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An independent commission concluded that the terrorists carrying out the 9-11 attacks – which caused nearly \$100 billion in damage – had spent less than \$500,000 (much of which came from donors and other contributors) to carry out their plans.

Legal Efforts Against Terrorist Financing: Opportunities & Obstacles



Denying terrorist groups financial support is said to be an important component in the fight against terrorism. What legal efforts have been taken at home and abroad to curb terrorist financing, and have they been successful? (See page 6)

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Using international law to interpret the U.S. Constitution

Should the U.S. Supreme Court cite international customs, practices, and foreign court rulings in its decisions?

In recent years, the U.S. Supreme Court has issued many decisions concerning divisive and controversial domestic issues – such as the death penalty, affirmative action, and same-sex sodomy – in which the majority cited modern-day international customs, practices, and even rulings from foreign courts to support a particular interpretation of certain provisions in the U.S. Constitution. This practice has sparked a lively debate on whether it is proper for the Supreme Court to use foreign authority in its rulings.

Proponents believe that citing foreign authority can “inform” the court (and the public) on how different countries around the world have addressed similar social issues. On the other hand, critics argue that U.S. courts should interpret provisions in the Constitution by using only precedents from American jurisprudence and, in part, by also gauging domestic public opinion.

What are the arguments in favor of and against using sources such as foreign court rulings and international practices in supporting a particular interpretation of certain constitutional provisions? To what extent did the Court

majority rely on foreign materials in making its recent decisions? Did the Supreme Court cite these foreign materials and sources in a systematic way? Where does the debate stand today?

A proper approach to constitutional interpretation?

Although the current controversy may, on its face, seem to focus on international law, it actually revolves around the issue of constitutional interpretation. Legal historians say that there are many sections and phrases in the U.S. Constitution – including “cruel and unusual punishment” and “due process” – whose meanings have generated and continue to generate much dispute. In trying to interpret the meaning of these phrases and other provisions, legal scholars, jurists, and historians have long-debated not only what sources of authority to use, but also the weight that should be given to these sources.

While there are different ways to help discern the meaning behind certain provisions in the Constitution, legal commentators say that these methods are generally subsets of two broader approaches – originalism and non-originalism.

Proponents of originalism believe that the courts should interpret the Constitution by looking at the original meaning or intent of the framers of that document, which they say is reflected in historical papers, other primary documents, and also in judicial precedents. They argue that this approach provides the judiciary with objective criteria to help make their decisions, and also helps to ensure predictability and consistency when interpreting the Constitution. Originalism, they say, also prevents judges from substituting their own biases and values (and perhaps furthering their own political agenda) in place of these objective criteria. Proponents of originalism also argue that if the Constitution doesn’t adequately address or provide enough guidance on handling a certain issue, then the legislatures (reflecting popular sentiment) should amend the Constitution rather than have the judicial branch replace them.

On the other side of the debate, non-originalists argue that the final text of the Constitution came about as a result of a compromise among many competing political factions, and that the framers deliberately left vague many of its provisions in order to ensure its final passage and also to maintain flexibility in its interpretation. They also say that the framers of the Constitution could not have anticipated every problem that would confront American governance, and that a more flexible approach in “maintaining liberty” should be the larger purpose of the Constitution. Therefore, some proponents of non-originalism view the Constitution as a so-called “living document” whose provisions and meanings generally evolve with changing norms and standards of behavior.

For instance, when the Constitution was written, sexual discrimination was an accepted part of life, say legal historians. Yet today, it not only is in disrepute, but has been held in violation of the equal protection clause of the Fourteenth Amendment. So in the absence of evidence stating the contrary, proponents of the non-originalist

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Founded with funding from the Starr Foundation, the Center for International Law supports teaching and research in a broad range of areas of international law. The Center organizes events whereby students, faculty, and guests of New York Law School may interact with experts who link theory and practice. (Clipart/Photos ©2005 Microsoft Corp.)



The high court responding to a higher law? Recent rulings by the U.S. Supreme Court – where the majority has cited modern-day international practices and foreign court rulings to support a particular interpretation of certain provisions in the U.S. Constitution – have intensified a long-running debate on the proper method of constitutional interpretation.

approach say that the judiciary should use modern-day standards when interpreting provisions in the Constitution.

Furthermore, other legal historians point out that it is difficult to ascertain with precision the so-called original or intended meaning of various Constitutional provisions written in 18th-century America. “The Revolutionary Era was a time of great social, political, and intellectual tumult during which there were strong disagreements about the nature of government and rights,” said one legal scholar. Others add that the historical record is imperfect and, thus, cannot provide an accurate picture of the supposed intentions of the framers. This debate remains unresolved today, and its dynamics change depending, for example, on the philosophical composition of the Supreme Court justices.

Domestic before international law or vice versa?

In addition to the debate on the proper approach in interpreting the Constitution, legal circles are also paying greater attention to the relationship between domestic U.S. jurisprudence and the vast area of international law (which is embodied in particular global treaties and also in customary practices which may or may not have been codified).

Many legal scholars and commentators largely agree that U.S. courts are not legally required to follow international practices or norms, or decisions of foreign courts. They say that domestic courts are required to base their decisions on “controlling authority” such as the Constitution and judicial precedents. Furthermore, legal experts generally say that American courts have no obligation to abide by the terms of a particular international treaty if those provisions are in direct conflict with the Constitution. According to one international law scholar: “The first and most important inquiry in examining the U.S. legal system is whether international law can prevail over the Constitution. The

answer is an emphatic no.”

Still, there are some questions concerning the extent to which international law affects or controls domestic U.S. jurisprudence. While legal experts acknowledge that the Constitution regards treaties signed by the U.S. as part of the “supreme law of the land” (meaning that the U.S. and the states are legally obligated to adhere to their provisions), there is – for example – a debate on whether a particular treaty is or is not “self-executing.” A self-executing treaty automatically becomes part of a country’s jurisprudence. On the other hand, a non-self-executing treaty requires the legislature of a signatory nation to enact specific legislation to carry out its obligations.

For instance, in *Asakura v. Seattle*, the U.S. Supreme Court ruled that a provision in a 1911 treaty between the U.S. and Japan was self-executing, holding that “the treaty operated of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.” However, in *Sei Fujii v. California*, the California Supreme Court held that the Preamble of the United Nations Charter (which states aspirational principles of that global institution) was not self-executing because “general purposes and objectives of the United Nations Organization . . . do not purport to impose legal obligations on the individual member nations or to create rights in private persons.” In the event of disagreements concerning whether a particular treaty was self-executing or not, courts have resolved them on a case-by-case basis.

There are also questions concerning the extent to which a country must abide by the terms of a particular treaty. While the Constitution grants the President power to sign international treaties, many are signed with certain “reservations,” meaning that while the U.S. has agreed to abide by a treaty’s obligations, it has also indicated that it will not be legally-bound to implement particular provisions it finds objectionable.

Reaching for support in international law

Commentators note that the unresolved issues surrounding so-called proper constitutional interpretation and the sometimes uncertain relationship between domestic law and international law have come together in the recent debate on whether the Supreme Court should cite international customs, practices, and rulings by foreign courts in order to confirm and support its decisions. Some of the more controversial cases have included the following:

Atkins v. Virginia (2002): The Court reversed precedent and deemed as unconstitutional the execution of mentally retarded persons, arguing that such a practice now violated the Eighth Amendment’s prohibition on “cruel and unusual punishment.” The Court found not only a “dramatic shift in the state legislative landscape” (which once gave states the option to impose such punishment), but also the rise of a “national consensus” that the death penalty was not a suitable punishment for mentally retarded persons. It also argued that the justifications for the death penalty – retribution and deterrence – were undermined by the “lessened culpability of

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mentally retarded offenders.”

In trying to interpret the meaning behind the phrase “cruel and unusual punishment,” the majority relied on a 1958 decision (*Trop v. Dulles*) where it declared: “The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Commentators say that *Trop* created an “evolving-standards” test (which, in part, gauged developments in public policy) to help determine the meaning behind the phrase “cruel and unusual punishment.”

To support further its decision and also to show that its reasoning reflected “a much broader social and professional consensus,” the majority made a reference to international opinion in a single footnote where it cited an amicus brief from the European Union stating that “imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved” in Western Europe. (The brief did not mention other countries or regions in the world.)

Grutter v. Bollinger (2003): In a decision concerning affirmative action, the majority decided that the admissions policy at the University of Michigan Law School (which considers an applicant’s race) did not violate the Equal Protection Clause of the Fourteenth Amendment. The Court reasoned that a narrowly-tailored use of race in the admissions process at that particular school furthered a compelling interest – it provided what some say are the educational benefits that come from having a diverse student body. The Court also concluded that because the law school conducted “highly individualized reviews of each applicant, no acceptance or rejection was based automatically on a variable such as race.”

In a concurring opinion, the hope was expressed that – in the years ahead – educational institutions would be able to look forward to the day when affirmative action programs were no longer necessary. To lend support to its reasoning, this concurring opinion cited international sources. For example, it said that “the Court’s observation that race conscious programs ‘must have a logical end point’ accords with international understanding of the office of affirmative action.” (Analysts say that, in addition to the U.S., other countries around the world have programs similar to affirmative action.) It also cited support from a treaty called the *International Convention on the Elimination of All Forms of Racial Discrimination*, which states that measures such as affirmative action “shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.”

Lawrence and Garner v. Texas (2003): In another controversial opinion, the Court overturned precedent and ruled that a Texas statute which criminalized homosexual sodomy violated “vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.” In its 1986 precedent decision, *Bowers v. Hardwick*, the Court said that that the Constitution did not

confer “a fundamental right upon homosexuals to engage in consensual sodomy,” and that states retained discretion in outlawing that practice. It reasoned that the Constitution only protected rights “implicit in the concept of ordered liberty” or “deeply rooted in the Nation’s history and tradition.” According to a commentator, “the Court held [in *Bowers*] that the right to commit sodomy did not meet either of these standards,” and that the prohibitions were “firmly rooted in Judeo-Christian moral and ethical standards.”

Yet in *Lawrence*, the majority argued that Messrs. Lawrence and Garner had, in fact, a right to engage in homosexual sodomy because it was – in its opinion – a fundamental right protected under the Fourteenth Amendment’s Due Process Clause. Legal scholars say that, under the principle of due process, an individual cannot be deprived of life, liberty, or property without carrying out proper legal procedures, and that the passage and enforcement of laws and regulations must be related to a legitimate government interest and may not contain provisions that result in the unfair or arbitrary treatment. In referring to Messrs. Lawrence and Garner, the majority concluded that “their right to liberty under the Due Process Clause gives them [and includes] the full right to engage in their conduct without intervention of the government.” It also stated that “the Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”

The majority also cited foreign court decisions to support its ruling. For example, it referred to a 1981 case from the European Court of Human Rights (*Dudgeon v. United Kingdom*), which held that laws proscribing homosexual conduct were invalid under the *European Convention of Human Rights*. In citing this particular case (which was issued five years before the *Bowers* decision), the majority said that it wanted specifically to counter an argument in *Bowers* that “homosexual sodomy is almost universally forbidden.” The majority argued that “to the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere,” and that “the right the petitioners [in *Lawrence*] seek in this case has been accepted as an integral part of human freedoms in many other countries.”

Roper v. Simmons (2004): In a ruling similar to the *Atkins* decision, the Supreme Court ruled that standards of decency in the U.S. have now evolved to the point where the execution of juveniles (i.e. individuals under the age of 18) was considered “cruel and unusual punishment” prohibited by the Eighth Amendment. In overruling its precedent ruling in 1989 (*Stanford v. Kentucky*), the majority opinion said that the death penalty was now “a disproportionate punishment for offenders under 18,” arguing that a majority of states in the nation (30) had rejected the death penalty for minors, and that states carrying out such punishment did so infrequently.

To confirm its decision, the Court cited “overwhelming weight of international opinion against the juvenile death penalty” as reflected in such treaties as the *UN Convention*

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Balancing domestic and international law: While originalists say that provisions in the U.S. Constitution should be construed using only precedents from American jurisprudence, some Supreme Court justices argue that the citation of global customs and foreign court rulings can confirm or lend support to their already-drawn conclusions.

on the *Rights of the Child*, which prohibits capital punishment for crimes committed by juveniles under 18 (but which the U.S. has not ratified). Also, the majority opinion stated that the United States was supposedly “the only country in the world that continues to give official sanction to the juvenile death penalty.” Still, the Court said that its decision was based primarily on what it describes as a “national consensus” against juvenile executions. It said: “The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” The ruling added that “the task of interpreting the Eighth Amendment’s ban on cruel and unusual punishment remains our responsibility.”

International law: a crutch for bad decisions?

In their dissents, other Supreme Court justices criticized the majority’s citation of supposed international norms, practices, and foreign court decisions (though commentators say that these critiques did not form the primary thrust of the dissenting decisions). Using an originalist approach in interpreting the Constitution, the dissents argued that because the meaning of the Constitution is static, “any ex post facto information” is “inherently valueless in interpreting the meaning of the Constitution.”

Accordingly, the citation of modern-day international treaties and rulings from foreign countries are – in the words of another Supreme Court justice – “meaningless dicta” simply because these foreign sources of authority did not even exist prior to the ratification of the Constitution, and, therefore, could – in no way – reflect the original intentions of the framers. (Some international law scholars note that, unlike the U.S., other countries around the world – such as South Africa and Spain – have constitutional provisions

which require their courts to consider international standards when interpreting certain provisions of law.)

In the *Roper* decision, for example, the dissent said that “to invoke alien law when it agrees with one’s thinking and ignore it otherwise is not reasoned decision-making, but sophistry.” In criticizing the majority’s decision in *Atkins*, the dissent stated: “Equally irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people. We must never forget that it is a Constitution for the United States of America that we are expounding.” Furthermore, one analyst said that even if the meaning of the Constitution did evolve with time, “the place to look for that evolution is in the values and opinions of the American people” and not international opinion. And in the *Lawrence* case, the dissent argued that “this Court ... should not impose foreign moods, fads, or fashions on Americans.”

