect the territorial sovereignty of Sudan under Article 2(7), which, in part, states that "nothing contained in the present [UN] Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state," unless, of course, a state actually requested international assistance. They say that any attempt to insert a UNIMIS peacekeeping force into Sudan without that country's express consent would violate the Charter and would also lead to a logistical nightmare. Critics also ask how the UN, in addition to facing possible armed resistance from the Sudanese government, could send in "constant shipments of fuel, food, and equipment" to its peacekeepers if Sudan—and even neighboring countries—did not allow access to any airfields.

Creating a more robust role for UN peacekeeping?

The growing humanitarian crisis in Darfur and problems in Lebanon have brought attention to several existing (yet still debatable) justifications to deploy a UN peacekeeping mission without the consent of the affected country. One justification is termed the "responsibility to protect." Advocates point out that, during the UN World Summit in 2005, the General Assembly had passed a non-binding resolution (60/1) which stated that "each individual State has the responsibility to protect its populations from genocide, ethnic cleansing, and crimes against humanity" (paragraph 138), and that this would require countries to take action in preventing such acts from taking place. The resolution also stated the UN member states had the responsibility to take collective action if "national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity" (paragraph 139). Other observers noted that the Security Council, in April 2006, unanimously passed resolution 1674(4), which "reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."

Some peacekeeping missions have stayed in place for decades (in countries such as Cyprus) without helping to resolve the underlying conflicts. . . other missions do not have clearly defined goals . . . other analysts argue that the role of peacekeeping is limited simply because, under its Charter, the UN needs the explicit consent of the warring parties to deploy an actual mission.

Under this so-called doctrine of "responsibility to protect," advocates say if a country cannot or will not protect its citizens from the acts mentioned in Resolution 60/1, then it must accept support from other nations to end the violence. And while every UN member state must respect the sovereignty of other members to conduct their own internal affairs, supporters of this doctrine argue that a country's sovereignty should not be absolute. They say that the doctrine places the right to life at the "center of the international system" and also above a state's right to sovereignty. So in the case of Darfur, the Security Council could, for example, "[give] notice to Khartoum that, while it seeks the government's cooperation, others will step in and substitute if Sudan cannot fulfill its sovereign responsibilities." But critics point out that these resolutions are not legally binding. Resolutions 60/1 and 1674(4), they say, do not contain any language which compels UN members states to take collective action against another state that is failing to protect its own people from, say, acts of genocide. Instead, the texts of these resolutions only mention that countries should have a "responsibility" to do so on a "case-by-case basis."

Another justification for deploying UN peacekeepers without the consent of the warring parties concerns a still-evolving and highly debatable concept called "humanitarian intervention," which, according to its proponents, is defined as the threat of or the use of force by a state or group of states for the purpose of protecting the "nationals of the target state from widespread deprivations of internationally recognized human rights." Its advocates believe that the individual (and not the state) should be the focus of international law, and that a country's sovereignty follows from individual rights. Because "sovereignty is not an inherent right of states, but derives from individual rights," a state that violates the autonomy and integrity of its citizens forfeits its claim to full sovereignty, the argument runs, and should open its borders to a humanitarian intervention.

As an example of what proponents claim is an emerging legal basis for humanitarian interventions, they point to the case where member nations of the North Atlantic Treaty Organization (NATO) intervened militarily in Kosovo. In March 1999, after failing to convince the Federal Republic of Yugoslavia (FRY) to stop its attacks in Kosovo (which were killing scores of civilians), NATO authorized its forces to begin aerial bombardments against FRY military groups. NATO ministers issued a statement saying, in part, that "[t]he FRY has repeatedly violated United Nations Security Council Regulations . . . [which] has created a massive humanitarian catastrophe which also threatens to destabilize the surrounding region . . . These extreme and criminally irresponsible policies . . . justify the military action by NATO." Proponents say that this case could eventually "lead to the development of a customary [international] rule allowing unilateral intervention."

When determining whether to authorize a humanitarian intervention, they argue that one of two conditions must exist: (1) a government must be supporting, committing, or abetting widespread violations of human rights or (2) there must be a total breakdown of law and order resulting in widespread violations of human rights. In addition, advocates say that the Security Council must call on the government of the target country to stop violating the human rights of people under its jurisdiction, and also take steps on its own to alleviate the situation. A final determination would also include an exhaustion of peaceful means in resolving a conflict and also a determination that the target country has repeatedly refused to comply with requests from the Security Council. Advocates of humanitarian intervention say that the current situation in Darfur largely satisfies these requirements, and that the Security Council should now take some action.

But legal experts say that there is an underlying tension in the concept of humanitarian intervention because it requires states to respect the sovereignty and self-determination of another country while, at the same time, trying to uphold fundamental human rights of that country, which many view as a domestic matter. Even though proponents of humanitarian intervention have offered several criteria for determining whether to authorize a humanitarian intervention, opponents point out that there is still a lack of consensus on an impartial mechanism to authorize such an intervention. Furthermore, others worry that countries may use the concept of humanitarian intervention as a cover to invade other nations. They also argue that the NATO intervention in Kosovo should be regarded as a single incident and should not be seen as "modifying the use of force regime." One commentator said that it was an exceptional measure taken in response to other countries' failure to act.

Federal Internet gambling ban: bluff or ace in the hole?

Last year, the United States enacted a new federal law which prohibits Americans from betting or wagering money through the Internet. While supporters say that the law will help to combat fraud and curb gambling addictions, critics believe that implementing and enforcing its provisions will be cumbersome and, in some cases, unrealistic. Analysts say that the new statute has disrupted online gambling industries in countries where such activities are legal and provide a sizeable source of employment and income. Others believe that the new prohibitions could also worsen an ongoing international trade dispute concerning Internet gambling.

Old gambling laws catching up with the Internet

Every nation regulates gambling within its own jurisdiction. (There is no international treaty per se that regulates the gambling industry.) In the United States, individual states mainly regulate gambling by granting charters under which casino operators must follow certain rules and standards. Legal analysts say that it is illegal to operate a gambling business or operation (including those in private homes) without express permission from a state government. States may also decide to ban gambling all together. In addition to complying with state laws, gambling operators must also follow federal laws, namely the Federal Wire Wager Act of 1961 (or "Wire Act"), which prohibits a gambling business from knowingly sending or receiving money for placing wagers through the use of interstate or international wire communication. (Because states take the main role in regulating the gambling industry, the Wire Act seeks to prevent, say, an individual in one state where gambling is illegal from placing bets—via wire transfer—in a state where gambling is legal, although it is not illegal for that individual to gamble and place bets in person in a state where gambling is legal.) In recent years, the government has—under the Wire Act—successfully prosecuted some foreign entities that offered online gambling services to American citizens by arguing that placing online wagers were the equivalent of sending bets using wire communication. But some courts and many legal experts have questioned whether the provisions of the Wire Act were actually meant to apply to online gambling operations.

In October 2006, after having been passed almost unanimously in the United States House of Representatives and the Senate, the Unlawful Internet Gambling Enforcement Act (or "UIGEA") was signed into law. The UIGEA prohibits only betting money in online gambling. It does not ban, for example, playing blackjack or poker on the Internet as long as players are not using money. In order to implement the ban (and also to clarify the terms of the Wire Act with regard to Internet gambling), the UIGEA prohibits anyone—including financial institutions or intermediaries—from receiving, sending, or processing payments for online gambling companies. However, the statute exempts horse-racing, state lottery games, and activities regulated under the Indian Gaming Regulatory Act, all of which may be operated over the Internet. The UIGEA further requires the Board of Governors and Secretary of the Federal Reserve System (along with the U.S. Attorney General) to "prescribe regulations requiring each designated payment system, and all participants therein, to identify and block or otherwise prevent or prohibit restricted transactions through the establishment of policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit the acceptance of restricted transactions" within 270 days of the enactment of §5363 of the statute.

Some advocates have applauded these measures. Unlike physical casinos, which are regulated by states to ensure that gamblers are afforded fair opportunities to win, online players may be at the mercy of the practices of online gambling companies, many of which remain lightly regulated. According to one supporter of the new legislation, an online gambler cannot be completely sure how the "virtual dice, roulette or cards were rolled, spun or dealt," or whether the game is sequenced to influence the odds in favor of the online site. Furthermore, unlike physical casinos, many online gambling sites offer little recourse to players who may claim that gambling operators had failed to credit winnings properly. Others have applauded the enactment of the UIGEA because they worry that online gambling may heighten gambling addictions and other social problems. Because Internet gambling does not provide tangible representation of money such as the use of actual chips, gamblers could easily lose track of the amount of money wagered and quickly find themselves in debt. According to another commentator, Internet gambling also poses a danger to underage players who may not understand the risks they undertake by gambling.

Unrealistic expectations in stopping Internet gambling?

But many critics have disparaged the passage of the UIGEA as an attempt to protect revenues flowing from state-regulated casinos. Analysts point out that online gambling alone is a $13 billion industry (with at least 50 percent of its revenues coming from United States citizens). Some companies such as PartyGaming PLC have generated over 76 percent of its revenue from the United States alone. Critics say that with growing online competition, states

could have seen a decrease in revenues coming from traditional gambling establishments. According to the New Jersey Casino Control Commission, in 2005, the gross revenue of all 12 casinos in New Jersey totaled over $5 billion. The Connecticut Division of Special Revenue said that, in the 2002-2003 fiscal year, gambling establishments in that state had collected over $20 billion in wagering revenue. States have, in turn, collected and used a portion of casino revenues to fund educational initiatives, build schools, promote tourism, and also to promote the arts.

Other analysts believe that the UIGEA will not stop online betting completely. They estimate that 2,500 to 3,000 online gambling companies are still taking wagers from American citizens. According to one online gambler, the passage of the UIGEA prevented her from gambling for only a few hours. She simply withdrew her money from one online gambling site and opened accounts with other online gambling operations. Another online gambler claimed that because she gambled for a living and made about $10,000 per month, she vowed to find a way around the restrictions placed by the UIGEA. In addition, other analysts believe that the expansive and free nature of the Internet will only create an underground online gambling scheme.

Some critics also believe that the new legislation will create jurisdictional and sovereignty concerns. Because many offshore online gambling companies do not have offices in the United States and are also located in jurisdictions where online betting is legal, the United States may not have personal jurisdiction over these particular operations, say legal experts. Still, in January 2007, federal prosecutors announced they had arrested two Canadian citizens who operated a payment system that allegedly processed billions of dollars of gambling proceeds from American citizens for the owners of Internet gambling companies based outside the United States. According to prosecutors, both men—who were apprehended while they were visiting the United States—knew that their activities were illegal under federal law. During that same month, the U.S. Department of Justice had issued subpoenas to four Wall Street investment banks—including Credit Suisse, HSBC, and Deutsche Bank—which had underwritten the initial public offerings of online gambling sites that operate outside of the United States.

Representatives of small U.S. banks and financial providers say that the provisions of the new act will essentially deputize banks to enforce social policy, and that compliance will be burdensome, especially because many online gamblers use electronic transfers and physical checks to execute their transactions. Typically, banks use a balance of payments coding system, which stamps all transactions with a sequence of numbers and letters. However, unlike credit card payments that are coded to show the type of business on the receiving end of the transaction, electronic transfers and physical checks are not coded on the receiving end. Therefore, financial providers cannot determine whether payments using a physical check or electronic transfer are being made to an offshore online gambling company or, for instance, a restaurant, according to representatives of the financial industry. One banker asserted that updating the existing system to code both physical checks and electronic transfers would require not only a massive and costly overhaul of the current banking system, but would also take away resources from other important activities such as flagging possible terrorist financing transactions.

Another financial provider further said that even if the coding system were updated so that banks would be able to determine the entity on the receiving end of an electronic transfer, the banks would still need a list of all the exact names of the offshore online gambling companies. Without such a list, finding these operations would be the equivalent of looking for "a needle in a haystack." Moreover, many online gambling companies do not interact directly with U.S. banks or financial providers, but rather through intermediaries or third-party payment companies such as Neteller.com, FirePay, or PayPal. These payment companies provide secure online fund transfer services which enable clients to load, withdraw, and transfer monies into an electronic account without requiring any contact with a U.S. bank or financial provider. In 2005, Neteller.com, for instance, had more than 3 million clients, and processed $7.3 billion in transactions. Some analysts believe that the provisions of the UIGEA do not apply to these third-party companies, and, thus, could serve as a loophole for individuals looking to circumvent the new law.

Although the United States is not the only country to make online gambling illegal (others include Australia), some point out that because many foreign online gambling operations have relied on American players to provide the bulk of their revenues, the passage of the UIGEA has severely damaged their profitability. After the passage of the act, the London Stock Exchange (which lists many online gambling operations) reported that the market value of these companies had declined by more than 4 billion (or U.S. $7.6 billion). PartyPoker.com, an offshore online gambling operation that had total revenues of $661.9 million, saw its stock price drop by 72 percent. Other offshore online gambling companies—such as PartyGaming and 888 Holdings which saw their market values fall between 26 percent to 78 percent after passage of the UIGEA—soon started discussions on merging their operations. Some have even sold their U.S. operations. For example, Sportingbet PLC sold its United States division for a single dollar, and BetOnSports, which generated more than 90 percent of its earnings from the United States, intends to close its U.S.-based operations and terminate about 800 jobs. In addition, ever since the United States began to prohibit American citizens from gambling online, smaller countries with a "thriving online gambling business" such as Antigua and Barbuda have lost over $30 million in revenues.

A different set of rules for foreign gambling companies?

Legal analysts say that the passage of the UIGEA could also further complicate an ongoing international trade dispute involving Internet gambling between the United States and Antigua and Barbuda. In 2004, the World Trade Organization (WTO) ruled that American laws restricting offshore Internet gambling operators from offering its services to the U.S. market violated international trade rules. The WTO administers major trade agreements on services, intellectual property, and goods. They operate under a principle called "national treatment," which requires a WTO member nation to give another member nation's goods and services the same treatment it accords to its own goods and services. (Trade experts say that this principle seeks to prevent countries from unfairly discriminating against foreign-made products and services.)