In response to these critiques, some proponents of the non-originalist approach in constitutional interpretation argued that the Supreme Court was under no obligation to follow these foreign sources of law, and that these sources did not *control* the outcome of the final decisions. “They do not bind us by any means,” said one Supreme Court justice. In fact, all the majority opinions relied wholly on U.S. jurisprudence and domestic norms and practices to support their reasoning. Another legal expert added: “What they [the majority decisions] propose is nothing less than being aware of what’s going on around us. To the extent those [international] opinions are cited, they are only cited as points of reference – never as mandatory authority upon which to base a decision in a federal case.”

Many non-originalists argued that the Court had cited these international sources of law, opinions, and practices simply to add additional support to their already-drawn conclusions. For example, some believe that foreign opinions “can be the source of good ideas in much the same way that a well-crafted legal brief or scholarly article can be.” Building on this idea, one Supreme Court justice said that if “U.S. experience and decisions can be instructive to systems that have more recently instituted or invigorated judicial review for constitutionality, so we can learn from others now engaged in measuring ordinary laws and executive actions against charters securing basic rights.” Another legal expert added that some phrases in the U.S. Constitution “are so open-textured (‘cruel and unusual,’ ‘due process of law,’ or ‘equal protection’) that they invite an [international] inquiry into fundamental conceptions of humanity and human rights, conceptions with which all countries must grapple.”

In response, the dissenting justices said that “the court’s parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing” and that citation of these foreign materials still have “no place in the legal opinion of this Court unless it is part of the [primary] basis of the Court’s judgment.” Some conservative groups also argue that relying on foreign sources of jurisprudence could marginalize domestic norms and practices, and replace them with decisions made by unaccountable groups.

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LEGAL EFFORTS AGAINST TERRORIST FINANCING: OPPORTUNITIES & OBSTACLES

On the morning of September 11, 2001, a small group of hijackers from the terrorist network Al-Qaeda commandeered four commercial airplanes while in flight. Passengers overtook their hijackers in one plane and crashed it into a field in Pennsylvania. Another smashed directly into the Pentagon. The remaining two planes struck and completely destroyed the World Trade Center in New York. These attacks not only claimed thousands of lives, but also cost the United States a figure nearing, perhaps even surpassing, \$100 billion. They set in motion the current global campaign against terrorism, which has included U.S.-led attacks against terrorist camps in Afghanistan, and an invasion and occupation of Iraq because it supposedly harbored terrorists and concealed weapons of mass destruction.

In addition to carrying out military strikes against terrorist groups since the 9-11 attacks, many national governments and international organizations are giving higher priority to efforts to curb terrorist financing. A report released by an independent commission investigating the 9-11 attacks stated that Al-Qaeda had financed their operations for a relatively small amount of money (between \$300,000–\$500,000), and that those who actually carried out the attacks had successfully opened bank accounts in the U.S. even though their names appeared on a terrorist watch list. Many experts say that such oversights illuminated the need for tighter financial controls and stronger efforts to curb terrorist financing. They argue that denying these groups the financial resources to recruit and train more members in carrying out their deadly attacks is an important component in the fight against terror, because, without funding and other material support, terrorist groups will be hard-pressed to continue their operations.

What legal efforts (at the domestic and international levels) were carried out before and after the 9-11 attacks to curb terrorist financing? Have they been successful? What are some of the obstacles in curbing terrorist financing? And where does the issue stand today?

The financing of terrorist operations

Terrorist groups must raise money in order to finance their activities. In a report released in August 2004, the National Commission on Terrorist Attacks Upon the United States – also known as the 9-11 Commission (or simply the “Commission”), which was created by the U.S. Congress to investigate the 9-11 attacks – determined that Al-Qaeda raised money primarily through donations (ranging from small contributions made in religious venues to direct support from wealthy benefactors), and that the network continues to receive its funding almost exclusively from private donors in the Middle East. Experts also believe that other terrorist groups not affiliated with Al-Qaeda fund their activities by participating in illegal activities such as drug trafficking, counterfeiting, and arms sales.

But, unlike legitimate businesses and charities, terrorist groups cannot simply deposit their donations or proceeds from their illegal activities into banks and other financial institutions because they risk attracting unwanted attention from law enforcement authorities and also risk leaving a paper trail that could reveal the identities of the depositors and recipients of terrorist financing.

Terrorist groups and their financiers must, therefore, engage in what experts say are a broad range of techniques used to conceal the true sources of their funding and also to move their money around without attracting attention. For example, some financiers of terrorism engage in money laundering, which is the process of “concealing the existence, illegal source, or application of income derived from criminal activity [otherwise known as “dirty money”], and the subsequent laundering [or cleaning] of the source of that income to make it appear legitimate.” In a typical money laundering scheme, someone may first deposit ill-gotten proceeds into a financial institution (such as a bank) and then move these funds from one financial institution to another through a series of complex transactions in order to separate them from their illegal sources. Once the laundering

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A private source of funding: A report issued by the National Commission on Terrorist Attacks Upon the United States (or the 9-11 Commission) concluded that Al-Qaeda – the terrorist group responsible for carrying out the 9-11 attacks – raises money almost exclusively through private donations. Other terrorist groups engage in criminal activities to raise money for their operations.

process is complete, the funding is then injected into a legitimate enterprise or activity. A money launderer may, for instance, use the supposedly clean money to buy legitimate businesses, securities (such as stocks and bonds), and even real estate.

Financial experts estimate that people around the world launder approximately \$800 billion to \$2 trillion every year (though this is a conservative estimate), which accounts for two to five percent of the world's gross domestic product. Money laundering also has damaging effects on a nation's economy. Experts say that it reduces a country's tax revenue and also calls into question the integrity of a nation's financial system because rogue bank employees sometimes assist money launderers in their schemes.

Until recently, money laundering has usually been largely associated with organized crime figures, corrupt public officials, and dishonest employees of private and public companies. But some analysts now believe that terrorist groups around the world regularly engage in this activity. In the case of Al-Qaeda, though, investigators from the Commission believe that the network engages in what is called "reverse money laundering" where its members have formed (or even infiltrated) legitimate charities in order to divert apparently clean money from donors who unknowingly (or even willingly) contributed money to fund deadly terrorist activities.

The Commission reported that Al-Qaeda members – when engaging in money laundering – had exploited lax banking laws in mostly under-regulated countries (primarily in the Middle East) where customers were allowed to open anonymous accounts without having to document the source of their deposits. Banking experts say that such jurisdictions serve as an ideal conduit for terrorist organizations wishing to avoid detection by law enforcement authorities when funneling their funds.

In its final report, the Commission also concluded that, in addition to laundering its funds, Al-Qaeda had exploited an alternative (and lawful) banking system known as hawala (meaning "trust"), which is an informal financial network that transmits money between different locations via service providers who then disperse the money for fees lower than those charged by banks and without leaving a paper trail. Experts say that migrants in Europe and North America use the hawala system to send money to relatives in other countries. Investigators noted that Al-Qaeda also engages in a long-standing technique called currency smuggling where bulks of actual currency are shipped from one location to the next via cars, wagons, and other means of transportation.

Pre-9-11: Domestic efforts to curb terrorist financing

Before the 9-11 attacks, the U.S. – and, for that matter, most other countries around the world – lacked a comprehensive set of regulations aimed specifically at combating terrorist financing in a systematic matter. Legal experts say that while there were existing laws which could have deterred some terrorist fundraising activities in the U.S., these laws and regulations were, at the time of their adoption, aimed mainly at other domestic-based groups (such as organized crime syndicates and those involved in long-running criminal activities). Some of these measures included the following:

Anti-money laundering laws: The U.S. was the first country to criminalize the act of money laundering when Congress passed the Money Laundering Control Act (or MLCA) in 1986. The MLCA – whose provisions are codified in 18 U.S.C. §1956 and §1957 – criminalizes the act of laundering money derived from specified unlawful activities (or "SUAs"), including bank fraud, embezzlement, copyright infringement, drug trafficking, and kidnapping. Violations are punishable by severe fines (up to the greater of \$500,000 or twice the value of the transaction) and prison sentences for up to 20 years. Furthermore, any property involved in the transaction or traceable to the proceeds of the criminal activity could be subject to forfeiture. The provisions of the MLCA also extend to non-Americans if part of the transaction occurred in the U.S. and involved more than \$10,000.



Cleaning up dirty money: Because terrorist groups cannot simply deposit the proceeds of their illegal activities into banks, they engage in money laundering, which is the process of concealing an illegal source of income and making it appear legitimate. On the other hand, the 9-11 Commission reported that Al-Qaeda engages in reverse money laundering where supposedly clean donations are used for terrorist activities.



Indirect approach in curbing terrorist financing: Legal analysts say that, before the 9-11 attacks, the United States did not systematically combat terrorist financing. Instead, it relied on existing laws, many of which were aimed mainly at domestic-based groups involved in long-running criminal activities.

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Beyond the reach of American laws:

The 9-11 Commission concluded that existing statutes – such as the Money Laundering Control Act and the Bank Secrecy Act (both of which try to detect money laundering schemes within U.S. jurisdictions) – did not effectively curb terrorist financing because Al-Qaeda raises its money outside of the American borders.



Flat efforts? Legal analysts point out that Congress did enact two measures against terrorist financing during the 1990s, but that several Federal and intelligence agencies did not commit resources or train prosecutors to take advantage of those new laws.

But legal experts point out that these laws would not have significantly affected terrorist supporters and financiers. The Commission concluded that there was no evidence that Al-Qaeda had derived and laundered their income from SUAs (such as drug trafficking) specified under American anti-money laundering statutes. In fact, it concluded that the U.S. was not even a significant source of fundraising efforts for Al-Qaeda. Furthermore, the Commission said that because Al-Qaeda members and their financiers conducted their fundraising activities wholly outside of U.S. jurisdiction, they were mostly beyond the reach of American anti-money laundering statutes.

Bank Secrecy Act: Analysts also say that prior to the 9-11 attacks, another existing law could have identified terrorist fundraising activities (although its primary purpose was not to curb terrorist financing). In 1970, Congress passed the Currency and Foreign Transactions Reporting Act (better known as the “Bank Secrecy Act” or BSA), which prohibits people from using banks and other financial institutions to launder proceeds from illegal activities. The BSA requires banks to have sufficient knowledge of their customers and their likely transactions. If the bank notices transactions that are “out of character” for a certain customer profile, it must file a Suspicious Activities Report (or SAR). One expert said that the BSA reporting requirements “create a paper trail for law enforcement to investigate money laundering schemes.” In 1994, Congress amended the BSA to require banks to file SARs for transactions involving at least \$5,000 within customer accounts.

But critics point out that the 9-11 terrorists were probably able to evade BSA thresholds – and detection by law enforcement authorities – by handling their finances in smaller amounts. In fact, the Commission concluded that the “money-laundering controls in place at the time were largely focused on drug trafficking and large-scale financial fraud and could not have detected the hijackers’ transactions. The controls were never intended to, and could not, detect or disrupt the routine transactions in which the hijackers engaged.” Furthermore, while the BSA tries to detect money laundering through the creation of “financial profiles,” the Commission concluded that “no effective financial profile for operational terrorists located in the United States exists . . . the requirement that financial institutions file SARs does not work very well to detect or prevent terrorist financing.”

Other critics also point out that foreign banks are largely out of reach of BSA reporting requirements, which make them vulnerable to use by terrorist financiers.

Other legal measures: In an effort to address directly the issue of terrorist financing, Congress enacted 18 USC §2339A in 1994, which criminalizes the act of providing material support or resources to designated terrorists. But critics said that the law required “tracing donor funds to a particular act of terrorism,” which prosecutors described as a “practical impossibility.” Two years later, Congress passed 18 USC §2339B to criminalize the act of providing material support or resources to designated foreign terrorist organizations (or FTO). Under this law, prosecutors only had to prove that the accused had contributed something of value to a designated FTO.

Despite the availability of these new laws, the Commission concluded that the U.S. Department of Justice “lacked a national program for prosecuting terrorist financing cases under the 1996 statute or otherwise.” It also said that there was little impetus to “committing resources to train prosecutors and agents to use the new statutory powers.” Critics noted that these statutes applied mainly to individuals under U.S. jurisdiction.

Pre-9-11: International efforts to curb terrorist financing

Analysts say that legal attempts to curb terrorist financing at the international level have, until recently, resembled efforts on the domestic front – they were often done piecemeal and without strong coordination among different jurisdictions. In some cases, they did not even deal directly with terrorist financing.

No consensus on fighting money laundering: Observers point out that a formal

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global treaty on money laundering didn't (and still does not) exist. While many individual countries across the world have long had anti-money laundering laws, legal experts say that there is no agreed-upon definition of the term *money laundering*, and that the levels of enforcement of (and penalties for breaking) such laws vary across different jurisdictions. For example, while every member nation of the European Union (EU) must implement money-laundering laws, each can set its own penalties for breaking those laws, leading one critic to say that such differing standards only "weaken the effectiveness" of anti-money laundering programs.

Others note that there is also a lack of uniformity on the criminalization of those activities from which laundered money is derived. While most countries, for example, criminalize the act of laundering money derived from heinous activities (such as murder), a broad consensus does not exist with respect to other activities. For example, France criminalizes the act of laundering money derived from tax evasion, but Switzerland does not.

Furthermore, other critics say that because so many global organizations – ranging from the World Bank to the United Nations to the International Monetary Fund – are trying to establish anti-money laundering standards, these efforts have produced overlapping results. In referring to these uncoordinated efforts, one critic said: "It is ironic that the international community would fail to produce a single, unified set of rules to take on a criminal activity that thrives precisely on exploiting differences in laws and regulations."