In its complaint, officials from Antigua and Barbuda (which once had what experts described as "a thriving Internet gaming business") argued that the United States had broken a prior commitment to open its gambling market to foreign competition. They

also said that particular interpretations and enforcement of certain American laws—such as the Wire Act—violated the principle of national treatment. While U.S. law enforcement officials have interpreted these regulations to prohibit Americans from placing bets through foreign online gambling services, these laws still allowed domestic operators to provide the very same Internet gambling services, they argued. The United States responded that Article XIV of the GATS agreement allows exemptions for trade measures deemed "necessary to protect public morals or to maintain public order." It argued that its restrictions on offshore gambling operations were necessary to protect vulnerable segments of its population (such as children) from gambling, and also to deter organized criminal activity from this particular area.

In 2005, the WTO Appellate Body largely upheld the findings of an earlier dispute settlement panel report which concluded that the United States did make a commitment to open its market for cross-border gambling and betting services. It also partly reversed the panel report by ruling that the U.S. ban on Internet gambling was, indeed, allowed under Article XIV as a measure undertaken "to protect public morals or to maintain public order." But the Appellate Body—which is the highest dispute settlement body in the WTO—also concluded that the United States had applied its Internet gambling ban in a discriminatory manner, thus violating the principle of national treatment. It noted that while U.S. laws prohibited foreign gambling companies from providing Americans with online betting services for, say, horse-racing, it did not apply that same prohibition to domestic gambling operators who provided the very same service. In February 2007, the WTO issued a preliminary ruling saying that the United States had, so far, failed to comply with the decision of the Appellate Body. A final decision concerning American compliance will be issued in March 2007.

Legal analysts say that the passage of the UIGEA will only exacerbate tensions. Because the act prohibits all Americans from placing bets through any Internet gambling operator, yet exempts domestic state lotteries and horse-racing, one legal analyst said that the law "flies in the face of the WTO ruling." In order to comply with the ruling of the Appellate Body, experts say that the United States must either ban all forms of Internet betting (including those exceptions listed under the UIGEA) or rework major portions of the statute. Political commentators say that either option will provoke strong resistance from the powerful gambling industry and social conservatives.

Because of its noticeable effects on the global economy, many experts have suggested alternatives to the current federal prohibition on online gambling. Some experts say that the United States should simply regulate, but not prohibit, online gambling. For example, Britain has a "tax-and-regulatory" system in which the government not only regulates and controls the licensing of online gambling operations, but also taxes the winnings. Under such a system, the federal government could raise revenues through online gambling. Other experts say that online gambling should be subject to international regulation. One foreign cultural minister asserted that since the Internet is a "global marketplace," the only effective action is on a global level. Regardless of the alternatives to federal sanctions on online gambling, many experts agree that United States cannot completely stop that activity. One commentator declared that prohibiting online gambling is similar to trying to stop the ocean from sending waves.

C.V. Starr Lecture

February 21, 2007

Sarbanes-Oxley and Beyond: Competitive Consequences at Home and Abroad

Alan L. Beller

Former Director, Division of Corporation Finance, U.S. Securities and Exchange Commission

In 2002, the U.S. government passed the Sarbanes-Oxley Act (or SOX) after several high-profile corporate scandals. Proponents argue that SOX has helped to improve the accuracy of financial disclosures. But critics say that the new regulations have imposed excessive burdens on companies listed in the United States. Has SOX helped to strengthen U.S. markets? What are the broader market implications of SOX at home and abroad? Alan L. Beller, who has been described as "one of the giants of the SEC of all time," addressed these and other questions.

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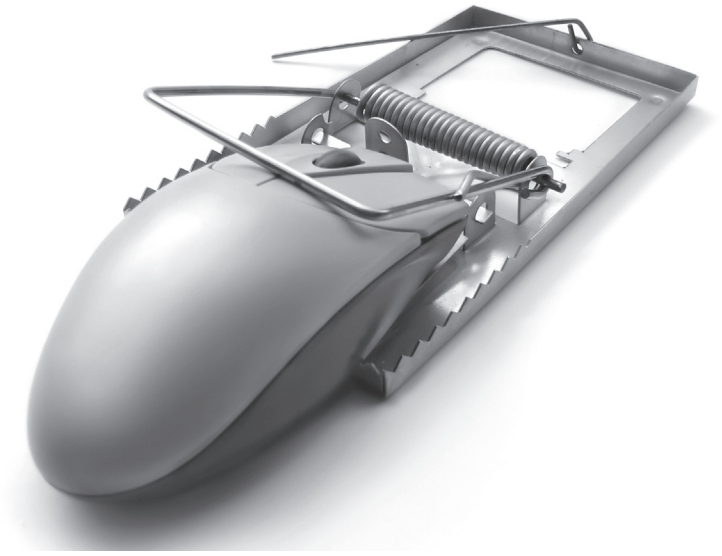
INTERNATIONAL TREATY

Cybercrime Convention: A threat to criminals and individual privacy?

Law enforcement authorities around the world say that cybercrime is one of the fastest growing crimes today. Individual countries have enacted their own laws and regulations in order to deal with cybercrimes within their own jurisdictions. In September 2006, the United States ratified and agreed to comply with the terms of the world's first cybercrime treaty. While supporters hope that the treaty will help to curb the growth of cybercrime and make it easier to prosecute individuals suspected of committing those acts, critics say that many of the treaty's provisions could increase government powers at the expense of protecting individual privacy rights.



Creating a global standard to fight cybercrimes

Experts define cybercrimes as criminal acts committed through computer and other electronic networks, including identity theft, piracy, copyright infringement, fraud, and the distribution of child pornography. Cybercriminals have, for example, successfully gained access to the electronic networks of banks and financial companies in order to steal personal information and even transfer funds to their own accounts. Technical analysts say that acts of cybercrime also pose a threat to national security. They point out that hackers regularly try to shut down military, transportation, and communication systems in the United States and other countries. The Federal Bureau of Investigation (FBI) says that the threat posed by cybercrimes is so serious that it recently made efforts to stop cybercrime and cyber-terrorism its third highest priority behind counterterrorism and counter-intelligence efforts.

Under the terms of the Council of Europe Convention on Cybercrime (Treaty 108-11 or the "Convention")—which one supporter described as "the first multilateral agreement drafted specifically to address the problems posed by the international nature of computer crime"—signatory nations must pass domestic laws which would make it a criminal offense to do any of the following: gain access illegally (or "hack") into computer and data systems; intercept private data communications; send massive amounts of data to shut down the lawful use of computer systems (also known as launching "cyber attacks"); offer, distribute or transmit child pornography through a computer system; and infringe on intellectual property rights by reproducing and disseminating protected works on the Internet. The Convention itself "does not create substantive criminal law offenses or detailed legal procedures," but requires each signatory nation to do so.

The U.S. Department of Justice said that the treaty will also provide a "solid basis" to "facilitate international cooperation in the investigation and prosecution of computer crimes." Under the terms of the Convention, signatory nations must assist each other in investigating and prosecuting cybercrimes (although there are certain exceptions). More specifically, Article 25 ("General principles relating to mutual assistance") states: "The Parties shall afford one another mutual assistance to the widest extent possible for the purpose of investigations or proceedings concerning criminal offences related to computer systems and data." Supporters say that the treaty will help to create a global standard to curb acts of cybercrime.

The actual drafting of the cybercrime treaty began in 1997 and was concluded in May 2001. In November of that year, the Council of Europe opened the Convention for signature. The treaty entered into force in July 2004 (thus becoming legally binding on the signatory countries). As of February 2007, 19 countries have ratified the Convention, including Albania, Denmark, France, Norway, and the Ukraine. Other countries in Europe (Germany, Ireland, Italy, Poland, Switzerland, and the United Kingdom) and even a few non-European nations (including Canada, Japan, and South Africa) have signed but not yet ratified the Convention. The United States ratified the treaty in September 2006, and is the only non-European country to do so. Although the treaty mandates all signatory nations to adopt specific legislation to deal with cybercrimes, some countries say that their domestic laws are already in full compliance with the terms of the treaty. For example, according to the Department of Justice, the United States will not have to enact more legislation to implement its obligations because "the central provisions of the Convention are consistent with the existing framework of U.S. law and procedure" concerning cybercrimes.

During the past decade, global efforts to stop cybercrime had remained largely uncoordinated because there was no single global agency or even an international treaty calling for a more uniform standard in criminalizing and prosecuting acts of cybercrime. Instead, individual countries had historically dealt with this problem by enacting their own laws criminalizing "specific conduct committed in cyberspace." The Philippines, for instance, had passed legislation criminalizing the spread of malicious computer viruses, but only after one of its citizens had created and disseminated the now-infamous "I love you" virus in 2000, which, according to security experts, caused over $10 billion in damage by destroying the files of infected computers all over the

world. But analysts say these laws in individual countries were not able to curb the growth of cybercrime because those engaged in such activities continually moved their operations to jurisdictions where cybercrime laws were weak or even non-existent. Because law enforcement authorities say that they had caught and prosecuted only five percent of all cyber-criminals (while seeing a simultaneous increase of cybercrimes being committed), advocates from different countries began to push for a more coordinated effort.

Stronger anti-cybercrime measures, weaker privacy rights?

While many have praised the Convention, others worry about certain provisions. For example, critics point out that the "mutual assistance" provision (Article 25)—which requires a requested party to offer its investigative expertise and facilities to a requesting party—does not have a "dual criminality" requirement. Under such a requirement, a requesting country would receive mutual assistance with an investigation, but only if the act in question is illegal in both the requesting and requested countries. Because the Convention does not have this requirement, critics say that there could be instances where a requesting country could be able to draw upon the resources of, say, the FBI to help investigate its citizens for suspected acts which are legal under American laws.

In addition to this concern, others say that the Convention will erode personal privacy. For example, some believe that signatory nations with already-weak privacy laws could further erode these protections because, under the treaty, they could eventually have access to the criminal detection resources of their more adept counterparts without having to implement any safeguards.

Critics point to what they say are other troubling provisions. One group called the Electronic Privacy Information Center (EPIC) said that Article 19 ("Search and seizure of stored computer data") will require countries to enact legislation which will compel individuals to disclose their "decryption keys" so that law enforcement officials will have wider access to private computer data. (When information is sent between two computer systems, it is encrypted "so as to be unintelligible until the recipient uses their decryption key, which is only known to the rightful owner, to read the information.") Others say that Article 20 ("Real-time collection of traffic data") and Article 21 ("Interception of content data") of the Convention—which mandate that parties implement laws requiring Internet service providers to cooperate in both collection and interception of real-time traffic data and the content of such data, respectively—could allow law enforcement authorities to conduct surveillance and give them direct access to the contents of personal e-mail accounts.

But supporters of the Convention point out that, under Article 15 ("Conditions and Safeguards"), a signatory nation that implements a domestic measure under the treaty must ensure that the measure is "subject to conditions and safeguards provided for under its domestic law, which shall provide for the adequate protection of human rights and liberties." Privacy advocates have responded that Article 15 simply assumes that all ratifying countries already have in place adequate protections, which, they believe, is not the case for many nations. In fact, legal experts point out that the parties to the Convention have varying standards of protection for individual privacy rights. Others say that the drafters of the cybercrime treaty should have used the negotiation process for the Convention to demand a standard level of individual privacy for all ratifying countries.

Because the Convention does not have [a dual criminality] requirement, critics say that there could be instances where a requesting country could be able to draw upon the resources of, say, the FBI to help investigate its citizens for suspected acts which are legal under American laws.

Civil libertarians worry that an optional "Protocol on the Criminalization of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems" could infringe upon civil liberties by requiring signatories to "criminalize the dissemination of racist and xenophobic material through computer systems, as well as of racist and xenophobic-motivated threats and insults, and denial of the Holocaust and other genocides." The Department of Justice has said that this optional provision would, for example, make it a crime to e-mail racist jokes, which it believes would be inconsistent with the protections provided under the First Amendment. (Only nine countries have ratified this protocol, including France and Denmark.) American officials say that the United States does not intend to sign the protocol, and also points out that it is "separate from the main Convention, [meaning that] a country that signed and ratified the main Convention, but not the protocol, would not be bound by the terms of the protocol." It also emphasized that American officials "would not be required to assist other countries in investigating activities prohibited by the protocol."

Privacy advocates also complain that the treaty was drafted largely in secrecy, which, they argued, allowed many controversial provisions to remain in the text. One critic said that "the treaty seems more like a law enforcement 'wish list' than an international instrument truly respectful of human rights . . ." On the other hand, the Department of Justice said that "representatives of the Departments of Justice, State, and Commerce met with representatives of the U.S. technology and communications industry and a variety of public interest groups to hear comments on draft provisions and to share information on the status of the Convention." They also asserted that "the Council of Europe made numerous successive drafts publicly available."

While many groups still have concerns about the treaty, representatives of the technology industry view the treaty in a better light. For example, the Business Software Alliance (a lobbying group whose members include Apple Computer, Cisco Systems, Dell, IBM, Intel, McAfee, and Microsoft) believes that the treaty "will serve as an important tool in the global fight against cybercriminals and encourage greater cooperation among nations," and that it will also help stop copyright infringements. The president of the alliance said: "Every step we can take to harmonize international law to better enable law enforcement to apprehend cybercriminals is a step in the right direction."