FATF: Because a treaty on money laundering does not exist, the global community has, instead, relied on a group called the Financial Action Task Force on Money Laundering (FATF) whose mission is to set voluntary "international standards for the detection and prosecution of money laundering." The FATF, formed in 1989, is best-known for its "40 Recommendations," which (as its name implies) is a list of measures that its 33 mostly-industrialized member nations should adopt – such as banning shell companies, adopting tighter banking controls, and enlarging the range of financial institutions covered by anti-money laundering statutes – to curb money laundering efforts. According to the FATF, "about 130 jurisdictions – representing about 85 percent of world population and about 95 percent of global economic output – have made political commitments to implement the '40 Recommendations.'"

Analysts say that the FATF's most significant contribution in curbing money laundering was the development of its "non-cooperative" list of countries. At periodic intervals, the FATF conducts an evaluation of a particular country's efforts to curb money laundering using a list of 25 criteria, including its enforcement of bank regulations, reporting of suspicious banking activities, and the degree to which it cooperates with other countries in curbing money laundering. Based on this review, regulators in FATF member countries then advise their banks and other financial institutions to exercise caution in dealing with non-cooperative countries. In June 2000, the FATF report listed 15 jurisdictions as "non-cooperative" in efforts to fight money laundering and 14 others for certain "deficiencies."

Yet some have criticized the FATF's work. Critics argue, for example, that because the FATF's membership consists primarily of industrialized countries, the efforts of that organization will not have a substantial effect on less-developed countries, which are more likely to have weaker anti-money laundering laws (or none at all) and are precisely the kinds of jurisdictions that terrorist financiers favor in their efforts to disguise and transmit their funding. Also, some political analysts say that while the FATF points out deficiencies in non-FATF countries, it treats its own members "gently" and with more leeway. One critic said: "The FATF has a deplorable tendency to place too little weight on its own members' failings." One commentator pointed out that Mexico "does not fully obey three of the rules, yet remains admitted" to FATF membership.



Lack of coordination at the global level: Legal analysts point out that there is no internationally agreed-upon definition of the term "money laundering," and that various global organizations are trying to establish their own (and sometimes overlapping) anti-money laundering standards in order to curb terrorist financing.



A flawed alternative? The world community has relied upon a group called the Financial Action Task Force on Money Laundering (FATF) to help set voluntary standards against money laundering. But critics point out that its standards don't even address terrorist financing, and that FATF members are treated more leniently than non-members.

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Efforts at the United Nations: In 1999, the UN adopted the *International Convention for the Suppression of the Financing of Terrorism*, which urges nations to adopt domestic laws criminalizing terrorist financing. But only four countries had ratified the convention before the 9-11 attacks. Even the U.S. – which signed the treaty in 2000 – did not ratify it until 2002.



A stronger response? Soon after the 9-11 attacks, the U.S. enacted the Patriot Act, which – among other controversial measures – contained stronger provisions against terrorist financing such as allowing the government to restrict access to the U.S. financial markets against countries with inadequate anti-money laundering controls.

Furthermore, some analysts point out that the FATF’s 40 recommendations do not even address specifically the issue of terrorist financing.

United Nations efforts: In other efforts to curb terrorist financing at the global level, the United Nations Security Council, in October 1999, adopted a resolution (UNSCR 1267) creating the “Al-Qaeda and Taliban Sanctions Committee” to oversee the implementation of UN sanctions imposed on Al-Qaeda, Osama bin Laden (the head of Al-Qaeda), and the Taliban (which then governed Afghanistan and provided a safe haven for Mr. bin Laden). The Committee maintains a so-called “name and shame” list of over 400 individuals and groups, and prohibits UN member nations from doing business with people on that list. But many critics questioned the capacity (and political will) of UN member nations to enforce such sanctions. They also point out that the Committee does not regularly expand its list, and that it had even dismissed an independent monitoring group established to track the work of the Committee.

In December 1999, the UN adopted a treaty called the *International Convention for the Suppression of the Financing of Terrorism* (or the “Convention”), which calls on its signatory nations to adopt domestic laws prohibiting people from “directly or indirectly providing or collecting funds with the intention that that they should be used . . . to carry out” an act of terrorism. The Convention also requires financial institutions and other professions in signatory nations to “maintain, for at least five years, all necessary records on transactions,” which could help authorities track down terrorist financiers.

But critics noted that, until the 9-11 terrorist attacks, only four countries had actually ratified the Convention. And similar to the criticisms leveled against UNSCR 1267, others questioned whether every signatory country could carry out the provisions of the Convention. Some analysts point out that the Convention does not impose penalties for countries that do not comply with all of its provisions.

Egmont Group: is an international network of financial intelligence units (FIUs), which are government agencies responsible for implementing policies to detect and prevent money laundering and other financial crimes within their established jurisdictions. Before the 9-11 terrorist attacks, there were 69 FIUs around the world sharing and disseminating information among each other to help support national and international law enforcement operations.

The FIU in the U.S. is called the Financial Crimes Enforcement Network (or FinCEN), and was created in 1990 within the Department of Treasury. According to experts, FinCEN uses anti-money laundering laws such as the BSA to provide “intelligence and analytical support to law enforcement.” But critics say that, initially, most FIUs weren’t created to address terrorist financing, and that their efforts mainly concentrated on existing criminal operations.

Post-9-11 efforts: A more vigorous response is met with limited success

Domestic efforts: In response to the 9-11 attacks, the US began a more systematic legal effort to fight terrorist financing.

The Patriot Act: On October 26, 2001, President Bush signed into law the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act* (or “Patriot Act”), which implemented many controversial measures – such as enhanced surveillance practices, new immigration procedures, and stronger criminal laws – to thwart terrorist attacks against the U.S. In addition, the Patriot Act contains many sections addressing money laundering and terrorist financing. Some of the measures include the following:

Section 311: This section allows the U.S. government to take “special measures” to “restrict or prohibit access to the U.S. financial system for states and individual foreign financial institutions that lack adequate anti-money laundering controls.” One prominent

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foreign policy think tank described this measure as the “centerpiece” of efforts to fight terrorist financing. Legal experts say that Section 311 does not require the U.S. government to prove that a certain foreign jurisdiction has ties to terrorist financing. Instead, it only has to show that “the jurisdictions or institutions targeted do not have adequate anti-money laundering controls – a much lower hurdle.” In May 2004, the U.S. designated the Commercial Bank of Syria under Section 311, which effectively cut off that bank from doing business in the U.S.

But a report issued by a task force of former policymakers concluded that, with the exception of the Commercial Bank of Syria, “the Executive Branch has not widely used the authorities given to it in the Patriot Act to crack down on foreign jurisdictions and foreign financial institutions suspected of abetting terrorist financing.” In many cases, the U.S. government had only announced its “intention” to impose special measures against certain entities and jurisdictions under Section 311, but did not follow through on these threats, stated the report.

Section 313: This section bans U.S. banks from dealing with foreign shell banks, which are banks “that have no physical offices anywhere but exist merely as a mechanism to move money from one place to another in secrecy.” Analysts believe that terrorist financiers had created and continue to create these shell banks in order to launder money through the international financial system.

Section 314(a): This section amends the BSA and “requires financial institutions, upon the government’s request, to search their records and determine if they have any information involving specific individuals” who are under suspicion of being involved in terrorist activities. While a financial institution must report any positive matches within two weeks of a request, law enforcement officials must obtain a subpoena in order to see the actual transaction records for an account in question. As of this year, law enforcement authorities have submitted 1,547 inquiries under Section 314(a), which resulted in 10,560 possible matches of individuals and groups suspected of terrorist ties or activities.

Section 317: Prior to the 9-11 attacks, some commentators said that law enforcement officials faced “jurisdictional constraints” (i.e. a lack of cooperation) in other foreign countries, which prevented them from obtaining relevant financial records and evidence during a money laundering investigation. To prevent such obstacles from impeding future investigations, Section 317 extends federal jurisdiction over foreign money launderers and their U.S. assets.

Section 326: This section requires banks to implement enhanced “Know Your Customer” rules. Banks must now obtain and verify not only their customers’ identifying information (such as names, addresses, dates of birth, and social security numbers), but they must also monitor account activity and determine the source of deposits. Before the passage of these strict requirements, one analyst said that “historically, the often incomplete and insufficient customer identification requirements for these accounts have left them vulnerable to money laundering opportunities.”

Section 356: Before the 9-11 attacks, the BSA required mainly large financial institutions (such as banks) to file reports of suspicious financial transactions. But some critics said that if terrorist financiers suspected increased government surveillance on a particular financial institution, they would then simply use other financial institutions. Section 356 now requires a wider range of institutions – such as brokerage firms, securities brokers, credit unions, and commodity trading advisors – to file such reports in order to identify and curb terrorist financing.

Section 359: This section requires greater regulatory oversight of alternative banking systems in the U.S., including hawalas. Yet legal experts point out that “there is [still] currently no federal plan to coordinate federal, state, and local law enforcement efforts to identify, surveil, and prosecute unregistered hawaladars.”

Section 371: In order to combat bulk currency smuggling, Section 371 “creates a



Other Patriot Act measures against terrorist financing:

Other sections require banks to search their records for individuals who are under suspicion of being involved in terrorist activities. Banks are also required to verify customers’ identifying information (such as names and dates of birth) and determine sources of deposits.



Not aggressive enough? Despite stronger anti-money laundering measures contained in the Patriot Act, some analysts say that the U.S. has not extensively used some provisions such as those allowing the government to cut off certain countries from U.S. financial markets.

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Stronger laws, same problems:

President Bush signed Executive Order (E.O.) 13224, which allows the U.S. to freeze the assets of designated groups and individuals on a specified list of terrorist supporters. But critics point out that E.O. 13224 does not affect significant terrorist assets outside of U.S. jurisdiction, and that the courts recently overturned some designations.



Just more talk at the United Nations?

In the aftermath of the 9-11 attacks, the UN Security Council passed resolution 1373, which called on all member states to increase their efforts at curbing terrorist financing. Critics say that these efforts only repeated past calls for nations to strengthen (or even create) laws against such financing.

new criminal felony offense for smuggling bulk cash in amounts greater than \$10,000.”

Executive Order 13224: In 1977, Congress passed the International Emergency Economic Powers Act (IEEPA), which gives the Executive branch limited power to impose sanctions during peacetime against countries, groups, and other entities considered to be a threat to U.S. national security. Using his authority under the IEEPA, President Bush signed Executive Order (E.O.) 13224 on September 23, 2001, which permitted the U.S. to “designate individuals and organizations as terrorists and terrorist supporters and then freeze [their] assets subject to U.S. jurisdiction and prohibit transactions by U.S. persons with that person or institution.” E.O. 13224 also enabled the government to “deny access to U.S. markets to those foreign banks that refuse to freeze terrorist assets.” One legal expert said that “IEEPA designations and blocking orders – actual or threatened – are among the most powerful tools the U.S. possesses in the war on terrorist finances.”

Pursuant to E.O. 13224, federal authorities have frozen more than 1,439 accounts containing almost \$137 million in assets. Analysts also note that almost 400 groups and individuals are currently designated under E.O. 13224 as having ties to terrorist groups. Furthermore, law enforcement officials had designated and closed three major U.S.-based charities accused of providing funding to terrorism.

But despite some of these successes, critics note that E.O. 13224 does not affect the assets of groups located beyond American jurisdiction, and that terrorist groups such as Al-Qaeda still raised most of its funds outside of the U.S. Other analysts point out that, in order to be designated under E.O. 13224, the government must show that an individual or group has a specific connection to terrorism, which they say is very difficult to prove. Commentators have even reported that some individuals have successfully challenged their designation under E.O. 13224. In such cases, the Commission reported that “these initial designations were undertaken with limited evidence, and some were overbroad Faced with having to defend actions in courts that required a higher standard of evidence, the U.S. was forced to ‘unfreeze’ assets.”

Analysts say that because the scope of E.O. 13224 remains limited to U.S. persons and assets subject to American jurisdiction, the U.S. began to push the UN “for a near-universal system of laws to freeze terrorist assets worldwide.”

International efforts: The 9-11 attacks also spurred the global community to take more action against terrorist financing.

United Nations: On September 28, 2001, the UN Security Council passed Resolution 1373 (UNSCR 1373), which required all member states to “criminalize the provision of financial support to terrorists; freeze without delay any funds related to persons who commit acts of terrorism; and deny all forms of financial support for terrorist groups.” Within weeks, over 100 nations drafted and passed their own domestic laws curbing terrorist financing and money laundering.

UNSCR 1373 also created a committee to monitor the implementation and compliance of the resolution by the UN’s 191 member states. In contrast to UNSCR 1267, this committee is not a sanctions committee and “does not maintain a list of terrorist organizations or individuals.” Instead, legal experts say that the committee formed under UNSCR 1373 is “designed to serve as a resource to assist member states in drafting new laws and regulations to combat terrorism.” The 9-11 Commission reported that UNSCR 1373 had helped approximately 170 nations develop the legal ability to freeze terrorist assets within their jurisdictions.

Despite these efforts, some analysts point out that UNSCR 1373 allows every country to draft and implement anti-terrorist financing laws with varying degrees of enforcement and penalties. They say that such differences will hamper efforts to curb such financing and allow terrorist financiers to move to jurisdictions with weaker laws.

By April 2004, the number of countries ratifying the *International Convention for*

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the Suppression of the Financing of Terrorism increased to 117 from 4 in the days before the 9-11 attacks.

FATF: In direct response to the 9-11 terrorist attacks, the FATF issued “8 Special Recommendations” to curb terrorist financing. For example, it calls on its member nations to criminalize the financing of terrorism, ratify the *International Convention for the Suppression of the Financing of Terrorism*, freeze and confiscate terrorist assets, impose anti-money laundering measures in international and domestic wire transfers, and requires financial institutions to report suspicious transactions linked to terrorism. As a result of the FATF’s work, many countries in areas where banking laws are known to be lax – such as Lebanon, the United Arab Emirates (UAE), and Egypt – passed new anti-money laundering laws. The Commission concluded, for example, that the “vast majority of the money funding the September 11 attacks flowed through the UAE.”

Despite an increase in the number of countries that claim to have established new anti-money laundering laws, experts say that “far more will depend on each country’s diligently implementing and enforcing these standards.” Critics, for instance, believe that some FATF countries are still not implementing measures to stop terrorist financing, and that they face little negative consequence in failing to do so. An independent think tank report concluded that “the U.S. recently allowed Lebanon, for example, to be removed from the FATF blacklist before it demonstrated a commitment to real implementation of its new anti-money laundering law.” It also said that another country, Egypt, was “allowed to stay on the FATF blacklist without any real threat of sanctions.”

Egmont Group: In the years after the 9-11 attacks, the number of FIUs around the world increased to a total of 94 (from 69). But critics say that despite this increase, they believe that many FIUs are inadequately funded and that others have missions that remain unclear. One analyst argued: “Some governments have created FIUs without any realistic idea of how these agencies deal with the information they receive and without allocating the financial, technological, or human resources necessary to support or launch investigations.” Even in the case of the U.S., a reputable think tank concluded that “America’s FIU is vastly under-resourced and lacks the capacity to serve as the FIU for the U.S. government.”

Obstacles in curbing terrorist financing

When the Commission released its final report and recommendations in July 2004, it concluded that U.S. government intelligence agencies – including the Federal Bureau of Investigation (which is the lead agency in terrorist financing investigations), the Central Intelligence Agency, and the Department of the Treasury – did not fully understand the nature of terrorist fundraising. For example, the report stated that the “FBI never gained a systematic or strategic understanding of the nature and extent of the jihadist or Al-Qaeda fund-raising problem within the United States” and that “the U.S. intelligence community largely failed to comprehend Al-Qaeda’s methods of raising, moving, and storing money, because it devoted relatively few resources to collecting the strategic financial intelligence . . .” Furthermore, it said that “terrorist financing was not a priority for either domestic or foreign intelligence collection.”

With the flurry of recent legal activity aimed at curbing terrorist financing, the Commission report noted that “the United States now has a far better understanding of the methods by which terrorists raise, move, and use money and has employed this knowledge to our advantage.”

But critics say that the war on terrorist financing still faces many obstacles. An independent report released by a prominent task force stated: “It would be wrong to say that no progress has been made in building many countries’ institutional capacities to cooperate in the global war against terrorist financing. But it would be equally wrong to overstate the progress that has been made.” These critics have pointed out some developments since the 9-11 attacks which question whether the U.S. government is



Other global efforts: In direct response to the 9-11 terrorist attacks, the FATF issued 8 special recommendations to curb terrorist financing. Some commentators say that, despite these efforts, some countries – including U.S. allies – continue to receive leniency when not complying with FATF measures.



Past obstacles continue into present efforts: In its report, the 9-11 Commission concluded that while the U.S. now has a better understanding of the nature and extent of terrorist fundraising, its intelligence agencies still face many obstacles. Some critics question whether the U.S. is doing enough to dismantle terrorist financing operations around the world.

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Slow efforts to curb terrorist financing:

Almost two years after the 9-11 attacks, the General Accountability Office reported that agencies such as the Federal Bureau of Investigation still did not systematically collect and analyze different terrorist financing techniques. Others noted that many countries still lack sufficient political will to carry out tougher anti-terrorist financing measures.



Decreasing political will abroad and at home:

Analysts report that some jurisdictions such as the European Union have watered down strict financial reporting requirements, which could help identify money laundering schemes. Others point out that even U.S. efforts against terrorist financing remain understaffed.

doing enough to dismantle terrorist financing operations around the world.

For example, a 2003 report from the U.S. Government Accountability Office (a nonpartisan agency that evaluates the effectiveness of government programs) concluded that “U.S. law enforcement agencies – specifically, the FBI, which leads terrorist financing investigations and operations – do not systematically collect and analyze data on terrorists’ use of alternative financing mechanisms.” It also stated that despite the enactment of new domestic regulations to curb terrorist financing, “the extent of the workload created under the [Patriot Act] initially increased the amount of work required of [for example] FinCEN and may have slowed efforts to take full advantage of the act concerning the establishment of anti-money laundering programs.”

Other experts say that many other countries still lack sufficient political will to implement and enforce newly-created anti-money laundering laws and other tough measures against terrorist financing. For example, a think tank concluded that while Saudi Arabia had passed many new regulations curbing terrorist financing in the wake of the 9-11 attacks, it had “not fully implemented its new laws and regulations, and because of that, opportunities for the witting and unwitting financing of terrorism persist.” (Analysts note that 15 of the 19 hijackers in the 9-11 attacks were Saudi citizens, and that Al-Qaeda still received most of its funding from individuals in that country.) That report also added: “Despite the flurry of laws and regulations, we are aware of no publicly announced arrests, trials, or incarcerations in Saudi Arabia in response to the financing of terrorism – despite the fact that such arrests and other punitive steps have reportedly taken place.” Furthermore, others note that Saudi Arabia does not yet have a fully-functioning FIU.

Speaking of other efforts, one private task force concluded: “Far too many countries – including virtually all in the Middle East and South Asia – still have in place ineffective or rudimentary bank supervisory and anti-money laundering regimes. In those cases where laws are on the books, implementation has been weak or nonexistent.”

While many criticize anti-terrorist financing efforts undertaken by developing countries, others believe that industrialized nations must also improve their efforts. For example, one study said that “Europe’s own domestic institutional capacities are found wanting.” It said that “the annual number of SARs submitted by financial institutions in many European countries has long been unusually low.” In May 2005, the European Parliament passed what critics called watered-down legislation requiring all EU member nations to make the financing of terrorism a crime. While the original legislation required the financial services industry and other professionals such as lawyers and accountants to keep more detailed records of their transactions, some commentators said that the proposal was “widely unpopular” and that a fierce lobbying campaign by various groups had “succeeded in weakening the legislation.”

Another independent report said that – in comparison to the U.S. – many agencies in Europe working to curb terrorist financing and money laundering had a fraction of the number of employees dedicated to that work. It noted that while the U.S. government had over 100 full-time employees working to implement sanctions pursuant to E.O. 13224, the effort still remained “understaffed.”

In response to what some commentators say is an apparent weakening of political resolve abroad in fighting terrorist financing, the U.S. announced in 2002 that it would begin a so-called “new phase” which will be “dominated by greater leadership by our coalition partners” and where “public designations and blockings will not dominate this new phase.” But critics say that, in light of faltering political commitments from other countries, greater reliance on them “may well be overly optimistic.” One analyst said: “Confronted with this lack of political will, the administration appears to have made a policy decision not to use the full power of U.S. influence and legal authorities to pressure or compel other governments to combat terrorist financing more effectively.”

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What should be done now?

The report issued by the Commission in August 2004 did not recommend concrete measures to curb terrorist financing, and has, instead, called for more study in this area. On the other hand, a report issued by a private task force concluded that “currently existing U.S. and international policies, programs, structures, and organizations will be inadequate to assure sustained results commensurate with the ongoing threat posed to the national security of the United States.” It proposed several recommendations.

For example, it argued that the U.S. should lead efforts to create a “specialized international organization dedicated solely to combating terrorist financing.” With so many different groups around the world issuing overlapping (and sometimes conflicting) anti-money laundering standards and other efforts aimed at fighting terrorist financing, advocates of this approach believe that a more centralized effort may reduce a duplication of efforts. One commentator said that the very nature of the problem required strong international rules: “Only global regulations can stop money laundering. In the absence of effective international cooperation, there will be no realistic chance of defeating or significantly curbing money laundering.”

In the meantime, the task force also recommended that the U.S. should expand its bilateral assistance programs to help developing countries create stronger anti-money laundering programs. It said that the currently allocated amount of \$4 million in assistance should increase tenfold. It also urged the U.S. to pressure other countries – especially Saudi Arabia, Pakistan, and Egypt – to bring up their banking supervision and anti-money laundering laws to international standards.

The private task force also recommended that, at the domestic level, the President should centralize efforts to combat terrorist financing by designating a “special assistant” to lead the various U.S. agencies now handling that issue: “Such an official would direct, coordinate, and reaffirm the domestic and international policies of the United States on a day-to-day basis and with the personal authority of the president of the United States.”

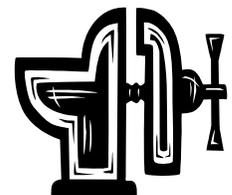
Other recommendations include the creation of a certification process whereby the Executive branch would have to certify to Congress on an annual basis that other countries are, indeed, taking steps to curb terrorist financing within their jurisdictions, and those countries that fail to undertake adequate measures would be subject to some kind of sanction. But political analysts say that such an approach may antagonize other countries who say it would infringe on their sovereignty.

In a recent effort, analysts say that the Department of Treasury is developing a plan which would allow the U.S. to track wire transfers in and out of the U.S. on a “case-by-case” basis in order to trace and deter terrorist financing. But banking experts say that there are about “a billion wire transfers a year involving the U.S.,” and that such a plan could inundate the government with “irrelevant” data. (Some analysts point out that, since the passage of new anti-money laundering legislation after the 9-11 attacks, many financial institutions have become wary of plans under which they will have to maintain even more records.)

Many experts agree that plans to curb terrorist financing will be a long-term effort, and that it would be unrealistic to expect quick results, especially in a world where every country has its own politics and processes for addressing this matter. One commentator said: “In reality, completely choking off the money to Al-Qaeda and affiliated terrorist groups has been essentially impossible . . . Ultimately, making it harder for terrorists to get money is a necessary, but not sufficient, component of our overall strategy.” Analysts say that these efforts will continue to shift as terrorists change the ways in which they finance their operations. ■



A new international body? Some analysts have proposed the creation of a global organization dedicated solely to combating terrorist financing. Others say that the U.S. needs to provide more financial assistance to those nations that don't have the capacity to curb such financing.



No end in sight? Despite efforts undertaken by governments at the domestic and global levels, some policymakers say that the problem of terrorist financing will be a long-term effort. One commentator said that it will be “impossible” to choke off completely all terrorist financing efforts.

The United Nations in control of the Internet

Can the UN provide better governance of the Internet or are existing measures sufficient?

The role and importance of the Internet in everyday life have grown so quickly in recent years that it is significantly affecting international commerce, intellectual property rights, economic development, and political issues such as privacy, freedom of speech, and freedom of expression. As more people, governments, and businesses use the Internet – for a variety of legitimate and illicit activities – there has been a growing debate in legal, political, and technical circles on whether existing arrangements in governing and managing the Internet can (in the long-term) adequately address its effects on these and other public policy issues.

What governance measures are now in place to address the implications of using the Internet, and have they adequately handled growing opportunities and threats? What other proposals have been offered to manage the Internet? And where do these proposals stand today?

Using the Internet: the benefits and threats

Although there are various definitions of the Internet, there is a general understanding that it refers to a set of software instructions (or protocols) for sending data over an existing (and decentralized) worldwide electronic network, which then allows computers and other devices to communicate with each other. In order to gain access to the Internet in, say, the United States, an individual or company can make arrangements with private Internet service providers such as America Online or NetZero, and then use a particular computer software program called a browser (such as Microsoft Internet Explorer or Netscape Navigator) to visit different homepages for a variety of individuals and other groups. Businesses, academics, and governments have, for example, used the Internet to share scientific and cultural information, create degree programs, and also to promote electronic commerce (such as selling financial services, music, books, clothing, and food) whose sales, say analysts, are now valued in the hundreds of billions of dollars.

But along with these commercial and non-commercial applications, certain illicit uses of the Internet have caused growing concern around the world. For example, law enforcement officials say that the Internet has helped criminals engage in their illegal activities (such as identification or ID theft) on a much larger scale. The Federal Trade Commission recently reported that ID theft now makes up almost half of the complaints it receives from American consumers. Legal analysts argue that the exchange of

information (such as digital music recordings) via the Internet – without appropriate permission – violates intellectual property rights. Some people are using the Internet for pernicious purposes such as posting and exchanging child pornography. Other analysts note that spamming – which is the practice of sending unsolicited e-mail messages – is slowing down Internet traffic.

The increasing use of the Internet has also created worries among human rights groups and civil libertarians who claim that – without stronger guidelines or regulations – governments and private companies may use (or already are using) the Internet to erode individual privacy by tracking visits to certain homepages.

In the area of economic development, analysts say that the majority of developing countries around the world still do not have reliable or even wide access to the Internet, and that the costs of connecting to the Internet in these countries are – in many cases – prohibitive. They argue that the use of the Internet has already created a “digital divide” where wealthier countries – using modern technologies such as the Internet – will further outpace their poorer counterparts in educational, economic, and job growth.

A hodgepodge of governance measures

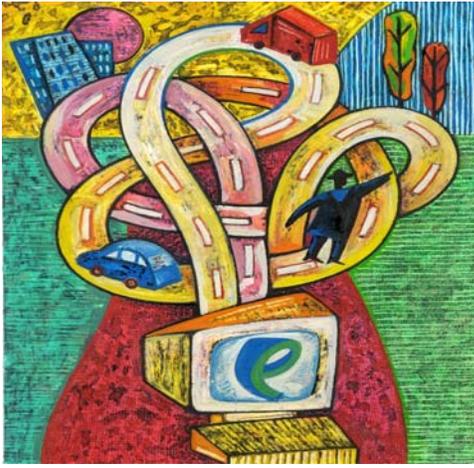
Currently, there is no one international body that addresses all of the public policy areas affected by the Internet or even one organization that helps to regulate the actual technical infrastructure underlying the Internet itself. (Commentators note that even at the national level in many countries, there is no single agency with sole responsibility for handling all issues affected by the Internet.) Instead, a broad spectrum of groups and organizations – such as government and regulatory agencies, international bodies, technical groups, non-governmental organizations, industry groups, and members of civil society – are involved in different aspects of managing the Internet and the implications it may have for a particular public policy area.