International Law News Roundup

INTERNATIONAL CRIMINAL COURT:
The First Case

The International Criminal Court (ICC) announced in January 2007 that it had sufficient evidence to begin its very first case. Prosecutors will try a leader from the Democratic Republic of the Congo (DRC) who is accused of conscripting children to fight in a civil war. The ICC, which is the world's first permanent criminal tribunal that prosecutes grave human rights violations, came into operation in 2002. Many hope that the very existence of the ICC will help to improve human rights conditions around the world by deterring national leaders and other officials from carrying out serious misdeeds. Legal analysts say that the ICC's first case will show whether it can live up to expectations and carry out its duties in a judicious manner.

Based in The Hague, the ICC has authority to prosecute individuals, including high-level government leaders, accused of carrying out war crimes, genocide, crimes against humanity, and crimes of aggression. Unlike international tribunals formed on an ad hoc basis by the United Nations to try alleged crimes committed only in specific countries such as the former Yugoslavia and Rwanda, the ICC has much wider jurisdiction to try individuals from those countries that have ratified the international agreement (the Rome Statute of the International Criminal Court) creating that tribunal. As of January 1, 2007, 104 countries have ratified the Rome Statute and are legally bound to abide by its provisions. (The United States has not.) Some legal experts refer to the ICC as the "court of last resort" because it will exercise its jurisdiction only in instances where a signatory nation is unable or unwilling to prosecute alleged violations of international human rights.

In June 2004, after receiving a formal request from the transitional government in the DRC, the ICC began an investigation into alleged crimes committed by the military wing of a group called the Union des Patriotes Congolais (UPC) during that country's five-year civil war, which ended in 2003. In "Africa's world war," troops from neighboring countries (including Angola, Chad, Namibia, Rwanda, Uganda, and Zimbabwe) had supported various sides within the DRC during that conflict, and had also plundered that nation's vast natural resources. The ICC said that its investigation of the UPC would be the "first in a series of investigations" of several other armed groups in the country. Political commentators say that the current president of the DRC had referred the alleged crimes to the ICC because the country's judicial institutions were still weak and having a trial in the DRC soon after the signing of a peace agreement could create domestic instability.

According to one witness, the UPC had removed children from the streets, their families, and schools, and then presented them with a "stark choice: kill or be killed." Some observers believe that over 30,000 children served as fighters, cooks, carriers, and sex slaves for the UPC army.

Congolese authorities arrested Thomas Lubanga Dyilo (who is the alleged founder and former president of the UPC) and transferred him to the ICC in March 2006. Prosecutors accused him of enlisting children to fight in a war, which is listed as a war crime under the Rome Statute. More specifically, Article 8(2)(b)(xxvi) of the statute states that "a war crime means . . . conscripting or enlisting children under the age of 15 years into the national armed forced or using them to participate actively in hostilities." Prosecutors say that even if Mr. Lubanga had only ordered the forced enlistment of children, they would still charge him on the basis of "individual criminal responsibility" under Article 25(3)(b) of the statute, which says that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person orders, solicits, or induces the commission of such a crime, which in fact occurs or is attempted."

The ICC began hearings in November 2006 to determine whether the evidence against Mr. Lubanga warranted a full trial. During these hearings (which are also called the "confirmation of charges"), the judges must decide whether to proceed with a full trial, dismiss the charges, or order the prosecutors to amend the charges. In January 2007, the ICC announced that "there [was] sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is criminally responsible as co-perpetrator for the war crimes of enlisting and conscripting of children under the age of fifteen years . . . and using them to participate actively in hostilities." The ICC also said that investigators had gathered sufficient evidence to prove that Mr. Lubanga "assumed an essential general coordinating role" in enlisting children, and that "he was aware of the importance of his role." Legal analysts say that if the ICC convicts Mr. Lubanga of the most serious charges, he could face a maximum sentence of life in prison. (Under the Rome Statute, the ICC cannot impose the death penalty.) In the

meantime, the ICC Chief Prosecutor, Luis Moreno-Ocampo, said: "As prosecutors, we have the responsibility to prove the case, we believe our evidence is strong. However, until his guilt is established, Thomas Lubanga Dyilo is presumed innocent." Under the leadership of Mr. Lubanga, the UPC army—from August 2002 to June 2003—attempted to gain control of a district called Ituri, which is not only the most ethnically diverse region of the Congo, but is also rich in deposits of gold, diamonds, oil, and timber. Human rights groups say that, as part of its military recruitment, the UPC army (which later came to be known as the "army of children") had allegedly commandeered children as young as seven years old, including boys and girls, into military service. According to one witness, the UPC had removed children from the streets, their families, and schools, and then presented them with a "stark choice: kill or be killed." Some observers believe that over 30,000 children served as fighters, cooks, carriers, and sex slaves for the UPC army.

Other human rights groups accused Mr. Lubanga of ordering ethnic cleansing where people are killed based solely on their ethnicities. For example, during its offensive, the UPC—which is composed of members of the Gegere tribe—had allegedly targeted and massacred over 60,000 Lendu, Nanda, and Bira tribal civilians (including women and children), and also displaced over 140,000 people who were forced to live in refugee camps or in the forest. Human rights advocates say that the victims were either killed while they slept, shot in the back of the head and buried in mass graves, or held in prisons. Other observers have alleged that, under the supposed direction of Mr. Lubanga, the UPC army had committed crimes of sexual violence. Witnesses say that members of the UPC had raped over 12,500 girls and used many as sex slaves. As a result, many of these females became unsuitable for marriage and were forced to leave with their rapists. Some also believe that the UPC had violated a United Nations Security Council resolution (1552/04) which "condemn[ed] the continuing illicit flow of weapons within and into the DRC." Experts say that continuous deliveries of arms and weaponry helped to prolong a conflict that claimed the lives of over 1,000 people each day and about 31,000 people per month.

Many advocates have applauded the ICC for charging Mr. Lubanga with the conscription of children because they say that it will draw attention to what they believe is one of the most heinous war crimes and among the most forgotten. Analysts say that, since the 1960s, more than 300,000 children—most in their teens—have been forced to serve in and fight for the armed forces in over 20 countries. In 1997, the United Nations drafted a set of recommendations called the Cape Town Principles to help nations prevent the recruitment of children into the military. For example, one recommendation urged countries to establish the age of 18 as the minimum age for recruitment. But legal analysts say that these recommendations were not legally binding, and that many nations simply ignored them. In February 2007, a group of over 60 countries updated these principles by adopting a text called the Paris Commitments, which urge countries to reintegrate child soldiers into society, among many other goals. But a commentator said that the text simply "[carried] moral, but no legal weight."

Some believe that Mr. Lubanga's alleged crimes have destroyed an entire generation of Congolese children, and that the Lubanga case will send a clear message to world leaders that enlisting children into the armed services and battle will not be condoned and can even be punished. The ICC chief prosecutor asserted: "Not only are [children] ordered to kill and torture, they often become victims of physical and sexual abuse. When they do return to civilian life, they are walking ghosts—damaged, uneducated pariahs."

But many others have criticized the ICC for charging Mr. Lubanga with only child conscription. They argued that other alleged atrocities ordered by Mr. Lubanga—including ethnic massacres, murder, and torture—had a strong evidentiary basis. For example, in comparison to the 30,000 child soldiers in the UPC army, an observer claimed that over 60,000 had died and that hundreds of thousands of others were maimed, traumatized, or displaced during the civil war. Other human rights advocates have insisted that ICC prosecutors expand the charges against Mr. Lubanga. But in a rebuttal, one political analyst claimed that since Mr. Lubanga is still considered a hero in some regions of the DRC, the ICC would have had great difficulty in finding cooperating witnesses, and that prosecutors had a more solid case in proving that Mr. Lubanga had ordered the conscription of children.

COMPARATIVE LAW:

Double Jeopardy Facing Jeopardy in England?

A recent conviction of a man in England who had already been tried for and acquitted of the same murder charge has raised eyebrows among legal observers concerning a fundamental procedural defense called double jeopardy, which generally prohibits the government from prosecuting an individual twice for the same crime. Some are worried that a retroactive change in English law that made it possible to convict the suspected murderer could open double jeopardy exceptions even further—and, thus, possibly strengthen the hand of prosecutors. But others have defended the action, arguing that evolving standards of justice would ensure the public that wrong-doers would be held accountable for their misdeeds.

Under [the Criminal Justice Act of 2003], exceptions to double jeopardy [in England] now extend to a list of 30 crimes, including murder, manslaughter, kidnapping, rape, and armed robbery. But the law sets the bar high for a re-trial.

In 1989, police in England arrested and charged William Dunlop of murdering his girlfriend Julie Hogg whose body was found behind a panel inside of her home. Mr. Dunlop was ultimately acquitted in 1991 after two jury trials failed to reach a verdict. But nine years later, Mr. Dunlop—who was in prison for a different crime—confessed to the murder of Ms. Hogg. But because of England's double jeopardy standard, prosecutors could charge Dunlop only with perjury, but not again for murder (even with his confession).

Since 1176, England's double jeopardy laws have imposed an almost absolute prohibition on a second trial for individuals acquitted of certain acts. The term "double jeopardy" (derived from the Old French term meaning "uncertainty") is found in the 5th Amendment of the United State Constitution, which bars any person "for the same offense to be twice put in jeopardy of life or limb." It also finds a basis in the common law tradition of res judicata, meaning that once an issue or claim has been the subject of a

final judgment, there can be no further litigation on those claims. Legal analysts say that the overarching purpose is to limit endless government prosecutions for the same crime while also encouraging thorough police work and investigation. Civil libertarians believe that any weakening of double jeopardy standards could increase the number of innocent convictions. In England, there are exceptions to double jeopardy only in cases of witness or jury intimidation. Legal analysts note that because Mr. Dunlop's confession did not fall into any these exceptions, he was free from further criminal prosecution. Ms. Hogg's mother and her supporters spent 15 years appealing for a change in England's double jeopardy exceptions so that suspects may be retried for certain crimes even after being acquitted by a court. They argued that allowing individuals to "get away with murder" based solely on faulty acquittals would undermine public confidence in the criminal justice system.

After England's Law Commission pushed for new exceptions to the country's double jeopardy standards, Parliament enacted the Criminal Justice Act of 2003, which came into force in April 2005. Under this act, whose provisions apply retroactively, exceptions to double jeopardy now extend to a list of 30 crimes, including murder, manslaughter, kidnapping, rape, and armed robbery. But the law sets the bar high for a re-trial. Prosecutors must first present "new and compelling" evidence. Section 78 of the Criminal Justice Act states that "evidence is new if it was not adduced [i.e., presented] in the proceedings in which the person was acquitted," and that "evidence is compelling if: (a) it is reliable; (b) it is substantial; and (c) in the context of the outstanding issues, it appears highly probative of the case against the acquitted person." Cases that could qualify for retrial must also be approved by the Director of Public Prosecutions. Also, the Court of Appeals must agree to quash the original acquittal based on a determination of whether the "interests of justice" would be served by another trial. Furthermore, the act allows for only one additional retrial.

After pleading guilty to the murder of Julie Hogg in September 2006, Mr. Dunlop became the first person to be convicted of murder under the new double jeopardy exception. Prosecutors and the court system determined that Mr. Dunlop's confession had qualified as "new and compelling evidence," hence permitting his retrial for the murder of Ms. Hogg. The National Crime Faculty believes that there are 35 other murder cases in England where police may re-investigate and bring new charges against previously acquitted defendants.

But critics believe that some terms in the new legislation are defined too broadly. The definition of "new" evidence, they say, includes evidence that the prosecutor had already possessed at the time of the original trial, but eventually did not use. They believe that having such a broad definition of "new" could tempt prosecutors and police to be less thorough in their investigations if they already know that they could re-try an unsuccessful case under the new double jeopardy standards. Other legal commentators also believe that the definition of "compelling" evidence is highly subjective. They believe that the courts will simultaneously declare any "new" evidence to be reliable, substantial, and highly probative. Furthermore, others note that because a statistically high proportion of confessions are known to be false, they worry that the retroactive nature of the new law could lead to faulty prosecutions in the future. But other legal observers believe that while some of the terms of the statute can be viewed as being overly broad in definition, they argue that the Court of Appeals will provide a check on the number of retrials.

Similar to those found in England, the United States also has exceptions to double jeopardy for mistrials involving witness or juror tampering. But, in a twist that is unique to the United States, double jeopardy applies only to prosecutions of the same criminal act by the same sovereign. In a technical sense, the United States has two separate sovereigns—the federal government and state governments. When both sovereigns bring separate prosecutions against a single individual for the same act (for a total of two trials), those two prosecutions are not considered double jeopardy. For example, in the case of the 1995 bombing of a federal office building in Oklahoma City, the defendant (Timothy McVeigh) was convicted and later executed by the federal government for murdering eight federal employees. While Mr. McVeigh could have also been tried in state court for murdering numerous other persons in that same explosion, the state government allowed the federal government to take the lead in that case. Also, in the United States, criminal prosecution stemming from a particular act is considered separate from civil charges arising from the very same act because civil and criminal procedures use different legal standards. Hence, even with double jeopardy, a criminal prosecution will not preclude the filing of civil charges. For example, while a criminal court acquitted former football star O.J. Simpson of double murder in 1995, a civil court found him liable for these same murders.

Many other countries also have some form of double jeopardy, though they vary in scope and exceptions. For example, Australia's double jeopardy standard prohibits prosecutions even for perjury which led to an acquittal for a certain crime. Legal analysts say that, under Australian law, Mr. Dunlop could not have been prosecuted for perjury. But after a public outcry, that country is moving toward adopting double jeopardy standards along the lines of those in England. France's double jeopardy exceptions are similar to those found in England before the enactment of the Criminal Justice Act of 2003. Under that country's laws, the prosecution is prohibited from retrying a crime even with the discovery of new incriminating evidence. Yet a person who had been convicted of a certain criminal act may request another trial on the grounds of new exculpating evidence. In India, double jeopardy as a defense is deemed a fundamental right guaranteed under its constitution.

UNITED NATIONS:

Taxation without representation in the nation's capital

A United Nations human rights body recently declared that the United States was in violation of a global human rights treaty by not allowing residents of the District of Columbia (or the "District") to vote in federal elections. While supporters of expanded voting rights in the District welcomed these findings, others say that there are compelling constitutional reasons to limit the voting rights of District residents, and that this situation is not a clear-cut case of "taxation without representation."

In a report issued in July 2006, the United Nations Human Rights Committee (or "UNHRC") concluded that, by limiting federal voting rights for American citizens residing in Washington DC, the United States was violating Article 25 of the International Covenant on Civil and Political Rights (or "ICCPR"), which states that "Every citizen shall have the right and the

opportunity, without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free of expression of the will of the electors; and (c) to have access, on general terms of equality, to public service in his country."

The report also said that the voting restrictions violated Article 26 of the ICCPR, which states that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, natural or social origin, property, birth or other status." The report noted that while American citizens residing in other states pay federal taxes and are given representation in the United States Senate and the House of Representatives, citizens residing in the District also pay federal taxes, yet are not afforded the same representation in Congress. According to the UNHRC, denying the current 550,521 District residents "the [full] fundamental right to equal suffrage in the United States Congress, which is granted to citizens of the 50 states, is disenfranchising."

The report noted that while American citizens residing in other states pay federal taxes and are given representation in the United States Senate and the House of Representatives, citizens residing in the District also pay federal taxes, yet are not afforded the same representation in Congress.

The UNHRC—a body consisting of 18 independent human rights experts—monitors whether signatory nations to the ICCPR are complying with their obligations under that agreement, which was adopted by the United Nations General Assembly in 1966 and later entered into force in 1976. The primary aim of the ICCPR is to "promote the universal respect for . . . human [political, civil, social, economic and cultural] rights and freedoms." Although the ICCPR is unenforceable, each State Party is required to submit a report every four to five years describing how it is implementing the provisions of that document. After examining each report, the UNHRC forwards its "concluding observations" to the State Party. As of December of last year, 160 countries, including the United States, had ratified the ICCPR.

In the early 1800s, the U.S. Congress took over exclusive jurisdiction of what is now known as the District of Columbia, which already had an existing population of 10,006 whites, 793 freed African-Americans, and 3,244 slaves. Historians say that residents of the District—which is not considered a state—slowly received voting rights from the federal government (i.e., Congress) over the next hundred years. For example, beginning in 1802, white male residents who lived in the District for at least a year received the right to vote for a 12-member council (which handles some governance matters relating to the District), though they did were not allowed to vote for members of Congress. It wasn't until the passage of the 23rd Amendment of the Constitution in 1961 that District residents gained the right to vote in presidential elections.

Currently, American citizens residing in the District are represented in the House of Representatives by a single delegate who may vote in committee and participate in debates, but cannot vote on measures that reach the House floor. (District residents don't have any representation in the Senate.) Political analysts say that this situation is similar to people living in American territories such as Guam, the Northern Mariana Islands, American Samoa, the United States Virgin Islands, and Puerto Rico. These territories are also represented by delegates in the House of Representatives who cannot vote on measures on the House floor. But unlike District residents, people living on U.S. territories do not pay federal income taxes (though employers and employees must deduct payroll taxes such as Social Security and Medicare). Supporters say that denial of full voting rights to citizens in the District is simply a case of "taxation without representation" (similar to Great Britain's treatment of the original British colonies before the American Revolution).

Many critics of the UNHRC report say that the U.S. Constitution supports the legality of limited voting rights for District residents. They note that the Constitution (in Article 1, Section 2, clause 3) states that "Representatives . . . shall be apportioned among the several states," and that Article 1, Section 3, clause 1 states "The Senate of the United States shall be composed of two Senators from each State." Because these residents live in a separate federal District which is not an actual state, the argument runs, they are not entitled to the same federal voting rights given to states. Critics of the UNHRC report also cite Federalist Paper No. 43, which claims that the seat of the Federal government

must be located in a separate jurisdiction in order to perform its duties effectively and ensure stability, and that no state would be able to guarantee this.

In responding to the UNHRC report, the United States made similar arguments justifying the lack of full voting rights for District residents: "The United States was founded as a federation of formerly sovereign states. In order to avoid placing the national capital under the jurisdiction of any individual State, the United States Constitution provides Congress with exclusive jurisdiction over the 'Seat of Government of the United States,' which is the District of Columbia."

Still, many believe that Congress does have the legal authority to grant District residents the same voting rights as citizens from other states. They point out that the Constitution (in Article 1, Section 8, clause 17) states that Congress has the power "to exercise exclusive legislation in all cases whatsoever." Some political analysts believe that Congress has not exercised this authority for political reasons. According to the 2000 U.S. Census, African-Americans made up almost 75 percent of the population of the District (which is the highest percentage of any U.S. jurisdiction), and that, during the 2004 presidential election, 89 percent of District voters supported the Democratic candidate. Therefore, they argue, granting more voting rights would benefit only the Democratic and not the Republican Party.

Congress is expected to review a bill this year to increase the number of seats in the House of Representatives to 437 from 435 by giving a seat both to Utah (a Republican stronghold) and Washington, DC. According to some political activists, the last census taken in 2000 had undercounted Utah's population by excluding all Mormon missionaries who were out of the state, and that giving an extra seat to Utah while creating a new one for Washington, DC, would accomplish the twin goals of giving full voting rights to the District while maintaining a political balance within Congress. But, in the meantime, some analysts say that the United States is still in violation of Articles 25 and 26 of the ICCPR.

UNITED NATIONS:

Global Counter-Terrorism Strategy

In September 2006, the United Nations (UN) unanimously adopted its Global Counter-Terrorism Strategy, which analysts say was the first time that all 192 UN member nations have agreed on a broad plan of measures to combat terrorism. While supporters say that the passage of the UN strategy signals a renewed commitment on the part of that global institution to combat terrorism, critics say that its provisions contain shortcomings which could limit its effectiveness.

The UN strategy—which is embodied in a resolution (A/RES/60/288) along with an annexed plan of action—provides a skeleton of four broad measures calling on member nations to: (i) identify the conditions that lead to the spread of terrorism; (ii) prevent and combat terrorism; (iii) strengthen their own capacities and the role of the UN system in addressing terrorism; and (iv) protect human rights of all people and the rule of law while countering terrorism. More specifically, it calls on every member nation to implement measures to stop terrorist financing, bio-terrorism, the creation of weapons of mass destruction, and the travel of terrorists, among other policies. In addition, the UN strategy supports the creation of a single comprehensive database on biological incidents in order to ensure that "biotechnology advances are not used for terrorist or other criminal purposes." Furthermore, it encourages frequent and informal meetings between the UN and its various agencies to coordinate efforts against terrorism. The UN strategy also calls on UN member states to reaffirm that terrorism "cannot and should not be associated with" any ethnic group, religion, nationality, or civilization.

Some have hailed the UN strategy for its clear stand against terrorism. Supporters say that its text sends a "clear and unequivocal message" that terrorism is unacceptable, violates human rights, and even "constitutes one of the most serious threats to international peace and security." More specifically, it calls on the UN member nations to "consistently, unequivocally, and strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever, and for whatever purposes . . ." Some believe that the UN strategy ends any doubt on the UN's stand on terrorism. Supporters also say that the UN strategy combines into a single framework all the important existing UN measures undertaken to counter terrorism, which may make them easier to implement and enforce by the member states. Some of these measures concern hostage-taking, the protection of human rights and fundamental freedoms while countering terrorism, and preventing terrorists from acquiring weapons of mass destruction.

[The UN Global Counter-Terrorism Strategy] calls on the UN member nations to "consistently, unequivocally, and strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever, and for whatever purposes . . ."

Other advocates say that the UN strategy provides what some describe as a "balanced view" of the different interests and priorities of all 192 member nations in fighting terrorism, and that its text was "carefully crafted" to represent this balance. While the plan of action, for example, calls on member states to implement aggressive measures against terrorism, it also says that they should "reaffirm that States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law, and international humanitarian law." Some political analysts believe that the UN included these particular statements in light of reports that some countries, in particular the United States, had undertaken policies which they believe marginalized human rights in general and the treatment of detained terrorist suspects such as those awaiting military trials at the American naval base in Guantanamo Bay, Cuba.

But others have strongly criticized the UN strategy. One ambassador described it as "unbalanced with many faults" because it does not, for instance, even define the term "terrorism," which he says is a "pre-condition" to implementing the UN strategy. Another commentator said that the failure to define terrorism will allow every country to categorize independently various groups as either terrorists or freedom fighters, which may then seriously hinder any collective international effort against terrorism. Political analysts say that many UN member states have resisted and continue to resist efforts to define terrorism in a way that would restrict the ability of people currently living

under foreign occupation to take up resistance. In the case of the Israeli-Palestinian conflict, for instance, there is disagreement over whether attacks against Israeli civilians should be viewed as terrorism.

While supporters hail the UN strategy for listing all previous UN resolutions adopted against terrorism, detractors say such an action is meaningless. One expert said that despite a few new suggestions (such as creating a database for biological incidents and enlisting help from the private sector), the UN strategy fails to offer any new and bold measures to counter terrorism. Moreover, although some say that the UN strategy expresses the collective will of the global community concerning terrorism, legal experts point out that the plan of action is not even legally binding under international law. One analyst said that the lack of serious consequences for not abiding by the terms of the UN strategy will decrease pressure on member states to take meaningful and politically unpopular actions against terrorism, especially in countries where large portions of the public may sympathize with terrorists. Despite the criticisms, one influential diplomat believes that the UN strategy still serves as a "living document" on the UN's long-term goal to counter terrorism, which is to be further examined in the next session of the General Assembly.

UNITED NATIONS:

Terrorist and legal blacklist?

During the 1990s, the member states of the United Nations (UN) adopted a variety of resolutions to stop terrorist activities. One resolution in particular seeks to curb terrorist financing by calling on nations to create a so-called "blacklist" of individuals and entities with suspected ties to terrorism. While some claim that the resolution has discouraged people from making donations to or establishing business ties with terrorist causes, critics believe that the actual listing process contains many flaws, including a vague process whereby people may have been mistakenly placed on the blacklist.

In an effort to curb terrorist financing at the global level, the UN Security Council, in October 1999, adopted Resolution 1267, which calls on all UN member states to "freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban . . ." In addition, the resolution calls on UN member states to "deny permission for any aircraft to take off from or land in their territory if it is owned, leased, or operated by or on behalf of the Taliban . . ." (The Taliban had once governed large parts of Afghanistan and later provided a safe haven to Osama bin Laden who is the leader of the terrorist network Al Qaeda. Even after repeated warnings from the UN, the Taliban refused to surrender Mr. bin Laden and to stop providing a sanctuary to international terrorists. Soon after the September 11 attacks—which analysts now believe were carried out by Al Qaeda members—the United States launched a massive military strike that toppled the Taliban.)

In order to carry out these international sanctions, Resolution 1267 designates a sanctions committee—consisting of all 15 permanent and non-permanent members of the Security Council—to determine, on a "case-by-case basis," whether certain persons or entities had ties to terrorism. It also encourages UN member states to submit to the committee (which is formally known as the "Al Qaeda and Taliban Sanctions Committee") the names of persons or entities with suspected terrorist ties. Once the members of the sanctions committee unanimously agree that a link does exist, the Security Council formally places those names on a consolidated list for public viewing. One supporter contends that this public list deters donations to, increases public awareness of, and "stigmatizes and isolates" the listed persons and entities. An observer said that the list also "identifies, disrupts and dismantles terrorist financial networks" by excluding persons associated with listed entities from international travel.

Supporters of [the UN terrorist blacklist] argue that the sanctions committee and its deliberations were not designed as a court or tribunal providing all of the rights and guarantees associated with an actual judicial system. One high-ranking diplomat said: "Obviously, the UN is not a court, and sanctions are not a criminal punishment."

The resolution itself, however, does not impose criminal punishment on any persons or entities linked to terrorist organizations, namely the Taliban and Al Qaeda. Instead, the UN leaves it to its member nations to determine whether to impose such punishment on suspected terrorists and those with terrorist ties within their jurisdictions. More specifically, Resolution 1267 "calls upon States to bring proceedings against persons and entities within their jurisdiction that violate the measures imposed . . . and to impose appropriate penalties." Although the United States and other countries have severely damaged terrorist operations and financial networks around the world, many analysts note that Al Qaeda is still considered one of the gravest threats to international security, and that the Taliban—although no longer in power—has increased its attacks in Afghanistan against the current government in recent months. As a result, the UN continues to carry out the work of Resolution 1267, which is just one of many resolutions passed by the UN to curb the financing of terrorist operations.

As of February 2007, the UN list contained the names of 142 individuals and one entity belonging to or associated with the Taliban, and 220 individuals and 124 entities with links to Al Qaeda. The sanctions committee said that it had also removed nine people and 11 entities from the list. The UN also claims that, under Resolution 1267, its member states have frozen over $150 million in funds with suspected terrorist ties. According to an American official, the United States and its allies have contributed the names of over 236 individuals and entities to the list and $112 million in frozen assets (with $38 million blocked by U.S. banks, and $74 million blocked by allies abroad).Although many officials have hailed the work accomplished through Resolution 1267, critics believe there are many problems. Some point out that neither the text of Resolution 1267 nor the actual guidelines adopted by the sanctions committee provide clear listing procedures or even criteria for designating whether an individual should be placed on the list. For example, the procedures only state that "the Committee will consider expeditiously requests to update the list to be provided through Member States or regional organizations, on the basis of relevant information received by the Committee." Legal analysts point out that, in November 2006, a U.S. federal judge had struck down the legality of a separate (and

unrelated) blacklist of "specially designated global terrorists," which was created and used only by the United States soon after the September 11 attacks. In her decision, the judge said that the executive order creating the list violated the Constitution because it "[provided] no explanation of the basis upon which these [groups] and individuals were designated." But even in the wake of this particular decision, others say that it will be difficult to challenge the legality of the Resolution 1267 list because an American court would not have jurisdiction to hear such a case.