While some groups (such as regional Internet registries) administer the registration and management of domain names and Internet addresses such as www.nyls.edu, others try to devise guidelines concerning the protection of privacy over the Internet, and still other organizations (such as the Federal Trade Commission in the United States) are involved in a debate on whether electronic commerce should face greater regulation.

Experts also note that many of these groups are still in the process of defining their roles and responsibilities in helping to manage the Internet. Many analysts point out that the work of these groups remains largely uncoordinated, and has – in many instances – overlapped or even pointed in contradictory directions. They say that the quickening pace of technology and its effects on various public policy issues – which themselves often overlap – have prevented a more coordinated response in governing the Internet.

Complicating the issue further, legal analysts say, the various parties managing the Internet haven’t yet reached a consensus on how to define the term “Internet governance”

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Jumbled Internet governance? There is no one international body that addresses all public policy areas affected by the Internet such as international commerce, intellectual property rights, economic development, and political issues. Some have proposed the creation of a global organization under the auspices of the United Nations to regulate the Internet.

or even the term “Internet” itself, and how much – or whether any – priority should be given to certain public policy issues affected by the Internet. Referring to the Internet, one academic study stated that its “governance is fragmented; no one organization dominates any of the issue areas, and there is almost no issue area in which only one organization is involved.” There is also a growing debate on the control and regulation of the actual infrastructure underlying Internet itself.

Some commentators worry that – without greater coordination among various stakeholders – it will become harder to address those public policy concerns affected by the Internet. And as more people, companies, and governments use and come to rely on the Internet, many worry that its illicit use (such as schemes to carry out wide-scale financial fraud and ID theft) will continue to increase and, in turn, adversely impact society.

The United Nations to the rescue?

In December 2003, delegates from 175 countries attended the first “World Summit on the Information Society” (WSIS) – organized under the auspices of the United Nations – to begin the process of studying the effects of the Internet on various public policy issues. The summit concluded with the creation of an independent Working Group on Internet Governance (WGIG) – composed of 40 representatives of government, the private sector, and civil society – whose mission was to “investigate and make proposals for action, as appropriate, on the governance of the Internet by 2005.”

In its report issued in July 2005, the WGIG proposed that the term “Internet governance” be defined as “the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programs that shape the evolution and use of the Internet.”

The report explained that – given the ever-evolving complexity of the Internet and the different priorities among its various stakeholders – it would be “impossible” to craft a “single, scientific, universally accepted, and uncontested definition” for Internet governance.

The WGIG report identified broad public policy areas and issues affected by the Internet – including spam, cybercrime, the administration of the actual infrastructure of the Internet, intellectual property rights, and political rights – and assessed the adequacy of those governance measures currently in place to handle these issues. It then proposed “recommendations and options on how to improve on current Internet governance arrangements.”

Governance of the infrastructure underlying the Internet

Technical experts say that the governance of the physical infrastructure underlying the Internet occurs at both the national and international levels. As mentioned before, the Internet uses existing telecommunication networks – created in individual countries and many of which are privately owned and interconnected with other vast networks throughout the entire world – to help computers and other electronic devices to communicate with each other.

Existing government agencies at the local and national levels (such as the Federal Communications Commission in the U.S.) already regulate these networks in their own jurisdictions. But there is no international body that maintains ultimate authority over these networks. Instead, a specialized UN agency called the International Telecommunication Union (ITU) – consisting of 189 member governments and 500 nongovernmental groups – tries to coordinate and standardize different telecommunications networks among its member nations through a series of recommendations. Technical experts say that the standardization work performed by the ITU – which spans over a century – has helped these networks function more smoothly with each other while setting the groundwork for the establishment of new tools of communications such as the Internet. Still, one commentator said that the ITU “enjoys virtually no influence over the Internet.”

The WGIG report concluded that “in general, the [governance of the] existing [technical] system [underlying the Internet] has functioned well for more than two decades,” and that any “adjustments, where needed, both for technical/operational and for political reasons, must be done so as not to interfere or disrupt the operational qualities of the system in terms of stability and security.” The report did not propose stronger international oversight over the telecommunication networks of individual countries, and, instead, affirmed the ongoing work of the ITU.

Decentralizing control over Internet addresses?

The governance of the allocation and management of particular domain names and Internet addresses (such as www.nyls.edu) has historically centered around a non-profit corporation called the Internet Corporation for Assigned Names and Numbers (or ICANN) – which was created in

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1998 and is currently based in California, but operates under the auspices of the U.S. Department of Commerce – and a handful of other regional Internet registries.

Many critics say that the area of domain name governance leaves an important component of Internet policymaking mainly in the hands of the United States, and they worry that the long-term management of the Internet itself will be subject to the preferences (some say “whims”) of the U.S. government, which maintains some degree of control over ICANN.

The WGIG report stated that the existing management of domain names “is mainly based on trust, not on a treaty,” and that such an arrangement “reduces the governmental participation in the authorization of modifications, additions or deletions to one single government.” On the other hand, the United States argues that it had historically governed this area of the Internet, and that it will continue to do so until ICANN has taken the “necessary steps . . . to assure the [Department of Commerce] and the Internet community that [it] is able to carry out effectively its important core technical missions in a stable and sustainable manner into the future.”

In terms of regulating domain names, the WGIG report only suggested possible improvements to the existing system such as “revising the balance and roles of various stakeholder groups in Internet governance and policymaking, including the governance structure of ICANN.”

Other issues affected by the Internet

The report noted that many other issues associated with using the Internet – such as spam, cybercrime, intellectual property rights, and certain political rights such as data privacy and freedom of expression – were characterized “by the fact that there are no international or intergovernmental organizations that have specific responsibility for coordinating” these issues.

Political rights: Many human rights and civil libertarian groups are accusing authoritarian regimes of using the Internet to block access to information and also to erode or continue to suppress political rights (such as freedom of speech and expression) under the guise of maintaining civil order and national security. For example, many claim that the government of China (among others) is allegedly using the Internet to monitor political dissidents who may post their political views and activities online. That government has also allegedly blocked access to supposedly politically-sensitive information on the Internet which it deems damaging to its national interests. According to one academic study, China had prevented its Internet users from gaining access to information on topics such as democracy.

In order to protect freedom of speech and expression on the Internet, a variety of international organizations – including the United Nations and the European Union (EU) – have issued several declarations and resolutions addressing these particular areas. But one expert said these agreements “often do not extend much beyond general norms; agreement is broad but not deep.” Furthermore, they note that these

declarations are not legally-binding.

For example, the participating countries of the *UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* passed a declaration in 2001 expressing “deep concern about the use of new information technologies, such as the Internet, for purposes contrary to respect for human values, equality, non-discrimination, respect for others and tolerance, including to propagate racism, racial hatred, xenophobia, racial discrimination and related intolerance.” Yet many critics say that the participating countries during this UN conference did not reach a consensus on how to address specifically these concerns, and that the declaration was non-binding (i.e. it could not be legally-enforced among UN member nations).

Another UN organization prepared a position paper stating that “new Internet governance arrangements must not be subjected to governmental control, nor should they facilitate or permit censorship.” But critics say that the paper was nonbinding on UN member nations.

In 2003, the UN Commission on Human Rights passed a resolution calling on UN member nations to refrain from “imposing restrictions on the Internet which are not consistent” with UN treaties such as the *International Covenant on Civil and Political Rights*. But critics say that the resolution gives states broad leeway to create exceptions for cases involving national security and public safety – terms which the declaration had left undefined. In that same year, the Council of Europe passed its own declaration – called the *Freedom of Communication on the Internet* – urging EU member states to “condemn practices aimed at restricting or controlling Internet access, especially for political reasons.” But political analysts say that the declaration “doesn’t offer any specific new rights to Internet users when it comes to privacy, freedom of speech, and access to knowledge.”

In its report, the WGIG recommended that all countries “ensure that all measures taken in relation to the Internet, in particular those on grounds of security or to fight crime, do not lead to violations of human rights principles,” and that UN member nations should work toward more specific actions in the months ahead. Analysts say that while many industrialized countries with strong traditions in democracy have generally extended protection to certain political rights on the Internet (and are still devising the extent of these protections), many other countries have not done the same.

Some political analysts believe that protecting political rights over the Internet has become a sensitive issue because it can be seen as an attempt to interfere in the domestic policies of authoritarian countries, and that efforts to promote these rights will most likely be met with resistance. In fact, some say that pushing this issue too hard will make it less likely that the world will ever reach agreement on how to handle other public policy issues affected by the Internet.

Spam: Policymakers and technical analysts say that spam – the term for unsolicited e-mail messages and for unwanted communications linked to deceptive business

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No consensus on Internet governance: Some critics say that further regulation of the Internet at the global level will be a very difficult political task. Not only do various countries disagree on a definition of the term “Internet governance,” but a broad spectrum of groups – each handling different aspects of the Internet – has different and even contradictory priorities.

practices – has become a worldwide problem. One report estimated that over 70 percent of daily e-mail communication consists of spam, and that this percentage is expected to increase. Many policymakers and experts concede that current efforts to deal with this problem have proved woefully inadequate, and that the practice of spamming has clogged Internet traffic.

The WGIG report noted that no one international agency regulates the practice of spamming, and that efforts to curb spam mainly occur at the domestic level in individual countries. For example, even though the United States enacted anti-spam legislation in late 2003 (known as the CAN-SPAM Act), analysts note that this particular law applied mainly to domestic-based spammers, and did not affect those individuals and organizations working in countries where anti-spamming statutes are weakly enforced or may not even exist.

The Organization of Economic Cooperation and Development (OECD) had organized workshops to help countries deal with spam, but critics say that these efforts did not lead to more specific measures against the practice of spamming. Furthermore, they said that because OECD membership primarily consisted of industrialized countries, the efforts of that organization would not significantly affect spammers operating in non-industrialized countries.

In 2002, the EU enacted its e-Privacy Directive (2002/58/EC), which required its member nations to pass their own domestic legislation to curb spam. But critics note that this has led to an uncoordinated effort producing inconsistent national legislation. Furthermore, one analyst said that because “there is no global consensus on a definition of spam,” various jurisdictions around the world could be uncooperative in trying to curb this practice.

The WGIG final report stated that “there is a need for global coordination among all stakeholders to develop

policies and technical instruments to combat spam,” and that further discussions would take place in the future in appropriate forums.

Cybercrime: In the area of cybercrime (such as engaging in ID theft and creating electronic viruses and other programs designed to damage computers), experts note that different countries have passed legislation criminalizing “specific conduct committed in cyberspace.” Still, analysts say that these efforts remain uncoordinated because there is no single global agency responsible for curbing cybercrime.

For example, in 1994, the United States enacted the Federal Computer Abuse Act, which prohibits the “transmission of a program, information, code, or command that cause[s] damage to a computer, computer system, network, information, data or program.” But experts note that other countries didn’t enact such laws until recently, and that many are still in the process of doing so. In the Philippines, for instance, a college student created what investigators say was the fastest spreading computer virus in history. In September 2000, the infamous “I love you” virus spread across electronic networks around the world, and, according to security experts, caused over \$10 billion in damage by destroying the files of infected computers. The Philippine government later passed laws criminalizing such conduct.

At the international level, the G-8 (a group of eight industrialized countries) established a Subgroup on High-Tech Crime in 1997, which later adopted 10 principles to combat cybercrime. But critics say that these principles were broad and unenforceable. The UN General Assembly also passed a resolution in 2000 calling on its member nations to “protect the confidentiality, integrity and availability of data and computer systems from unauthorized impairment and ensure that criminal abuse is penalized.” But, like the G-8 principles, the UN resolution left it to individual nations to take appropriate action in their domestic legislatures. Furthermore, some analysts say that many countries have weak laws that make it difficult to prosecute cybercrimes committed in other jurisdictions.

Political and technical analysts believe that further discussions to curb cybercrime will likely take place in the future, but that efforts will probably remain piecemeal at best in the short-term.

Personal privacy and data protection: Analysts say that protecting personal privacy and data over the Internet poses a particularly sensitive problem because “the intrinsic nature of the Internet makes it possible to track effectively an individual in cyberspace and use information about him/her illegally or without authorization.” For example, consumer advocates say that businesses are electronically tracking visitors to their homepages for marketing and other commercial purposes. In recent months, many private data companies and even banks in the United States – which hold personal and financial information on hundreds of millions of people – have reported widely-publicized security breaches where computer hackers have gained unauthorized access to such information. Among the victims were LexisNexis, ChoicePoint, and the Bank of America.

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Implosion of the Nuclear Non-Proliferation Treaty

Will the world maintain its confidence in a treaty preventing the spread of nuclear weapons?

Although the world community continues to devote much of its resources to combating international terrorism, it has recently focused more attention on preventing the spread of weapons of mass destruction, meaning chemical, biological, and – in particular – nuclear weapons. In the case of Iraq, the United States and a coalition of nations invaded that country in 2003 to seek out and destroy an alleged stockpile of these weapons.

Negotiators from the European Union (EU) are now trying to sway Iran from taking steps in its civilian nuclear energy program which, they say, could lead to the development of nuclear weapons. In the case of North Korea, the U.S. and other countries are trying to convince that government to dismantle its already-existing nuclear-weapons program. Political experts and policymakers worry that the acquisition of nuclear weapons by these governments could destabilize global security by fueling a nuclear arms race in their respective regions.

There is an existing international treaty – the Treaty on the Nonproliferation of Nuclear Weapons or, simply, the Nuclear Nonproliferation Treaty (NPT) – to prevent the spread of nuclear weapons. But critics say that the recent activities of Iran and North Korea highlight some of the NPT treaty's alleged deficiencies that could threaten its long-term effectiveness. And the recent discovery of an international network selling nuclear weapons designs and parts has worried policymakers who believe that terrorists are working to acquire such technology.