Critics also believe that the current de-listing process is vague. In order to remove the name of an individual or entity, the guidelines simply say that "the petitioner should provide justification for the de-listing request, offer relevant information, and request support for de-listing." Without clearer guidelines or even criteria to de-list, critics contend that the provisions of Resolution 1267 will be viewed as procedurally unfair. Critics also point out what they believe to be other shortcomings. For example, only the countries of residence of the listed people or entities are permitted to submit de-listing requests to the Security Council, which may be problematic if a particular state refuses—for whatever reason—to forward such requests. But supporters of Resolution 1267 argue that the sanctions committee and its deliberations were not designed as a court or tribunal providing all of the rights and guarantees associated with an actual judicial system. One high-ranking diplomat said: "Obviously, the UN is not a court, and sanctions are not a criminal punishment. Terrorist designations made by the Security Council are based on international security and policy considerations . . ."

Others believe that Resolution 1267 is not being implemented in an even-handed manner because it permits each UN member state to codify its own de-listing procedures. In Canada, for instance, a person or entity seeking removal from the list must petition a government official in writing. Unless there is a substantial change in information, the person or entity can only submit one petition. The government then informs the petitioning person or entity of its decision within 60 days. But other UN member states have imposed actual penalties on listed persons or entities. For example, in Australia, it is a "criminal offense to hold assets that are owned or controlled by terrorist organizations or individuals, or to make assets available to them, punishable by up to five years imprisonment."

Some commentators also say that Resolution 1267 has been ineffective in ending the threat posed by the Taliban and Al Qaeda. They say that the bulk of funds raised by these groups comes from private donations, which are difficult to track, especially in regions of the world where governments are still implementing regulations to track suspicious financial transactions. One analyst emphasized that while Resolution 1267 has given more insight into the financial tools used by terrorist organizations, many funding sources are still unidentifiable, and what is currently known may be mere speculation.

In response to complaints concerning the lack of transparency concerning the listing and de-listing processes, the Security Council, in November 2006, amended its listing guidelines. For example, one new guideline states that a country proposing a new listing "should provide as much detail as possible . . . including: (1) specific findings demonstrating the association or activities alleged; (2) the nature of the supporting evidence (e.g., intelligence, law enforcement, judicial, media, admissions by subject, etc.); and (3) supporting evidence or documents that can be supplied." But an analyst noted that the amended guidelines do not require the UN to contact individuals who are placed on the consolidated list. Furthermore, in December 2006, the Security Council passed Resolution 1730, which calls on the UN Secretary-General to establish "a focal point [within the UN Secretariat] to receive de-listing requests" from listed individuals. This focal point would then forward the request to the government which had placed the individual on the list. Experts say that while, under earlier procedures, a country could refuse to forward a de-listing request to the UN, the new procedure "enabled affected persons to submit petitions directly and independently."

But others note that the resolution does not offer any more assurance that an individual's case will be heard or expedited by the country which had made the original listing request. One analyst said: "It does not give the [affected persons] the right to participate in the review process, nor does it constitute an independent review mechanism. Removal from the list is still possible only with the consent of all governments represented in the [Sanctions] Committee."

UNITED NATIONS:

Is the Human Rights Council breaking with its past?

Even before its inception last year, the United Nations Human Rights Council (or "Council") has been the target of strong criticism. Some point out that many dictatorial governments would be able to become members of the Council, which is supposed to promote human rights around the world. Human rights advocates, on the other hand, said that a rigorous membership process and a new mandate for this newly-created body would restore the credibility of the UN in the area of human rights. But detractors charge that the priorities of some of the Council's current members and their sponsorship of recently-passed (and highly-criticized) resolutions are already hobbling that body's mission.

According to the General Assembly resolution (60/251) creating the Council in March 2006, the Council is not only responsible for promoting universal respect of all human rights and fundamental freedoms, but should also address situations of gross and systematic violations of human rights, among many other tasks. While the Council may also make recommendations on how the UN should respond to violations of human rights, it is not required to do so. The resolution also states that the work of the Council "shall be guided by the principles of universality, impartiality, objectivity, and non-selectivity."

The 47-member Council replaced the Commission on Human Rights, which was also entrusted with reviewing and investigating human rights practices and violations around the world. (Critics note that some of the worst offenders of human rights—including the governments of Libya, Syria, China, and Sudan—sat on the Commission in order to deflect attention away from their own human rights abuses or simply to criticize others for political reasons.) Analysts say that gaining membership on the Council has become more rigorous—a country must receive support from at least 96 (or half) of all UN member countries. Furthermore, while all UN member nations must eventually submit their human rights practices to a "universal periodic review" conducted by the

Council, the newly-elected members of the Council will face scrutiny before all others. Even a group critical of the Council described this review system as a "major innovation."

While higher standards for membership have deterred many dictatorial governments from running for Council seats, critics point out that several countries that had served on the Commission on Human Rights—including China, Cuba, Pakistan, Russia, and Saudi Arabia—have gained membership on the Council anyway. (The United States—citing many shortcomings—voted against the creation of the Council, and currently has what is called "observer" status, which allows it to attend meetings, though it cannot vote on formal Council matters.) But human rights groups say that a majority of countries (37 out of 47) now serving on the council are (to varying degrees) considered democracies, and that well-known human rights violators are a "reduced [but still significant] minority." But other political analysts assert that over half of the Council members "fail to meet the basic standards of a free democracy." Supporters also argued that the creation of the Council was the "best institution achievable in a General Assembly vote," and that a supposedly flawed human rights body was preferable to having none at all.

A human rights expert added that, through the passage of these resolutions, the [UN Human Rights] Council "already has garnered a level of condemnation that its predecessor took decades to achieve."

The Council is not related to other existing UN bodies that deal with human rights. For example, the Office of the High Commissioner for Human Rights is a department within the UN Secretariat responsible for coordinating activities among a score of other human rights offices and committees within the United Nations (and is also under the close direction of the UN Secretary-General who, under the UN Charter, is described as that body's "chief administrative officer"). The UN Human Rights Committee, on the other hand, is a "body of [18] independent experts that monitors implementation of the International Covenant on Civil and Political Rights" by UN member nations. The Council, in contrast to these two groups, has a much broader mandate, and its membership consists only of UN member governments who set the agenda and priorities for the group independently from the UN Secretary-General.

Special Session resolutions	Excerpts from the resolution	Vote count
A/HRC/S-1/L.1/Rev.1 *July 6, 2006, concerning human rights situation in the Occupied Palestinian Territory*	• Expresses "concern at the violations of human rights of the Palestinian people caused by Israeli occupation" • Demands that Israel end its military operations in Palestinian territory • Demands that Israel "refrain from imposing collective punishment on Palestinian civilians" • Decided to dispatch fact-finding mission on situation of human rights in occupied Palestinian territory	• 29 in favor • 11 against • 5 abstentions (including South Korea, Mexico, and Switzerland)
A/HRC/S-2/L.1 *August 11, 2006, concerning the grave situation of human rights in Lebanon caused by Israeli military operations*	• "Strongly condemns the grave Israeli violations of human rights and breaches on international humanitarian law in Lebanon" • Condemns Israeli bombardment of civilian infrastructure • Dispatched a fact-finding mission to investigate the targeting and killing of civilians by Israelis and assess the extend and deadly impact of Israeli attacks on human life	• 27 in favor (including Russia, Brazil, China, India, Peru, and South Africa) • 11 against • 8 abstentions (including South Korea and Switzerland) • 1 not voting
A/HRC/S-3/1 *November 15, 2006, concerning Israeli military incursions in Occupied Palestinian Territory*	• "Expresses shock at the horror of Israeli killing of Palestinian citizens" • Denounces the Israeli destruction of Palestinian homes • Calls for the "immediate protection of the Palestinian civilians in the occupied Palestinian territory in compliance with human rights law"	• 32 in favor (including China, Cuba, and Russia) • 8 against • 6 abstentions (including France)
Decision S-4/101 *December 13, 2006, concerning the situation of human rights in Darfur*	• "Expresses its concern regarding the seriousness of the human rights and humanitarian situation in Darfur" • "Decides to dispatch a High-Level Mission to assess the human rights situation in Darfur and the needs of the Sudan in this regard"	• Passed unanimously

The Council must convene at least three regular sessions a year (for a total of at least ten weeks). It also may convene special (or emergency) sessions when necessary upon the request of one-third of its 47 members. During its first session in June 2006, Council members established, for example, a working group which will propose recommendations next year for a universal system of reviewing the human rights practices of UN member states. Still, some analysts worry whether that working group will make significant and meaningful progress. They note that countries with questionable human rights practices have proposed that the information which would form the basis of a country's review should come only from "the government of the country under review," and that a review should also be based on each country's "religious and socio-cultural specificities."

The Council had also convened four emergency sessions in 2006. But detractors believe that some Council members had convened some of these so-called emergency sessions in order to score political points against long-standing adversaries. Currently, a bloc of 21 Council members (who also happen to be part of a separate group outside of the UN called the Organization of the Islamic Conference or "OIC") has sufficient numbers to convene emergency sessions concerning what it believes to be urgent human rights violations. Three of these sessions had focused solely on Israel and its military actions in Lebanon against the terrorist group Hezbollah. With a slim majority, the Council had managed to pass several resolutions "criticizing Israel for abuses during military operations in South Lebanon." (See the table for excerpts and vote count from each resolution.)

In response, American, Israeli, and other officials said that Israel was being unfairly singled out, and that the Council's work was not being guided by the principles of "universality, impartiality, objectivity, and non-selectivity" as required under the original resolution creating the Council. Critics also say that these resolutions did not mention that provocations by Hezbollah had triggered the fighting. One commentator said that "the Council's first steps are already treading down the path of selectivity and politicization that . . . led to the demise of the Council's predecessor, the discredited Human Rights Commission." A human rights expert added that, through the passage of these resolutions, the Council "already has garnered a level of condemnation that its predecessor took decades to achieve."

To its credit, the Council did unanimously pass a resolution—concerning the deteriorating human rights situation in Darfur—during its fourth emergency session in December 2006, but only after the world community expressed outrage over past Council inaction. Human rights experts believe that hundreds of thousands of people were killed (and continue to be killed) in an ongoing civil war in Darfur, which is a province in Sudan. Others have accused the Sudanese government and its militias of engaging in war crimes. The Council's human rights envoys also presented reports in September 2006 containing long lists of violations in other countries such as North Korea and Belarus. But the Council itself did not successfully pass any resolutions or statements concerning these countries and their human rights practices. The former UN Secretary-General even commented that "there are surely other situations, besides the one in the Middle East, which would merit scrutiny at a special session . . . I would suggest that Darfur is a glaring case in point." He later said: "Sixty years after the liberation of the Nazi death camps, and 30 years after the Cambodian killing fields, the promise of 'never again' is ringing hollow."

Analysts have offered a variety of ways in pushing the Council to strengthen human rights standards and investigate violations occurring around the world. One advocate from a well-respected human rights group believes that the passage of the Israeli resolutions resulted partly from "the absence of leadership from states that supported the creation of a stronger, more effective Council." She said that "the European Union and Latin American states have been anemic in raising their voices to protect human rights," and that these countries "have been hamstrung by their desire to first achieve consensus." Another legal advocate wrote: "Why is the Council failing? The problem is not the concept . . . but its implementation. No one was surprised that the [OIC] would use the Council to try to advance its agenda on Israel. What's surprising is the flat-footed response from the other Council members." In order to counterbalance blocs such as the OIC, human rights supporters are urging the democratic nations on the Council to be "more assertive and proactive, rather than just reacting" to initiatives from the OIC.

Other experts suggest that these democratic members give much greater support to swing states that are under political and domestic pressure to vote with dictatorial governments within their respective regional blocs. One commentator said that "the failure of the governmental supporters of human rights to put forward a compelling vision and to do the needed outreach and lobbying has meant that these swing voters have sided with their regional blocs, led by confirmed opponents of human rights." Others have urged the United States to reconsider joining the Council.

But some political experts are not surprised by the work of the Council to date. One points out that the UN "necessarily reflects not only its own ideals, but also the interests and internal conditions of its member states," and that many of these states would rather protect their national interests instead of strengthening human rights standards. To underscore this point, analysts note that, in November 2006, the Social, Humanitarian & Cultural (or Third) Committee of the UN General Assembly voted in favor of a resolution which "stresses the need to avoid politically motivated and biased country-specific resolutions on the situation of human rights." Political experts say that the aim of the resolution is to discourage all UN human rights bodies (including the Council) from singling out specific countries for their poor human rights practices.

INTERNATIONAL MONETARY FUND:

Does membership have its rewards? Reforming the IMF

Late last year, the member nations of the International Monetary Fund (IMF) approved what many say are the most significant plans to reform that organization's governance procedures since its founding. Analysts say that the IMF is trying to increase its legitimacy (especially among developing countries) as economies around the world become further dependent on each other. But some critics say that many of the proposed IMF reform plans do not go far enough to increase the stake of smaller countries, and that more work is required to rebuild its credibility.

The IMF is the international financial organization that promotes the stability of exchange rates among different national currencies and tries to bolster the supply of foreign currency reserves in the banking system of member nations so that

basic world commerce can take place in a predictable manner. Composed of 184 member nations, the IMF is not an aid agency or a development bank (such as the World Bank) that provides funding for specific projects. Instead, the IMF is best known for providing a fund (as its name suggests) to those countries having balance-of-payment problems such as shortages in their foreign currency reserves. For example, at the start of the Asian financial crisis in 1997 when, say, American investors began to withdraw tens of millions of dollars from economically-troubled countries such as Korea, Thailand, and Indonesia, the banking systems in these countries naturally saw a sharp decline in their dollar reserves which are used to pay debts and obligations to the United States. IMF member nations finding themselves in this situation can request a variety of temporary loans (unflatteringly known as "bailouts") which must be paid back in full so that other countries will be able to draw from the IMF. These loans are also conditional—a borrower must adopt certain policies to correct its economic problems in return for a loan.

The IMF is "run by the countries that are least affected by its policies," said one critic. "You begin to wonder why the developing countries bother to turn up."

The bulk of the IMF's funds come from "subscriptions" (also known as "quotas") paid by member nations when they first join the organization. These quotas reflect, in part, the size of a member's economy in the overall world economy. In setting quotas, the IMF uses a complex formula taking into account various factors of a country's economy, including gross domestic product and official reserves. The United States currently pays 17.14 percent of all quotas (the highest in the IMF). When a country in economic distress needs to draw from the fund, it may request loans equal to its quota every year.

Political analysts say that a country's quota also determines its decision-making heft within the IMF. Unlike organizations such as the United Nations which gives its members a single vote, the IMF uses a weighted voting system where larger and wealthier member nations are given more votes than their smaller counterparts. While every member is given a minimum of 250 votes, the IMF grants additional votes based, in part, on a country's quota. For example, because the United States currently pays the highest quota, it also has the largest number of votes—371,743 out of 2,208,456, or 16.83 percent of all votes. (The island nation of Palau—with 281—has the smallest number of votes.) According to current rules, approval of IMF policies requires 85 percent of all votes. Analysts point out that because the United States has over 16 percent of all votes, it can veto any measure it does not support.

In recent years, many IMF members have been calling for the organization to reform its governance rules, procedures, and voting system, which they say reflects the world's balance of power as it existed in 1944 (the year of the creation of the IMF). "[F]und governance arrangements have not kept pace," said one commentator. "They reflect the economic structure of the postwar period rather than that of the 21st century." For example, political analysts point out that the distribution of votes (which, again, are based on a country's quota) did not keep up with several growing economies. While China's economy represents 15 percent of global output, its allocation of votes stands at 2.9 percent. On the other hand, Belgium has 2.2 percent of votes even though its economy represents less than one percent of global output. They also point out that while Asia accounted for around 25 percent of the world's economic output, "its share of fund quotas was a third less by proportion." These various examples prompted the chief of the IMF to say: "[T]he relative quotas and voting shares of our members do not adequately reflect the greatly increased economic weight of major market economies in the global economy." Another analyst put it more bluntly: "The quotas and representation of a number of fast-growing emerging market economies are substantially out of line with their global economic weight."

In October 2006, the executive board of the IMF (which is composed of representatives from its most influential members) agreed to reform some of the IMF's procedures in order to increase the stakes of the smaller members. One high-ranking official described the decision as "the biggest reform to the governance of the IMF for 60 years." The IMF announced that reform would come in two stages. During the first stage, the IMF would give China, Mexico, South Korea, and Turkey more votes to reflect their growing economies. While other IMF members will not see a decrease in their actual number of votes, their proportion of votes will decrease relative to the overall number of votes. Others point out that the vote increase will not affect the veto power of the United States. "[Neither] the initial nor the future increases in the shares of these [four] countries," said one commentator, "would reduce the American share by more than a fraction of a percentage point." (The proposal to increase the votes for China, Mexico, South Korea, and Turkey later passed with over 90 percent of all votes. China, for instance, will see its share of votes increase to 3.7 percent from 2.9 percent while South Korea will see an increase to 1.3 percent from 0.8 percent.)

During the second stage of reforms which must be completed by 2008, the IMF will consider a variety of other measures. One includes a proposal to increase the minimum number of votes given to every member nation, which stands at 250 and hasn't changed since 1944. Critics say that this particular measure still won't give enough leverage to developing countries to make a

significant difference in the governance of the IMF. One analyst estimated that the 80 poorest members of the IMF have 10 percent of the vote among them. Furthermore, some say that the proportion of the total number of basic votes has fallen from 11.3 percent to 2.1 percent in recent years, meaning that any increase will not substantially affect the voting power of the poorest countries. And even if the IMF decided to double the number of basic votes, said another critic, it would increase the number of votes among poor members by less than one percent. But policy analysts say that it is highly unlikely that countries which contribute substantial funding to the IMF will allow smaller nations to take greater control over its use and disbursements.

The IMF will also consider revising its formula used to determine quotas, which will, in turn, affect the number of votes a country receives. Some have proposed that any formula calculating quotas should be based "predominantly" on a country's gross domestic product. But smaller nations, including many in Europe, say that a revised formula should also give considerable weight to other criteria, including the openness and transparency of a country's economy. Other reform measures include giving better representation to smaller countries in the management of the IMF. While large countries such as the United States, Germany, and Japan have single seats on the IMF's executive board, developing countries, including Brazil, must share one seat among eight countries.

Unless it undertakes some attempt at reform, political analysts say that the IMF will have further eroded its legitimacy among developing countries. "The failure to reform governance in recent years," said one expert, "[was] undermining the authority and effectiveness of the IMF." One critic of the IMF pointed out that the countries which are the least likely to borrow from the fund (mainly wealthy nations) have the most influence within that organization. The IMF is "run by the countries that are least affected by its policies," he said. "You begin to wonder why the developing countries bother to turn up." Others point out that many developing countries view the IMF with great suspicion and distrust because, beginning in 1997 during the Asian economic crisis, that organization required economically-troubled member nations to implement what some believe were overly harsh austerity measures before it disbursed loans. Even some IMF officials have admitted that, with hindsight, some if its measures had caused more harm than anticipated, and that its analysts were prescribing ad hoc measures simply to keep up with fast-changing developments on the ground.

But supporters of the IMF point out that the 1997 financial crisis simply revealed that many of these countries had long pursued unsound and unsustainable fiscal policies. In responding to criticisms that the IMF had actually caused these problems, one analyst said: "At its heart, the austerity critique confuses correlation with causation. Blaming the IMF for the reality that every country must confront its budget constraints is like blaming the [IMF] for gravity."

Some analysts point out that, in recent years, many developing countries which had previously received (and then later repaid) IMF loans have been increasing their foreign currency reserves to avoid dealing with the IMF again. "Lack of faith in the IMF," said one commentator, "is one reason often cited for developing countries' vast accumulation of foreign exchange reserves in recent years." In fact, some countries such as China—which had not been overly affected by the 1997 Asian financial crisis and did not need IMF assistance—have been lending out some of their foreign currency reserves to many developing countries in Africa and Southeast Asia. Other analysts also say that because more private capital is available for developing countries, "there is far less need for IMF funds."

But financial experts argue that the benefits of having developing countries cooperate with the IMF outweigh the disadvantages. They note that, in addition to providing emergency loans, the IMF also "assesses a country's exchange rate, monetary and fiscal policies; financial sector issues; and risks and vulnerabilities." The IMF, say its supporters, also encourages countries to pursue sounder economic policies whose short-term effects may be painful, but will help a country's economy in the long-term. Furthermore, while future financial crises will affect developing countries more than their wealthier neighbors, political analysts say that growing economic problems (and their accompanying social unrest) in one country can easily spread across an entire region.

Even with these reform measures, some question whether the IMF will better represent its member nations and rebuild its trust among some of its previous recipients. Some observers said that influential countries such as Brazil and India may have voted against the reform plans, but that the vote tally was not made publicly available. A political analyst believes that these countries will most likely make strong demands during the second round of reforms. Others have questioned whether the reform plans will actually convince its members to implement much sounder economic policies. One analyst pointed out that while the IMF monitors the economic policies of its member nations, it cannot impose its recommendations. "One shouldn't look to IMF surveillance as a solution to global imbalances," said an official.

INTERNATIONAL TREATY:

A better way to regulate toxic chemicals?

In December 2006, the member nations of the European Union (EU) reached an agreement on a new legal framework to regulate the use of all chemicals, including those found in a wide array of household products such as hair spray and detergent, and those used to manufacture everyday products such as computers and furniture. Supporters say that the new regulations will better protect public health and the environment by requiring companies to provide more information about the chemicals they manufacture and use. But others believe that complying with the new law will be too expensive and burdensome.

Supporters describe the REACH framework "as the most important policy addressing toxic chemicals in 30 years," claiming that a single, comprehensive system will better inform consumers about the health risks posed by certain chemicals and protect the environment.

Under the "Registration, Evaluation, and Authorization of Chemicals" (or REACH) system—whose aim is to "improve the protection of human health and the environment from the hazards of chemicals"—all companies that manufacture over one metric ton of chemicals in or export chemicals to the EU must register their existing and new chemicals in a central database, parts of

which will be accessible by the general public in the coming years. According to an EU official, registration involves "submitting a technical dossier containing information on the substance [in question] and information on how to effectively manage the risk entailed by using it." Those companies that make or export over 10 metric tons of a particular chemical must also submit a "Chemical Safety Report," which will include more detailed information about the chemical and how it will be used.

Analysts estimate that the REACH system—which will come into force on June 1, 2007—will cover approximately 30,000 chemicals. If a company fails to register a chemical, it cannot manufacture that chemical in or export it to the EU market. Registration deadlines for chemicals will vary according to volume of production, with higher volumes facing earlier deadlines. All countries exporting chemicals to the EU will also have to comply with the REACH system, including the United States, which exports over $20 billion worth of chemicals to Europe every year. EU officials say that mounting public concern over the safety of using certain chemicals, their effects on the environment, and the tremendous costs involved in cleaning up toxic waste sites had spurred the idea for a REACH system.

The final agreement also requires companies to obtain government authorization to use the most hazardous and toxic substances (i.e., those chemicals classified as "carcinogenic, damaging to reproductive systems, or very bioaccumulative"). But, at the same time, it also requires companies to find alternatives to these toxic substances. Under REACH procedures, a company applying for permission to use the most dangerous chemicals must first submit "an analysis of possible alternatives." If alternatives are available, the company must "submit a substitution plan showing how they will phase out the [toxic] substance." If alternatives are not available, a new government agency overseeing the REACH system—known as the European Chemicals Agency—may still authorize the use of a toxic chemical if the manufacturer: (i) can demonstrate that it can adequately control the safe use of the substance and (ii) submits a "research and development plan setting out a program to identify alternatives." The regulations further state that if a company cannot quickly find an alternative, it may still receive government permission "if an overwhelming social and economic case for the substance can be demonstrated."

Officials say that these substitution procedures will prevent REACH from suddenly disrupting the chemicals trade while still pushing for companies to find alternatives to the most toxic chemicals. (According to government statistics, the EU is the world's largest producer of chemicals, accounting for 28 percent of global output valued at $776 billion. The industry itself directly and indirectly employs over 4.7 million people.) Supporters of a more stringent REACH system had pushed for provisions which would have made it mandatory for companies to find substitutes for the most dangerous chemicals and would have otherwise banned their use. But negotiators had deleted this provision in favor of the current substitution plan. An environmental advocate said that "the only adequate form of control for such [toxic] substances is substitution when possible," and described the current substitution plan as a "giant loophole." EU officials say that they will conduct a review of the effectiveness of the REACH system in 2013.

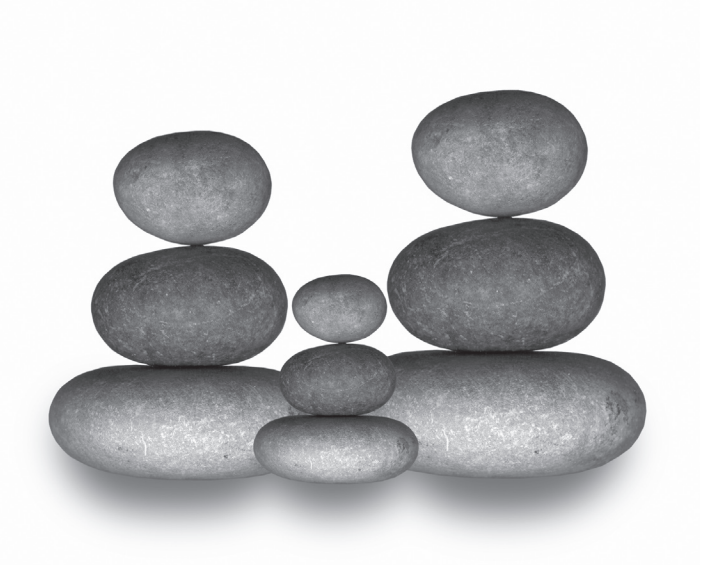
Under the terms of the REACH framework, the European Chemicals Agency—over the next three years—will work with the chemicals industry in developing a list of the most dangerous substances requiring government authorization. They estimate that the agency (which will become fully operational in 2008) may place approximately 1,500 substances on this list. Many critics—mainly the chemicals industry and business associations—have described such as list as a "black list," which could lead consumers to demand products made without the chemicals on that list.

Supporters describe the REACH framework "as the most important policy addressing toxic chemicals in 30 years," claiming that a single, comprehensive system will better inform consumers about the health risks posed by certain chemicals and protect the environment. Under the previous patchwork of over 40 separate pieces of regulations, chemicals created before 1981 (numbering over 100,000) did not have to undergo safety testing while those produced after that date (over 4,000) required more rigorous analysis. One official said that these "shortcomings [had] potentially put human health and the environment at risk." In fact, some analysts claim that almost 99 percent of the 400 million tons of chemicals sold in the EU every year were not subject to testing under previous EU rules. Under the REACH system, officials say that "the hazards and risks of chemicals are more systematically identified," and that this will "contribute to the prevention of health problems caused by exposure to chemicals, leading to a lower occurrence of diseases and preventable death . . ."