While some countries are calling for a reform of the treaty's provisions to prevent the secret development of nuclear weapons, others argue that nations with existing stockpiles of nuclear weapons are ignoring their obligation under the treaty to eliminate them completely. What are the controversies behind the Iranian and North Korean nuclear programs? What are some of the supposed deficiencies of the NPT treaty, and what reform measures have been proposed to deal with these problems? Where does the issue stand?

A tenuous balance between haves and have-nots

Arms control experts say that the NPT is the most widely accepted arms control agreement prohibiting the development and proliferation of nuclear weapons and

nuclear weapons technology. Coming into force in 1970, the NPT currently has 189 signatory nations. While some say that the treaty came about in an effort to stop a nuclear arms race, many political analysts believe that those countries already possessing nuclear weapons supported the NPT in order to maintain their military advantage by making the development of nuclear weapons illegal for all other nations.

According to Articles I and II of the treaty, nuclear-weapon (NW) states agree not to help non-nuclear-weapon (NNW) states develop or acquire nuclear weapons or weapons technology such as “equipment or material especially designed or prepared for the processing, use, or production” of fuel for nuclear weapons. NW states also agree to eliminate their existing nuclear weapons “at an early date” and under “strict and effective international control” in order to remove the very incentive for NNW states to develop their own nuclear weapons.

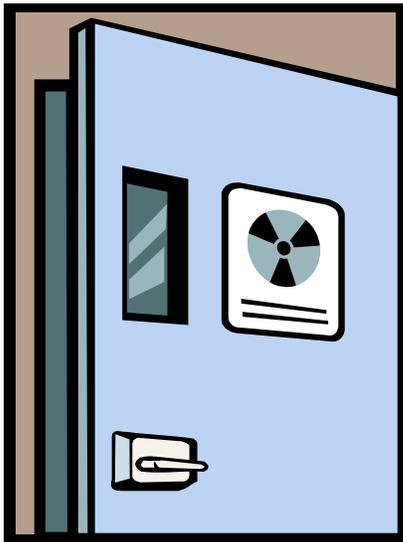
NNW states, in turn, agree not to develop, acquire, or seek assistance in the development of nuclear weapons in exchange for access to nuclear technology for peaceful purposes (such as the generation of electricity). To verify compliance with the treaty's provisions, NNW states must open their *declared* nuclear facilities to inspections by a United Nations organization called the International Atomic Energy Agency (IAEA) – which recently won the 2005 Nobel Peace prize – to ensure, for example, that materials from these facilities are not being diverted to nuclear weapons programs. Experts say that the terms of the inspections are negotiated in advance.

Violations of the terms of the treaty may be referred to the United Nations Security Council for further deliberation and action. (According to the United Nations Charter, the Security Council is responsible for the maintenance of international peace and security, and experts generally agree that a country's development of nuclear weapons – which it had probably undertaken because of a perceived or actual threat from, say, a neighboring country or existing enemy – could create regional instability by fueling an arms race.)

Although the NPT treaty requires NNW states to forswear the development of nuclear weapons, Article IV of the treaty also states that “nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes . . . in conformity with Articles I and II of this Treaty.” Scientists say that many countries use uranium or plutonium – from either domestic or outside sources, and which must then be refined using a technologically arduous process mastered by only a small group of countries – to fuel civilian nuclear reactors. According to arms control experts, Article IV allows countries to enrich nuclear materials such as uranium solely for peaceful purposes such as creating the fuel for nuclear reactors to generate electricity.

But they also point out that both substances – when refined further using advanced technology such as centrifuges spinning at twice the speed of sound – also

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Opening the door to nuclear proliferation? Critics say that countries such as Iran are exploiting flaws in the Nuclear Non-Proliferation Treaty (or the NPT treaty) – which is credited for curbing the spread of nuclear weapons – in order to develop such weapons. Another nation, North Korea, has already announced that it has developed nuclear weapons despite being a signatory of the NPT treaty.

constitute the main ingredients in nuclear weapons, and that a NNW state government can (if it chooses to do so) readily convert a civilian nuclear program into a weapons program once it has mastered the refining process, though such an action would break the terms of the NPT treaty. One expert said that “the technology for making low-enriched uranium for civilian reactors is nearly identical to that for making highly enriched uranium for atomic bombs.”

The NPT treaty is not to be confused with other nuclear arms agreements such as the Comprehensive Test Ban Treaty (CTBT), which prohibits all nuclear test explosions and does not address the proliferation of the nuclear weapons themselves. The CTBT has not yet come into force. The U.S. Senate rejected its ratification in 1999.

Though many political analysts have credited the NPT treaty with preventing the spread of nuclear weapons, they say that it contains flaws which an NNW state may exploit to develop these weapons secretly. Critics believe that Iran and North Korea are now exploiting these flaws, which, in turn, have stirred a sharp debate as to whether the NPT treaty is still effective in its stated purposes and goals.

Iran: Secret plans to build the bomb?

In 2002, Iran admitted that it had operated (for nearly 20 years) an undisclosed facility to enrich uranium, and that it had plans to construct another facility solely for that purpose. (Experts say that Iran has its own domestic sources of uranium ore.) Iran – which ratified the NPT treaty in 1968 – argued that Article IV of the NPT treaty allowed it to pursue nuclear research for peaceful purposes such as refining the uranium needed to power that country’s nuclear reactors for civilian electricity projects.

But IAEA investigators said that the undisclosed facility was enriching uranium at levels exceeding those necessary to fuel a civilian nuclear power plant. And the fact that Iran had operated the facility in secret for a long period of time prompted suspicions in the global community that the Iranian government was operating a nuclear weapons program under the guise of its civilian program. One official argued that Iran had “forfeited the right to peaceful nuclear technology because it had organized a deliberate effort to hide its [previously undisclosed uranium enrichment] activity.”

Some political experts say that the successful development of nuclear weapons by Iran could set off a nuclear arms race in the Middle East, which is already a politically volatile region of the world. Some commentators have also asked why an oil-rich nation such as Iran would need to pursue a nuclear energy program.

In 2003, the EU and Iran reached an agreement whereby Iran would temporarily suspend all of its uranium enrichment and reprocessing activities until the two sides reached a final agreement concerning the future of that country’s nuclear power program. Experts say that no one is suggesting that Iran completely forego nuclear power. Instead, the two sides are trying to negotiate a final agreement to “limit and monitor Iran’s uranium-enrichment capabilities.”

In return for limiting its efforts to enrich uranium, Iran would – under the terms of the draft agreement – receive an outside supply of uranium for its nuclear power reactors (which would be strictly monitored by the IAEA) and also technical assistance in building nuclear reactors whose byproducts cannot be reprocessed into weapons-grade fuel. The agreement also offered a host of other economic incentives such as increased trading opportunities with the EU. But Iran chafed at some of the requirements in the 2003 agreement, and threatened to resume its uranium enrichment activities. In September 2005, after several rounds of unsuccessful talks with Iran, the board of the IAEA (which is composed of NPT signatory nations) approved a resolution to refer Iran to the UN Security Council for violating its obligations under the NPT treaty. But the resolution leaves open the actual timing of the referral.

Negotiators from the EU and Iran are currently trying to craft another agreement agreeable to all sides. On the other hand, the United States has been calling on the UN Security Council to impose immediate economic and political sanctions on Iran if negotiations fail.

North Korea: Dropping several bombs

North Korea signed the NPT treaty in 1985, and then agreed to IAEA inspections of its nuclear energy program, whose stated purpose was to generate electricity for that impoverished nation. When the IAEA demanded inspections of several undisclosed nuclear sites, North Korea, in 1993, withdrew from the NPT treaty. In the following year, North Korea reached an accord (called the Agreed Framework) with the United States, South Korea, and Japan in which it agreed to shut down operations and eventually dismantle its

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existing nuclear power plants, stop construction of related facilities, and abide by the terms of the NPT treaty. In exchange, it would receive heavy oil shipments and assistance in the construction of two nuclear reactors whose byproducts could not be used in a nuclear weapons program. North Korea also agreed to allow the other nations to store and eventually dispose of the spent fuel from its existing reactors. (Scientists say that the spent fuel could be reprocessed into weapons-grade plutonium.)

In 2002, the U.S. claimed that North Korea had violated the Agreed Framework (and the NPT treaty) by secretly enriching uranium for a nuclear weapons program. North Korea again withdrew from the NPT treaty and announced that it would reopen its nuclear facilities. It also stated that it would begin reprocessing its spent fuel rods to make weapons-grade plutonium. Intelligence experts say that North Korea now probably has enough plutonium to make five or six nuclear weapons.

Analysts say that a nuclear-armed North Korea could, as in the case of Iran, set off a nuclear arms race, this one in Asia. After holding three unsuccessful rounds of talks since 2003, North Korea later declared that it had nuclear weapons, and that it could test them soon. But in the face of international pressure and U.S. threats to refer the matter to the UN Security Council, North Korea returned to negotiations concerning its nuclear weapons program in August 2005. These talks are still underway.

Doubts surrounding the effectiveness of the NPT

Legal experts and analysts say that the recent controversies concerning Iran, North Korea, and a peculiar case where a rogue nuclear scientist assisted some countries in developing nuclear weapons have caused policymakers to cast doubt on the long-term effectiveness of the NPT treaty. One expert described the NPT treaty as “a pyramid scheme [which] works as long as everyone believes in it. As soon as they stop doing that, it collapses.” Some of the apparent problems include the following:

(i) ***The NPT provides loopholes for a NNW nation determined to build nuclear weapons.*** Analysts say that under the so-called Article IV “loophole,” a country could say, for example, that it is simply developing the technical expertise of refining nuclear fuel for ostensibly peaceful purposes (such as the generation of electricity). But after achieving this capability, that country could then renounce its NPT obligations (which a country may do under the treaty “if it decides that extraordinary events . . . have jeopardized the supreme interests of its country”), produce weapons-grade fuel, and then declare itself a nuclear weapons state.

Many government officials suspect Iran of using this tactic (even though that government continues to deny it). According to the Secretary General of the UN: “States that wish to exercise their undoubted right to develop and use nuclear energy for peaceful purposes must not insist that they can only do so by developing capacities that might be used to create nuclear weapons.”



A weapons program draped in civilian clothing? One apparent loophole in the NPT treaty allows a country to pursue nuclear research – such as refining uranium – for peaceful purposes such as generating electricity. But one expert noted that “the technology for making low-enriched uranium for civilian reactors is nearly identical to that for making highly enriched uranium for atomic bombs.”

The NPT also provides what some critics say is an “undeclared facilities loophole” for NNW nations to pursue secret nuclear weapons programs. Experts point out that IAEA inspections are confined only to *declared* nuclear facilities, and that these inspections are voluntary and negotiated in advance of the actual inspections (where, according to one expert, a country being inspected can “largely control inspectors’ movements”). Critics say that this loophole can allow countries to pursue secret nuclear weapons development.

In 1997, the IAEA adopted a set of voluntary “Additional Protocols” which would allow the IAEA to make unannounced visits to both declared and undeclared nuclear facilities. While many countries have signed these protocols, they have not introduced legislation in their respective countries to implement its provisions.

(ii) ***The NPT treaty is not enforceable beyond a referral to the UN Security Council.*** Furthermore, some analysts argue that a referral to the Security Council may fall on deaf ears if a particular member (such as China) will likely vote against such a referral in order to prevent a potentially destabilizing security situation (as in the case of North Korea, which shares a border with that country). Also, legal analysts note that the treaty does not have any particular provisions to punish a country that decides to renounce the treaty and later declare itself a nuclear weapons state.

(iii) ***The NPT treaty has not yet created an incentive for nations to renounce completely the pursuit of nuclear weapons.*** Many critics point out that Article VI requires NW states to undertake efforts to eliminate completely their existing nuclear weapons stockpiles. But, as one commentator pointed out, “the treaty does not specify a

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[specific] date, and the goal of nuclear disarmament has not been reached nearly 25 years” after the treaty had come into force. Though political analysts say that the United States has and continues to reduce its stockpile of nuclear weapons after the collapse of the Soviet Union, its pace has slowed in recent years.

In fact, some point out that countries such as the United States (which did ratify the treaty) are actively pursuing the development of more advanced nuclear weapons to destroy, for example, underground bunkers. Furthermore, critics cite the U.S.’s rejection of the CTBT treaty as evidence that it will not continue to eliminate its existing nuclear stockpile as required under Article VI of the treaty.

(iv) *The treaty does not apply to non-signatory nations such as Pakistan and India or even non-state actors.* In February 2004, a nuclear weapons scientist in Pakistan – Dr. Abdul Qadeer Khan – admitted to operating an international network to sell nuclear weapons designs, blueprints, parts, and other technologies to countries such as North Korea. Investigators say that Dr. Khan’s network even provided “customer support” to his buyers, which prompted the head of the IAEA to describe the network as the “Wal-Mart of private-sector proliferation.” Another expert said that despite the existence of the NPT treaty, “Pakistan [was] absolutely the biggest and most important illicit exporter of nuclear technology in the history of the nuclear age.” Supporters of the NPT treaty say that this supposed flaw can easily apply to any international treaty which does not have universal membership.

What can be done to reform the NPT treaty?

In May 2005, the signatory nations of the NPT treaty held a month-long conference in New York to review progress of the treaty’s implementation (which the treaty requires every five years) and also to offer recommendations in strengthening its provisions. At the start of the conference, the IAEA chief stated that “it is clear that recent events [concerning Iran and North Korea] have placed the NPT and the regime supporting it under unprecedented stress, exposing some of its inherent limitations”

The IAEA chief proposed that the so-called loopholes in Article IV – where countries can supposedly pursue the development of nuclear weapons under the guise of peaceful nuclear research – should be closed by imposing a moratorium on the construction of new facilities to enrich uranium and plutonium until the world community creates an international consortium which would supply these ingredients under strict IAEA monitoring. The IAEA also proposed that the Additional Protocols – which would allow surprise inspections of undeclared declared nuclear sites – should be established “as the norm for verifying compliance with the NPT.”