Furthermore, while previous regulations required EU member governments to identify potential risks from using certain chemicals, the REACH system says that the chemicals industry must now pay for the testing and registration requirements under the current system, which will be phased in over an 11-year period and will cost between $3 billion and $7 billion to implement, according to EU officials. They also believe that the health benefits of the REACH system will outweigh any costs. But industry executives dispute figures provided by government officials, saying that the full implementation of the REACH system could cost over $70 billion over the same period. They also say that the

legislation will disproportionately hurt smaller manufacturers who may not be able to afford the testing of their products, and could lead to the loss of almost 2 million jobs.

Some legal experts believe that several provisions in the REACH system could violate World Trade Organization (WTO) rules. For example, one expert argued that the regulations could be viewed as a "technical barrier" to trade. (The WTO prohibits its member nations from implementing barriers to trade which can distort competition, including barriers disguised as regulations.) According to WTO rules, "technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective." Opponents of the REACH system have argued that the EU could have implemented a less costly but comparatively effective set of regulations with minimum effects on the international chemicals trade. But an official recently stated that the EU "is absolutely convinced that REACH is compatible with WTO rules," although he did not provide more details.



INTERNATIONAL TREATY:

Will a new convention improve the intercountry adoption process?

Almost 13 years after it had signed an international adoption treaty, the United States announced that it will finally ratify the convention this year. Supporters say that this treaty will make the process of intercountry adoptions more transparent and also help to curb problems such as child trafficking and abduction. But others note that several nations which serve as the primary sources of foreign adoptions are either not in compliance with the terms of the treaty or have not even signed it.

In May 1993, the Contracting States concluded negotiations for the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (or "Hague treaty") whose primary aim is to prevent the abduction, sale of, or trafficking in children by "[establishing] safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized by international law." Under the treaty, all Contracting States (i.e., the States of Origin and Receiving States) must appoint a "central authority" (such as a government agency) to implement and enforce the provisions of the agreement. The central authority in the State of Origin—which is the country where the adoptable child was born—must prepare, for instance, a report detailing "information about [the adoptable child's] identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child . . ."

It must further ensure that the mother of the adoptable child had given her consent for adoption freely, without induced payment, and that the consent was given after the birth of the child. The central authority must also fully inform all affected parties—including prospective adoptive parents and biological parents—of the legal effects of the intercountry adoption. Most importantly, the State of Origin must ensure that the intercountry adoption serves the "best interests of the child." The agreement came into force in May 1995. As of February 2007, seventy countries have ratified the Hague treaty.

Under the treaty, the Receiving State—which is the country where the adoptable child will reside after being adopted—must ensure that the prospective adoptive parents are eligible and well-suited for the adoptable child, that the child is authorized to enter and reside permanently in that State, and, if needed, that the prospective adoptive parents receive counseling. Legal experts say that the adoption process is essentially a private legal matter between the prospective adoptive parents and the State of Origin, which has the authority to set its own rules and procedures as long as they are in compliance with applicable international agreements such as the Hague treaty. In fact, some analysts say that the government of the Receiving State cannot become directly involved in the adoption process unless the prospective adoptive parents need, for example, to clarify documentations, make inquiries on a specific case, or feel that the State of Origin is discriminating against them.

The Hague treaty also makes the adoption process "more transparent and predictable" for the adoptive parents. Under the treaty, adoption agencies must disclose all costs of the adoption process up front so that the adoptive parents will not be surprised by last-minute fees and other hidden costs. Also, because the treaty requires agencies to collect, for instance, health information on the adoptive child, the adoptive parents will have much more information concerning the child. According to experts, over one million children are trafficked or abducted every year. Many child traffickers promise the biological parents that, through an intercountry adoption, their children will have a better life. They also allegedly pay biological parents about $320 for each child, which, in many instances, is more than the biological parents earn in a year. Although many children are successfully adopted, observers note that others become sex workers or are exploited for cheap labor.

Critics say that the Hague treaty won't stop child trafficking because, according to one expert, some of the countries that serve as the largest sources of U.S. foreign adoptions—such as Russia, Guatemala, and South Korea—either did not ratify or are in violation of terms of the Hague treaty. (Analysts say that these nations serve as the second, third, and fourth largest sources of U.S. foreign adoptions, respectively.) Without the cooperation of these countries, analysts say that many children will continue to go through an adoption process that will not serve their best interests. For example, although the Hague treaty had come into force over

a decade ago, critics point out that, in 2005, only 58 percent (or 13,241) of all adoptive children were adopted from countries that had ratified the Hague treaty (with the significant remainder coming from non-signatory nations). Analysts say that the relatively fast adoption process in non-Convention countries accounts for the high number of adoptions from those countries. In Guatemala (which is considered to be in violation of the Hague treaty), the adoption process is still primarily administered by approximately 500 private lawyers, notaries, and baby brokers instead of being handled by judges, courts, and other professional administrators. In comparison to other States of Origin where the adoption process can last anywhere between three months and two years, some say that an adoption in Guatemala can take only a week.

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The United States signed the Hague treaty in 1994, and says that it intends to ratify the agreement this year. Analysts say that the United States adopts more children from abroad than any other country in the world. In 2005 alone, American families adopted 22,739 children. But the United States had been unable to ratify the Hague treaty for the past 12 years because it had not created a central authority that would oversee the implementation of the treaty. It took a step closer to ratification when it enacted the Intercountry Adoption Act of 2000 (ICA) in October 2000. The ICA appointed the U.S. Department of State as the country's "central authority." The ICA also says that adoptive children "should not be classified as immigrants in the traditional sense," and, instead "should be treated as children of United States citizens."

Under the treaty, Contracting States still retain their national authority to enact those adoption guidelines which they believe will ensure that "each child [has] the opportunity to grow up in a 'family environment, in an atmosphere of happiness, love and understanding,'" and also to ensure that an intercountry adoption serves "the best interests of the child." China, for instance, recently announced that it will tighten its international adoption guidelines. That country is currently the largest source of U.S. foreign adoptions. In 2005 alone, American families adopted 7,906 Chinese children, and over 55,000 Chinese children since 1991.

As of May 2007, the Chinese government will implement new adoption guidelines to recruit parents that it believes will provide each adoptive child with the greatest chance of living in a household with healthy and economically stable adoptive parents. For example, the new guidelines will require prospective adoptive parents to be married for at least two years and have no more than two divorces between them. If either spouse is divorced, the couple cannot apply for adoption in China for at least five years. Current adoption guidelines prohibit adoption by a homosexual couple, and analysts say that the prohibition is unlikely to change. Furthermore, each prospective adoptive parent must have a body-mass index of less than 40, no criminal record, a high school diploma, no health problems, and must not be taking medication for anxiety and depression. The prospective adoptive parents must also have a net worth of at least $80,000 and an income of at least $10,000 per person in the household.

INTERNATIONAL TREATY:

Disabling discrimination against the disabled?

In December 2006, the member states of the United Nations unanimously adopted a new international treaty which calls on them to prohibit discrimination against the hundreds of millions of people living with a disability. According to disability rights groups, the Convention on the Rights of Persons with Disabilities (or "CRPD treaty") is the culmination of a "global effort to realize that not only are persons with disabilities a sizable minority that has needs . . . but also that the discrimination that accompanies this minority group is unacceptable." Although analysts say that there is strong support for the CRPD treaty (which is the first human rights treaty passed in the 21st century), not all major countries such as the United States have agreed to ratify it.

Drafters of the convention state that the CRPD treaty's aim is to "guarantee an effective protection of disabled people and ensure that they can enjoy the full range of human rights: civil, political, economic, social and cultural" by prohibiting discrimination against them in many areas of life. Advocates say that simple discrimination (where people are judged solely by their particular disabilities) is one of the primary reasons why such people are not treated well and live poorly in comparison to people without disabilities. Analysts say that the convention views such discrimination as a human rights violation (rather than a social welfare or medical issue) so that governments may take stronger legal measures to discourage such practices. One legal analyst said that although already-existing human rights treaties are supposed to protect the rights of people with disabilities, "the reality, unfortunately, has not followed the theory."

According to the United Nations Development Programme (UNDP), approximately 10 percent of the world's population (or 650 million people) live with a disability, and 80 percent of this number lives in developing countries where disability rights are weak or non-existent. Observers report that most countries around the world do not have in place a legal framework to protect people with disabilities from everyday discrimination. (Currently, only 45 countries have legislation dealing with disability rights.) The convention will be formally opened for signature beginning in March 2007. Analysts expect more than 100 countries to sign and ratify the convention, which encourages (but does not compel) countries to enact domestic laws and other measures to protect those with disabilities, including laws that prohibit customs and practices that discriminate against the disabled. The 40 articles in the convention list what should be the broad rights of persons with disabilities without creating any new or additional rights. (The convention itself does not define the term "disability.")

For example, Article 6 (which focuses on women with disabilities) says that "States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention." Article 13 (concerning access to justice) calls on States Parties "to ensure effective access to justice for persons with disabilities on an equal basis with others." On education issues, Article 24 says that States Parties "shall ensure that persons with disabilities are not excluded from the general

education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary and secondary education on the basis of disability."

Article 27 (dealing with work and employment issues) calls on States Parties to prohibit discrimination "on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment against the disabled in the work place." It also calls on them to provide disabled people with access to general technical and vocational guidance programs, placement services, and vocational and continuing training. The Convention also contains provisions covering areas such as health, equal recognition before the law, and adequate standard of living and social protections for the disabled. Analysts say that, although many of these provisions are broadly worded (and not legally enforceable), they could eventually provide the legal basis for advocates to push for stronger measures in helping and protecting the disabled.

Drafters of the convention say that discrimination facing disabled people is prevalent and commonplace throughout the world. The United Nations Children's Fund estimates that 90 percent of children with disabilities in developing countries do not go to school at all. A 1998 UNDP study found that the global literacy rate for adults with disabilities is as low as three percent for men and below one percent for women. Advocates say that disabled women fall victim to forced sterilization, rape, and sexual abuse. The UN also estimates that, in developing countries, 98 percent of disabled persons do not work because many employers refuse to hire them solely on the basis of their disability. Some studies have shown a direct correlation between having a disability and living in poverty. In other countries, disabled people cannot exercise their right to vote because many governments do not provide accommodations for the disabled. Many physically disabled people are, for instance, unable to gain access to polling stations. Braille ballots are often unavailable.

The negotiations for the CRPD treaty began in December 2001 when the UN General Assembly established an ad hoc committee "to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, based on the holistic approach in the work done in the fields of social development, human rights and non-discrimination." In August 2006, all 192 member states of the United Nations concluded negotiations and agreed to a final text. In order to enter into force and becoming binding upon its signatories, the convention requires 20 countries to ratify the agreement. According to the terms of the convention, two years after ratification, signatory countries must submit reports to an independent committee of experts on measures they have undertaken to fulfill their obligations under the convention. An expert said that the disability treaty could even help people currently living without disabilities because, as the world's age expectancy continues to rise, the "average person [will eventually] live eight years of their life with a disability."

Some countries, including the United States, have already announced that they will neither sign nor ratify the convention, citing various reasons such as concerns over technicalities and funding. But an American official said that the United States still fully supported the improvement of international standards for the protection of the disabled. Another official also noted that the United States had already implemented various federal laws protecting the rights of people with disabilities, including the landmark Americans with Disabilities Act of 1990, which "guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, State and local government services, and telecommunications," according to the United States Department of Justice. Many observers have wondered why the United States will not sign or ratify the CRPD treaty. They note that the United States had provided extensive technical assistance during the drafting process, and that, unlike most other countries around the world, will not have to enact further legislation to comply with the obligations of the treaty. Some political analysts believe that the current administration fears that advocates for disability rights may use the convention as a basis to create further (and costly) rights for the disabled.

TERRORIST FINANCING:

A SWIFT way to combat terrorism?

Shortly after the terrorist attacks on September 11, 2001, the United States passed new laws and regulations to curb terrorist financing and also to make it easier to prosecute individuals engaged therein. But other measures remained largely hidden from public view. In one particular secret program, the United States obtained millions of records from a global financial database. When the existence of this program became public, it ignited criticism from around the world. But American officials defended the record-gathering, arguing that it had played and continues to play a central role in tracking down suspected terrorists and their financial supporters.

According to American officials, in the weeks after the September 11 attacks, the United States had implemented a secret program where government agencies (and not the courts) directly issued administrative subpoenas to an international body called the Society for Worldwide Interbank Financial Telecommunications (or SWIFT) in order to obtain information concerning financial transactions of suspected terrorists, including those belonging to the terrorist group Al Qaeda. "The records mostly [have involved] wire transfers and other methods of moving money overseas," said one analyst. More specifically, the United States Department of the Treasury issued the administrative subpoenas to obtain financial records from SWIFT, which are then examined by the Central Intelligence Agency (CIA).

Officials say that, in many instances, they had successfully used this information to track down, apprehend, and later convict several individuals suspected of engaging in terrorist financing. The program apparently led to the capture of the "most wanted [Al] Qaeda figure in Southeast Asia" who had planned the bombing of a resort in Bali in 2002, and also an individual in Brooklyn, New York, who had allegedly agreed to launder money for Al Qaeda. One person described the SWIFT program as "the biggest and most far-reaching of several secret efforts to trace terrorist financing."

SWIFT itself is an international body that administers a standardized data processing and communications network which allows its members to route information among each other and carry out various financial transactions. One commentator described SWIFT as "the nerve center of the global banking industry." Over 8,000 financial institutions located in 207 countries use the SWIFT network. Its users include "virtually every commercial bank, as well as brokerage houses, fund managers,

and stock exchanges," said an expert. Representatives from SWIFT say that, on a daily basis, its network handles approximately 11 million "messages" (or transactions) worth over $6 trillion. Officials say that SWIFT does not store information concerning routine financial transactions such as ATM withdrawals or checking account balances, and that its network primarily handles transactions among (and not within) nations. Before the creation of SWIFT, different private networks had routed transactions and communications among various financial institutions. But these networks used links and software that were largely incompatible with each other.