On the other hand, the U.S. proposed that the NPT treaty should go further and ban states from “acquiring the technology [including the construction of enrichment processing plants] needed to produce fuel for a nuclear

reactor or a nuclear bomb.” Still other countries proposed that the treaty should punish states that renounce their treaty obligations, and that such states should relinquish any advanced technology they obtained under the treaty.

Uncertain future for the NPT?

Commentators noted that the parties to the review conference couldn’t even agree on an agenda, and that many countries sparred on how much emphasis to place on “existing cases of noncompliance” such as those presented by Iran and North Korea. Many delegates from the developing world insisted that nations such as the United States and Russia must first agree to measurable targets and firm deadlines in dismantling their existing nuclear weapons stockpiles, which is required under Article VI of the treaty.

At the conclusion of the review conference, the parties failed to issue any specific recommendations concerning the NPT treaty, which caused policymakers to worry that the long-standing NPT treaty could eventually break down further. Although political analysts note that several past review conferences had also failed to make concrete recommendations, they conceded that the cases of Iran, North Korea, and the recently discovered nuclear black-market network have presented serious challenges to the effectiveness of the NPT treaty in carrying out its stated goal of preventing the proliferation of nuclear weapons and weapons technology.

In the meantime, other nations have bypassed the NPT treaty to help curb the proliferation of nuclear weapons and its related technology. For example, the United States and 21 other nations have created a Proliferation Security Initiative (PSI) whereby these countries would intercept suspected shipments of nuclear materials and technology. But critics say that the PSI’s lack of universal membership will limit its effectiveness.

The U.S. also recently announced that it had reached an agreement with India (which never signed the NPT agreement and later developed nuclear weapons) to allow – for the first time – international inspectors to examine that country’s nuclear energy program, in return for technical assistance. The United States had rebuffed India’s request that it join the NPT treaty without giving up its nuclear weapons. (According to the treaty’s provisions, any country that joins the NPT after it comes into force must do so as an NNW state, meaning that India would have to give up its nuclear arsenal, which political analysts say is very unlikely to occur.) Some analysts worry that if India joined the NPT with its nuclear weapons program intact, it would encourage other non-signatory nations – such as Pakistan and Israel – to do the same, which could then undermine the integrity of the treaty itself.

Officials still hope that the United States, the EU, and other members of the NPT treaty will be able to reach an agreement with Iran and North Korea to curb the proliferation of nuclear weapons and the technology used to create such weapons. ■

Citing international authority: not a new phenomenon

Despite the media attention given to this debate, commentators note that this is not the first time that the Supreme Court has struggled over the proper approach in interpreting the Constitution and in determining the relationship between domestic and international law. Although some legal analysts argue that the judiciary should never cite international sources of materials when making their rulings, some legal historians point out that – since the nation’s founding – the Supreme Court had often looked to international rules in a broad range of contexts in order to, for instance, “help define state powers within our federal system, and to construe the commerce clause, the government’s power over immigrants, and the meaning of involuntary servitude and due process, to name a few.”

For instance, *O’Malley v. Woodrough* (1939) cited a South African opinion. *Selective Service System v. Minnesota Public Interest Research Group* (1984) cited legal opinions from Belgium and other European countries. *Planned Parenthood v. Casey* (1992) cited an opinion from West Germany. In *The Paquete Habana* decision (1900), Justice Horace Gray held “international law is part of our law,” and “where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.”

Other experts also point out that many phrases in the Constitution – such as “due process” and the “right to confront” – were borrowed from the Magna Carta from England. Also, not all originalists are wholly against using foreign sources of law to interpret the Constitution. Some argue that English common law would be one of the few exceptions in using foreign sources to interpret the Constitution. (Legal historians say that the framers had used that particular system of law to set the foundation in the drafting of the Constitution.)

Furthermore, scholars point out that even the Constitution makes several references to international law. One expert said that “many provisions of the Constitution directly invite reference to foreign and international law (such as the power of Congress to ‘define offenses against the law of nations’).” Various sides of the political spectrum also say that, in past rulings, the Court had cited rulings from international tribunals and other global judicial bodies in order to determine the U.S.’s obligations under certain international treaties which it had signed.

Even those justices who are against the practice of citing international sources of authority have themselves cited those exact sources to support their past rulings. In a 1997 opinion upholding Washington state’s ban on assisted suicide, Chief Justice William Rehnquist noted that the Canadian Supreme Court had reached a similar decision, and that Australia, Britain and New Zealand continued to outlaw that practice. Commentators point out that Mr. Rehnquist had once stated: “[N]ow that constitutional law is solidly grounded in so many countries, it [is] time the US courts began looking to the decisions of other constitutional courts to aid in their own

deliberative process.” In 1995, Justice Antonin Scalia – another critic of citing foreign sources of materials – wrote about the practices of Australia, Canada, and England when dissenting from a decision striking down a state law “requiring the publishers of political-campaign pamphlets to identify themselves.”

Some problems in citing international authority?

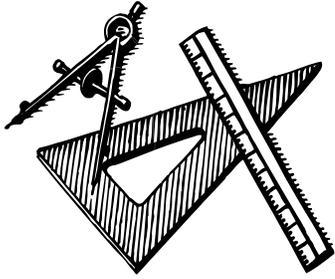
Although the Supreme Court has been citing international sources of authority in recent cases (mainly by relying on information provided in amicus briefs submitted by interested parties to a particular case), some legal commentators have questioned whether the Court had analyzed these sources in a systematic and rigorous manner. They have pointed out several problems.

Comparing apples and oranges: Legal experts opposed to the citation of international sources argue that while there are, indeed, foreign opinions that deal with similar issues in the U.S., American judges “do not comprehend the social, historical, political, and institutional background from which foreign opinions emerge.” In other words, while a certain foreign case may seem similar on its face, it may involve different legal questions produced in a society with different legal traditions. One judge warned that “judges both in the United States and in other countries [should] be cautious about engaging in comparative constitutional analysis for our respective countries and legal systems remain distinct in several important respects.”

In the *Lawrence* case, for example, critics say that the amicus brief from the human rights group Amnesty International had cited a decision (*Dudgeon v. United Kingdom*) from the European Court of Human Rights to support its claim that many countries had rejected the criminalization of homosexual sodomy. But they argued that the *Lawrence* and *Dudgeon* decisions involved entirely different legal questions, and, thus, could not be compared to one another: “As the *Dudgeon* Court described it, the principal question was whether the sodomy law was ‘necessary’ . . . for the protection of health or morals . . . In the U.S. case, in contrast, . . . the Court was asking not whether sodomy laws were ‘necessary,’ but whether they were reasonable – that is, exactly the question *Dudgeon* said it was *not* asking.” One expert said that there was no “connection” between the two cases, both of which addressed “the interpretation of different documents, written in different times and different countries.” Another added: “The low cost of accessing the mere words of a foreign judicial opinion can blind us to the fact that we are only seeing the surface of a far deeper social structure that is incompatible with American institutions.”

Questions concerning accuracy: Some have questioned the accuracy of some of the claims made in several amicus briefs. In its brief to the Court in *Lawrence*, Amnesty International argued that many foreign jurisdictions around the world no longer criminalized homosexual sodomy “as a result of either court decisions or legislative action.” But a

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Citing international law with greater precision? Critics argue that the judiciary should adopt stricter standards for citing international authority. Some believe that recent Supreme Court majority decisions have, for example, cited only those foreign court rulings which support their conclusions and have ignored assertions to the contrary. Other scholars say that devising – and following – strict standards is not possible.

report issued by another prominent human rights group reported that there is "hardly any support for gay and lesbian rights among the population in 144 countries," and that "74 of the 172 countries surveyed outlaw homosexuality." Critics also point out that Amnesty International seemed to contradict its own assertions by stating in a recent report that "individuals in all continents and cultures are at risk of discrimination based on sexual orientation."

In the *Roper* case, legal analysts point out that the majority opinion had cited the *International Covenant on Civil and Political Rights* to support its claim that international norms disfavored the execution of juveniles. But critics point out that the U.S. had ratified this treaty with a specific reservation that reads: "The United States reserves the right, subject to its Constitutional restraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crime committed by persons below eighteen years of age." The dissenting opinion in *Roper* concluded: "Unless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position."

Other critics note what they believe are other inaccuracies and unsupported claims in recent decisions citing foreign sources of materials. They argue, for instance, that even though the *Atkins* decision cited a supposed "world community" that overwhelmingly disapproved of the execution of mentally retarded offenders, no one had taken an actual opinion poll to back up this claim. One analyst asked: "How are U.S. judges supposed to survey the laws" of every country?

Instead, they say that the *Atkins* decision had actually cited a poll conducted by the United Nations, in which that organization had sent out a questionnaire to its 191 member nations concerning the death penalty, but only received responses from less than one-third of those countries. A critic

said: "Yet the UN study is essentially all that the brief cites on the question of international practice."

Questions of selectiveness: Others argue that the majority decisions seem to avoid "the bitter from the sweet" in that they only seem to refer to opinions and other materials that support their own conclusions and ignore assertions to the contrary. In referring to the amicus brief from Amnesty International in the *Lawrence* decision, one scholar said that "while the European Union protects sodomy as a constitutional right, many nations still criminalize sodomy. Why should the Court look to the European Union and not these other nations?"

In addition, some political analysts point out that while many more countries have greater restrictions on certain political rights (such as freedom of speech) than the U.S., they believe that American courts would "never contemplate scaling back those rights in order to align itself with the views of a world community." They argue that some of those in favor of citing international decisions and practices in Supreme Court decisions seem only to want to cite those decisions and practices that enhance, rather than restrict, certain rights.

A more rigorous standard?

These problems have led some legal scholars to argue that the Supreme Court must develop a more systematic and rigorous approach in evaluating and using these wide-ranging (and sometimes conflicting) international sources of materials. One commentator said: "The dearth of methodological guideposts opens courts to the criticism that foreign practice does not really aid deliberation but merely cloaks otherwise unsupported policy decisions."

Even a former Supreme Court justice who had cited international sources in recent decisions recently said: "I do not know much about international law. I am just learning." But some scholars say that it will be very difficult – if not impossible – to devise such a systematic approach in evaluating the wide range of international decisions, norms, and customs coming from a variety of legal traditions.

Although the Supreme Court had cited and continues to cite international sources in their decisions, some commentators have expressed surprise at the level of rancor in the current debate. Some politicians have called for a reduction in pay for members of the judiciary who cite international sources in their decisions and even for their impeachment. Recently, the U.S. House of Representatives introduced a resolution which would prohibit judges from citing international sources of materials in their decisions.

Some political analysts believe that these recent cases have garnered so much attention in legal circles not only because they involved controversial social issues in a highly-charged partisan environment, but because they also involved the still unresolved debate concerning the proper method for interpreting the Constitution. They say that this debate will simply continue into the future, and that any decisive resolution is unlikely. ■

Legal experts say that protecting personal privacy and data has been difficult because different countries approach these issues from different philosophical perspectives. For instance, one legal expert said that “one approach presumes that personal data are not private unless the data object explicitly declares it so, and another approach presumes that personal data are private and not to be disclosed unless there is an explicit consent authorizing disclosure and use.”

The EU, in 1995, adopted a Directive that protects personal data. On the other hand, in the United States, while there are federal laws that prevent the unauthorized disclosure of certain personal information, such as financial and credit records, by third parties, the data industry selling such records is largely self-regulated. Many countries (including the United States) simply don't have “comprehensive privacy protection laws,” say legal experts.

Organizations such as the UN have also tried to address personal privacy. In 1990, the General Assembly passed resolution 45/95 on “Guidelines for the Regulation of Computerized Personal Data Files,” but critics noted that these guidelines allowed each UN member state to take its own initiative in addressing data protection.

In its final report, the WGIG simply encouraged countries that “lack privacy and/or personal data protection legislation to develop clear rules and legal frameworks . . . to protect citizens against the misuse of personal data.”

Intellectual property rights: In the area of intellectual property rights, legal analysts say that the Internet has made it easier for people to exchange materials such as digital music recordings, photos, movies, and manuscripts, but that, in many instances, the exchange of such information violates intellectual property rights such as copyrights and trademarks. According to several media companies, such violations have resulted in the loss of hundreds of millions of dollars in lost revenue. “The ease and duplication and distribution make such works in the digital world highly vulnerable to unauthorized copying and modification [over the Internet],” stated the WGIG background report.

Legal analysts note that a majority of countries around the world do have laws that protect intellectual property, but that jurisdictions vary as to the degree in which they enforce such laws. For example, within the EU (which comprises 25 member nations), every country has its own laws and courts for handling intellectual property protection and disputes. But analysts have noted that courts in various EU nations have issued different decisions concerning the same intellectual property dispute. In the United States, the Federal Bureau of Investigation recently announced – in an operation called “Operation Site Down” – that it had worked with law enforcement officials from 10 other countries to disrupt an international criminal network of organizations involved in the illegal distribution of copyrighted music, software, movies, and video games. But legal analysts note that, even with these kinds of efforts, counterfeiters will simply move their operations to jurisdictions that don't vigorously enforce their intellectual property laws.

Experts say that there are enforceable international treaties such as the Trade-Related Aspects of Intellectual Property Rights (which is administered by the World Trade Organization or WTO) that help to protect intellectual property. But critics note that the WTO only requires its member nations to implement minimum standards of protection. So, as on the national level, analysts say that different WTO member nations still have varying degrees of protection for intellectual property rights.

Other legal experts say that certain agreements made by various international organizations “tend to neglect linkages” with the work of similar bodies. For example, one study said that the World Intellectual Property Organization's treaties protecting intellectual property rights may not be compatible with, say, resolutions urging UN member nations to promote science and culture, which some analysts say may involve a more accommodating standard in protecting these rights.

The WGIG noted in its report that “while there is agreement on the need for balance between the rights of holders and the rights of users, there are different views on the precise nature of the balance that will be most beneficial to all stakeholders . . .”