While SWIFT has offices around the globe, including the United States, its headquarters are based in Belgium. Under that country's law, SWIFT is structured as a "cooperative," meaning that the body is owned and operated by its member organizations, which number over 2,000. The governance of SWIFT is also overseen by the central banks of such countries as the United States, Belgium, and Japan. Legal analysts say that SWIFT and its operations must comply with Belgian and European Union (EU) banking and data-protection laws. Because SWIFT has offices in the United States, it must also comply with various American regulations.

Once the existence of the SWIFT program became public during the summer of 2006, it created a firestorm of controversy. Legislators and privacy advocates in Europe claimed that, by providing the CIA with records of what are believed to be millions of financial transactions, executives of SWIFT had broken EU privacy and banking laws. They argued that EU regulations do not allow SWIFT to share private financial information with countries that do not have privacy laws that are as strict as those found in Europe, like the United States. Critics also note that the creation of the SWIFT program had never received formal authorization from Congress, and that most members of Congress were unaware of its existence.

SWIFT executives defended their decision to share certain information with American investigators. Because SWIFT has offices in the United States, it had no choice but to comply with American subpoenas requesting financial information from its database, they argued. In addition, a spokesperson said that the subpoenas targeted only those individuals suspected of engaging in terrorist financing, and that a private auditing firm (later revealed to be Booz Allen Hamilton) had supposedly implemented many safeguards to ensure that the data searches were, indeed, "based on intelligence leads about suspected terrorists." But a later investigation revealed that personnel for the program had initially conducted wide searches outside of established criteria, which led to the dismissal of one analyst. Furthermore, another expert said that the SWIFT program had reviewed the financial transactions of thousands of people in the United States.

In defending the legality of the program, U.S. officials said that the International Emergency Economic Powers Act (or IEEPA, which Congress had passed in 1977) gave authority to the President to "deal with any unusual and extraordinary threat" by allowing Executive branch agencies to "investigate, regulate, or prohibit any transactions in foreign exchange and transfers of credit or payments . . ." They say that such language allowed the President to create the SWIFT program in order to curb terrorist financing. Legislative historians note that the Executive branch has—over the last several decades—issued many regulations under the IEEPA imposing sanctions on various countries and entities, such as the Cuban Assets Control Regulation, the Sudanese Sanctions Regulations, the Terrorism Sanctions Regulations, and the Foreign Narcotics Kingpin Designation Act.

Officials also argued that domestic financial privacy laws (embodied in the Right to Financial Privacy Act of 1978) did not apply to the SWIFT program because, under their interpretation of the regulations, they considered SWIFT to be a "messaging service" and not an actual financial institution such as a bank. The 1978 act generally restricts government access to private records from financial institutions without a warrant or subpoena issued by a court. Government lawyers also concluded that the law "protected individual customers and small companies, not major institutions that route money through SWIFT on behalf of their customers." While some legal experts have disagreed with this interpretation, others say that the issue is not clear cut. "Financial privacy laws [in the United States] are murky and sometimes contradictory," said one analyst, later adding that the role of these laws "in national security cases remains largely untested."

After conducting an investigation, a Belgian government commission on privacy protection issued a report in September 2006 which largely concluded that SWIFT had broken Belgian and EU data-protection laws by transferring—"without effective and clear legal basis and independent controls"—confidential and private banking information to American authorities. Furthermore, the commission said that even though SWIFT had offices in the United States, it still had to comply with Belgian and EU data-protection rules. "SWIFT should have realized that exceptional measures based on American rules do not legitimize hidden, systematic violations of fundamental European principles related to data protection," it stated. The EU later issued a report in November 2006 which reached similar conclusions. In February 2007, an agency called the European Data Protection Supervisor called on the European Central Bank (ECB) to urge SWIFT to comply with European data-protection legislation by April 2007. But analysts say that measures passed by the ECB will not be legally binding on SWIFT, adding that the central bank mainly had "moral suasion powers." An executive of SWIFT said: "We are caught between complying with U.S. and European rules, and it's a train wreck. But what we have done saves lives in the U.S. and Europe, and we must not lose sight of that."

Despite the criticisms surrounding the SWIFT program, analysts note that neither the Belgian government nor the EU had explicitly called on SWIFT to stop sharing information with the United States. Instead, they believe that the group (with assistance from EU officials) will put into place more robust internal controls before giving financial information from the SWIFT network to the United States.

WORLD TRADE ORGANIZATION:

Global trade negotiations back on track?

In January 2007, the World Trade Organization (WTO) announced that its member nations had resumed their global trade negotiations, and are again trying to break an impasse concerning agricultural trade, which had previously slowed the progress of talks and forced the WTO Director-General to suspend negotiations last year. While some analysts have expressed hope that a resumption of talks will quickly lead to a conclusion of the current trade round, others question whether the United

States and the European Union (EU) will make significant concessions to keep the negotiations moving forward.

The WTO had suspended negotiations in all areas of trade talks in July 2006 because its member nations failed to reach an agreement concerning agricultural trade. Although current global talks involve negotiations in other economic sectors such as telecommunications, industrial goods, and services, many WTO member governments refused to make progress in these areas until they first reached an agreement concerning agriculture, which is one of the most politically sensitive areas of negotiations.

Many developing countries have a competitive advantage in producing agricultural products and depend on exports of these goods for their main sources of economic growth. But the United States and the EU provide over $300 billion in subsidies to their farmers every year. Smaller and poorer developing countries have complained that they cannot compete against such subsidies (which cover the difference between higher-priced agricultural goods produced in wealthier countries and lower world prices). As a result, many developing countries said that they would not, for example, lower their tariffs on industrial goods (which are mainly manufactured by developed countries). In the following months, one commentator said that "the United States needs to agree to reduce agricultural subsidies, the EU must reduce agricultural tariffs, and India must agree to reduce agricultural and industrial tariffs."

In November 2001, the member nations of the WTO—which is the premier global organization that administers international trade rules and settles trade disputes—agreed to begin the current round of global trade talks (called the Doha Round) to reduce tariffs and other barriers to global trade in areas such as agriculture, services, intellectual property, and investment. The last successful conclusion of global trade talks—called the Uruguay Round—ended in 1994 after negotiations over a period of 7-1/2 years. The World Bank estimates that a successful conclusion to the current round could increase world prosperity by trillions of dollars. The Doha negotiations were set to conclude on January 1, 2005.

The Doha talks also face a political hurdle. Legal observers note that the U.S. president's "trade promotion authority" (or TPA)—which allows the president to negotiate trade agreements with other countries and submit them to Congress for an up-or-down vote without any amendments—will expire on July 1, 2007, and cannot be reinstated without approval from Congress. Many believe that Congress (which is currently controlled by the Democratic Party) will not reauthorize TPA. (Analysts say that the Democratic Party generally views trade agreements with suspicion.) Without such authority, any final trade agreement that the president submits to Congress will be open for amendments. Political analysts believe that any changes to the final agreement will prevent its passage because other WTO members will demand changes of their own.

WORLD TRADE ORGANIZATION:

Stare decisis in the making?

The dispute settlement process of the World Trade Organization (WTO) has handled many cases and issued hundreds of decisions since it came into operation in 1995. On the basis of a growing body of cases and decisions, scholars are trying to determine how a WTO tribunal will decide subsequent disputes by analyzing past decisions. But does the WTO dispute-settlement system actually use precedent when adjudicating particular disputes among its member nations?

The role of precedent is part of a broader legal concept called stare decisis ("to stand by things decided"), whereby a court applies the reasoning behind a prior decision (known as precedent) in order to adjudicate subsequent cases having similar sets of facts. One legal scholar said that stare decisis "allows citizens to have a reasonable expectation of the legal solutions which apply in a given situation." Another analyst added that this concept "promote[s] certainty, stability, and predictability of the law." In the United States and other countries that share similar legal traditions, precedents established by a higher court are usually binding on lower courts within the same jurisdiction. Experts point out that the doctrine of stare decisis does not prevent a higher court from overturning its precedents.

Legal analysts also say that precedents handed down by a court in a particular country apply only within the legal system of that country alone, and that there is no obligation for other nations to follow those decisions. If, for example, the Supreme Court of Ireland—the highest court in that nation—handed down a ruling concerning a particular dispute, that precedent does not apply to any other nation. But scholars note that, in many instances, the courts in one country have cited decisions made by foreign courts (and even international treaties) to add additional support to their conclusions.

With the proliferation of many different kinds of international tribunals, many people assume that these bodies have formally adopted similar legal rules and principles from domestic jurisdictions, including the concept of stare decisis. In particular, the dispute settlement process in the 150-member nation WTO has attracted much attention.

Based in Geneva, the WTO is the premier international organization that sets the rules for international trade and the settlement of trade disputes. It administers three main agreements regulating trade in goods, services, and intellectual property, respectively. Policymakers describe the organization's Dispute Settlement Understanding (DSU)—which is the legal text setting forth the WTO's rules and procedures for settling trade disputes—as the "backbone of the multilateral trading system." In the event of an actual trade dispute among member nations, the WTO creates an ad hoc dispute settlement panel to adjudicate disputes during closed-door deliberations. There are no standing (i.e., permanent) dispute settlement panels because the WTO always creates a new panel to address disputes as they arise. A losing party to a dispute may appeal a panel's report (or decision)—but only on issues of law and legal interpretation—to a permanent Appellate Body, which may uphold, reverse, or modify a panel report. It lacks the power to remand, however. Only by a unanimous vote can the WTO's members, sitting as the Dispute Settlement Body, reject a decision by the Appellate Body. This has never happened.

Unlike other international organizations where adherence to agreements and rules is often voluntary on the part of member nations, adherence to the WTO's rules in regulating international trade and dispute settlement decisions is legally binding on its member nations. In fact, the WTO is considered one of the most powerful global organizations because it allows the winning party of a dispute to enforce panel and Appellate body rulings by, for instance, imposing sanctions on the losing party. Since 1995, the WTO has handled over 350 cases and issued many rulings.

But does the WTO formally apply the concept of stare decisis when resolving particular disputes? In practice, many legal scholars say that the WTO Appellate Body is using what seems to be stare decisis. One legal expert said that in a 2004 decision called "United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina," the Appellate Body stated that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from [dispute settlement] panels, especially where the issues are the same." In a 1996 decision called "Japan—Taxes on Alcoholic Beverages," the Appellate Body stated that its prior decisions "create[d] legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."

But other legal experts point out that neither the words "stare decisis" nor "precedent" appear anywhere in the DSU text. Also, that text does not make any reference (even in a section called "Procedures for Appellate Review") concerning whether the Appellate Body can or should use its prior decisions to help adjudicate subsequent disputes having similar facts. But other analysts argue that the DSU text passively alludes to the use of stare decisis. One expert pointed out that Article 3.2 of the DSU states that "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system," and that using the legal reasoning from past WTO decisions leads to this predictability. Yet others counter that Article 11 of the DSU text says that "a [dispute settlement] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case," and that this assessment would not be possible if a panel made a ruling solely on the basis of a previously decided case.

In a 2006 decision called "United States—Measures Relating to Zeroing and Sunset Reviews," a WTO panel did not follow the rationale of previous Appellate Body reports concerning a prohibition on a statistical methodology called zeroing. More specifically, that panel stated: ". . . while we recognize the important systemic considerations in favour of following adopted panel and Appellate Body reports, we have decided not to adopt that approach . . ." While some may claim that this particular case demonstrates that precedent does not always play a role during WTO deliberations, other legal analysts are quick to point out that the panel did not try to discredit the use of previous Appellate Body decisions. Instead, the panel explained that it did not use a similar approach from previous Appellate Body reports because those reports did not provide "a sufficiently detailed legal analysis" to "warrant the conclusion that zeroing is prohibited in all circumstances." In fact, the panel seemed to support the use of precedent when it stated: "[I]t is well established that panel and Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties to the dispute, but that such reports create 'legitimate expectations' among WTO Members and should therefore be taken into account where they are relevant to any dispute."

So does the WTO dispute settlement system use stare decisis? An authoritative trade scholar said that "international tribunals surely do not follow stare decisis." But, given that the Appellate Body has clearly cited the legal rationale of past decisions when deciding the outcome of subsequent cases, this same expert said: ". . . it can be argued that there is quite a powerful precedent effect in the jurisprudence of the WTO, but that is certainly not stare decisis, and it is not so powerful as to require panels or the Appellate Body considering new cases to follow prior cases . . ." But he also added that "the 'flavor' of the precedent effect in the WTO is still somewhat fluid, and possible will remain somewhat fluid for the time being."

WORLD TRADE ORGANIZATION:

Summaries of decisions: Hundreds of pages condensed into one

The WTO recently announced the publication of "WTO Dispute Settlement: One-Page Case Summaries," which (as its title suggests) summarizes in a single page the "core facts" and "substantive findings" of adopted dispute settlement panel and Appellate Body reports (or decisions) issued from 1995 through September 2006. The WTO is the premier international organization that sets the rules for international trade and the settlement of trade disputes. "This publication is in response to a continuous stream of requests from a broad cross-section of interests for a simple, straightforward explanation of the key points emanating from the ever-growing body of WTO jurisprudence," wrote the director of that global body's legal affairs division in the book's forward. A free copy is available for downloading at www.wto.org.

Critics of the WTO have complained that because some dispute settlement panel and Appellate Body reports are hundreds of pages in length, it is difficult for lay people and non-experts in the area of international trade to understand these rulings in their entirety, especially on issues which they say are of public importance. For example, they note that a 1997 dispute settlement panel report called "European Communities—Regime for the Importation, Sale and Distribution of Bananas" is 402 pages long. But legal analysts point out that more than half of the total length of many panel reports consists of the factual aspects of the case, the main arguments of the disputing and even third parties, and a description of the relevant agreements. In fact, in the decision concerning bananas, over 70 percent of the report consisted of these sections. But the actual findings (which describe the panel's ruling and reasoning) were approximately 100 pages in length.

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