A way forward in the future of Internet governance?

The WGIG report concluded that existing governance measures have not adequately dealt with public policy issues related to the use of the Internet, and that effective long-term governance would require the creation of a “forum” to address these issues in a more coordinated and disciplined fashion. “Since there is no global multi-stakeholder forum to address Internet-related public policy issues, it [the WGIG] came to the conclusion that there would be merit in creating such a space for dialogue among all stakeholders,” stated the report. It recommended that “the forum should preferably be linked to the United Nations, in a forum to be defined.”

The report also proposed different organizational models for the forum, including a Global Internet Council which would “set international Internet public policy and provide the necessary oversight relating to Internet resource management.” Analysts note that there is still no agreement on the function, responsibilities, and financing of such a forum, or even whether such a forum should exist.

Political analysts say that a second WSIS summit scheduled for November 2005 in Tunisia will use the WGIG report as a basis for future negotiations concerning the long-term management of the Internet by its various stakeholders.

But analysts say that there is already some opposition to some of the recommendations. For example, a few weeks before the WGIG released its report, the U.S. announced that it would “maintain its historic role in authorizing changes and modifications” concerning domain name and addressing systems. And in what commentators say is an attempt to prevent a large bureaucracy – such as the UN – from supposedly stifling innovation, the U.S. also announced that it will “continue to support market-based approaches and private sector leadership in Internet development broadly.” ■

International Law News Round-up



The end of the European Union Constitution?

In a significant setback for greater European integration, voters in France and the Netherlands recently rejected the approval of a European Union (EU) constitution, thereby suspending indefinitely a ratification process that started in January 2005. Legal experts say that while the rejection of the constitution will certainly not bring about the demise of the EU itself, it will make it harder for its member nations to promote unity and reach decisions among its growing ranks.

As it stands today, the EU is a political and economic union of 25 nations (encompassing over 400 million people) bound together by a series of complex international treaties. These treaties created common institutions – the European Commission, which proposes legislation, and the European Parliament and Council, which enact laws proposed by the Commission – to manage certain political and economic areas of mutual concern such as trade, finance, environmental protection, and agricultural policy.

In June 2003, delegates to the “Convention on the Future of Europe” presented a draft constitution to the leaders of the EU member nations, and a final draft was later approved in January 2005. Political commentators say that, as the EU increased its membership (from 15 members to the current 25), it saw the need to streamline its decision-making process – which one commentator described as “creaky and cumbersome” – and that one single, all-encompassing constitutional treaty would help reach that goal.

For example, under the proposed constitution, decision-making in many areas of governance would have changed to “qualified majority voting” whereby the EU would have adopted a certain legislative proposal if it were supported by a majority representing at least 55 percent of all EU member nations and 65 percent of the EU population. (Under the existing system, certain legislation is created through a process of consensus, which would allow a single nation to block its passage.)

Although referred to as a constitution, the draft text is actually a treaty. Unlike, say, the U.S. Constitution which binds a single nation, the proposed EU constitution was to be an agreement among sovereign nations still retaining a large measure of governmental power. Legal experts say that the much of the draft constitution was simply a combination of the various EU treaties. If it had been implemented, rules

under the EU constitution would have, in some cases, superseded domestic law in individual member nations in areas such as immigration law, justice issues, and asylum procedures. Still, speaking of the constitution, one analyst said that it would “co-exist with – but not replace – individual members’ constitutions.” In fact, every EU country would have retained its sovereignty in important policy areas, including taxation and military policies.

Beginning in January 2005, the EU constitution became subject to a ratification process whereby all 25 member nations – over an almost two-year period – had to schedule and then approve that document in order for it to come into force. In the event that a single EU nation failed to ratify the constitution, one official said: “There was no Plan B.”

While 10 nations did ratify the constitution earlier this year, voters in France had rejected it by a vote of 55 percent to 45 percent. A few days later, voters in the Netherlands had voted down the constitution by an even wider margin – 60 percent to 40 percent. The EU leadership later announced that it would not be possible to implement the constitution on its previously announced starting date of November 1, 2006. Several other EU members – such as the United Kingdom and the Czech Republic – postponed their scheduled votes.

Analysts say that a variety of problems confront passage of the constitution. Economists say that a stagnant European economy (combined with weak job growth) created fears among the public that the EU constitution would allow a more generous immigration policy and lead to a greater influx of laborers from Eastern Europe who would be willing to work for lower wages. Others add that because the framers of the constitution had written that document with little outside input, the public viewed the ratification process and the document itself with suspicion and mistrust. Some say that the constitution gave too much voting power to larger members such as France and Germany, and that smaller EU nations would have been unable to attain their own majority to push forward certain legislation.

Despite the setback of the ratification process, the EU is expected to continue to operate under its existing treaties as it has done for the past several decades. One commentator added: “Talk of an apocalypse is surely overdone.” But political analysts believe that with a growing membership – the EU had admitted 10 nations in 2004, and it could admit two more countries in 2006, hence bringing total membership to 27 nations – it will be much harder to reach consensus and move forward on contentious issues.

Political analysts say that the EU leadership doesn’t have many viable options for reviving the ratification process in the near future. While some have argued that the framers of the constitution could change some of its provisions in order to draw more public support, others noted that the constitution was a product of many delicate compromises, and that any changes could undo support for the entire document. Some officials have called on other EU nations to hold their votes as scheduled. But others responded that, rather than emboldening opponents of the constitution, it

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would be best to postpone any future votes.

Rather than announcing the end (some say “death”) of the ratification process, many legal and political analysts describe the effort as temporarily stalled. They predict that the EU leadership will eventually have to revive the ratification process in the future. Experts believe that without more streamlined procedures for making important decisions, the 25 members of the EU could experience more deadlocks in the future, which could prevent it from addressing various issues ranging from economic problems to terrorism. Indeed, soon after the stalled ratification attempt, the EU failed to implement its annual budget because its member nations could not resolve several disagreements concerning agricultural policy. ■



Law school: A cure for foreign competition?

Can a government job retraining program reimburse a worker for law school expenses such as tuition? In a recent case, a state appeals court affirmed a decision not to reimburse a former engineer – who lost his job because of foreign competition – for such expenses under a particular government program used to help retrain and provide workers with job search assistance.

Though many economists and other analysts say that international trade has helped to create millions of jobs in the United States, they also acknowledge that foreign competition has hit the manufacturing sector particularly hard since the 1960s and has led to hundreds of thousands of job losses as many companies have moved their operations to countries where workers are paid lower wages.

To offset these job losses, Congress created – under the Trade Act of 1974 – the Trade Adjustment Assistance (or TAA) program, which helps trade-impacted workers enhance their job skills by providing, for example, “career counseling, up to two years of job training, income support during training, job search assistance, and relocation allowances.” While the U.S. Department of Labor oversees the TAA program, certain agencies in every state help to administer the program.

In order to qualify for TAA benefits, the applicant must meet six criteria: (i) there is no suitable employment available in the field last occupied by the applicant; (ii) the worker would benefit from appropriate training by earning at least 80 percent of his wages from the previous job; (iii) the worker would have a reasonable expectation of employment four months following completion of such training; (iv) training is reasonably available to the worker; (v) the worker is qualified to undertake and complete such training; and (vi) such training is suitable for the worker and available at a

reasonable cost.

In December 2002, James Allen – a metallurgical engineer in Utah who was earning \$87,500 annually – was laid off by his employer of 19 years, the cause being foreign competition. After claiming that he was unable to find available work in his particular field, he enrolled at the University of Utah Law School. Under Utah’s TAA program, Allen requested reimbursement for law school expenses such as tuition. The Department of Workforce Services – which is the agency handling the administration of the TAA program in Utah – rejected Allen’s request, stating it was neither within reasonable costs nor time limits of that program. Allen appealed that decision to the courts.

In its April 2005 decision (*James P. Allen v. Department of Workforce Services, Workforce Appeals Board*), the state Court of Appeals for Utah affirmed the ruling of the Department of Workforce Services by arguing that Allen had failed to meet several criteria to receive TAA benefits. For example, it ruled that Mr. Allen would not fulfill the criterion of being “job ready” within four months upon graduation (in June 2005) from law school. Because he would have to take a bar exam, await the results, and then undergo the process of being sworn in, he would not be ready to practice law before October (which is the four-month limit).

The Board also argued that – based on the average starting salary for a state law school graduate – Allen, as a lawyer, would not make at least 80 percent of his original wages (which is the third criterion). Analysts say that although Mr. Allen did not win his case, they noted that the Department of Workforce Services did state in its original determination that Mr. Allen could have received TAA benefits if he had pursued, for instance, an advanced engineering degree or a graduate degree in business administration, both of which would cost “one-third the amount of law school, could be completed much faster,” and, in the Department’s view, were more “suitable” for Allen. ■



While the U.S. barely passes CAFTA . . .

In July 2005, the House of Representatives narrowly passed the Central American Free Trade Agreement (CAFTA) on a mostly Republican Party-line vote of 217-215. While many hailed the passage of that agreement – which will remove most barriers to trade and investment between the U.S. and several countries in Central America – others believe that its razor-thin approval (and declining public support for open trade) will make it harder to pass larger and more ambitious trade agreements in the future.

Officials say that, under the terms of the CAFTA agreement, over 80 percent of U.S. exports of consumer and

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industrial goods and over 50 percent of U.S. agricultural products will receive duty-free treatment in the six CAFTA nations. Economists say that, by not being subject to import duties, U.S. companies and their products will become more competitive in Central American markets. Remaining tariffs on most U.S. products will be phased out over a 15-year period. Business executives say that CAFTA will also provide U.S. service providers with substantial new access to several sectors in Central America such as telecommunications, insurance, and banking. Trade experts estimate that, under the CAFTA agreement, U.S. exports will increase to \$1.5 billion a year.

On the other hand, critics say that the economic benefits of the CAFTA agreement will not be significant and that its provisions will mostly benefit the U.S. Analysts say that close to 80 percent of exports from Central America already enter the U.S. duty-free under previously-established trade preference programs. They also note that total U.S. exports to the six CAFTA member nations – Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua – totaled \$17 billion a year, an amount equivalent to the total value of goods and services exported by the state of New Jersey to other countries around the world. Critics such as human rights groups and unions also say that the CAFTA agreement does not provide enforceable provisions protecting labor standards in those countries.

But supporters counter that the CAFTA agreement will “lock-in” and expand previously granted trade preferences to the six CAFTA nations in the years to come, and that the agreement will allow more access in the American market (and perhaps create more jobs) for businesses in these poorer countries, especially in the areas of textile and sugar production where Central American has a competitive advantage. (Analysts say that a broad spectrum of businesses supported CAFTA.) Proponents of the measure also argue that the state parties to the agreement agreed to allocate more than \$160 million in aid to help enforce domestic labor laws in each CAFTA nation.

Political analysts believe that the hard-fought passage of CAFTA reaffirms U.S. commitment to open markets. The U.S. trade representative described the recent vote as “a strong signal to the world that the U.S. is committed to market liberalization.” But they also argue that the House’s narrow approval of the agreement reflects growing public fear of greater foreign competition. (The measure had passed in the Senate the previous month on a 54-45 vote.)

Such fears, say analysts, will make it harder to conclude ongoing negotiations on much larger and complex trade agreements such as those taking place under the auspices of the World Trade Organization, which involve many more economic sectors and the views of over 140 countries of varying economic development. One analyst said: “To supporters and opponents alike, the [CAFTA] pact became a political symbol over how best to respond to globalization, competition from low-wage countries, and the loss of manufacturing jobs in the United States.”

Indeed, critics of CAFTA note that supporters of the measure did even not secure its passage until the day of the actual vote. Furthermore, supporters also had to promise several wavering lawmakers certain benefits in exchange for their votes. One commentator said that the passage of CAFTA had turned into a “vote-buying bazaar.” ■



... the outcome of ongoing WTO talks remains uncertain

Trade experts worry that the slow pace of the world’s largest ongoing trade negotiations – being conducted under the auspices of the World Trade Organization (WTO) – could delay the conclusion of those talks, which were originally scheduled to end before January 1, 2006. They say that the rich and poor member nations of the WTO have yet to resolve major differences concerning sensitive economic sectors such as agriculture, and that these delays could even derail the talks all-together.

In November 2001, the member nations of the WTO agreed to begin their latest round of global trade talks – called the Doha Round – to reduce further tariffs and other barriers to global trade and business in areas such as agriculture, services, intellectual property, and investment. The current round had been dubbed the “development round” to call greater attention to the needs of the developing countries of the WTO, which make up over 80 percent of that organization’s membership. The World Bank estimates that a successful conclusion of the round – and the accompanying liberalization of trade – could increase world prosperity by almost \$3 trillion by the year 2015. The trade activities of the WTO’s 148 member nations encompass over 90 percent of global trade.

Current negotiations in the Doha Round had stalled during the last WTO meeting held in Cancun, Mexico, in September 2003, after member nations – largely divided along the lines of developed and developing – failed to reach an agreement on several areas of negotiations, particularly in the area of agriculture. Trade experts say that agriculture has long been a particularly sensitive area of trade in both developing and industrialized countries. They note that many developing countries have a competitive advantage in producing agricultural goods and depend on exports of these goods for their main source of economic growth.

On the other hand, economists estimate that industrialized countries – particularly the United States, the European Union, and Japan – provide over \$300 billion in subsidies to their farmers every year, and claim that these subsidies encourage farmers to overproduce and flood the

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world market with cheap food (which, ultimately, brings down prices for these commodities). Some economists also believe that these lower prices have cost developing countries hundreds of millions of dollars in profits every year. Trade ministers from the developing countries had refused to continue negotiations in Cancun until richer nations pledged to reduce these subsidies.

In July 2004, the WTO announced that several industrialized members had pledged to reduce their agricultural subsidies by 20 percent on various agricultural products if their poorer counterparts made a general commitment to lower their tariffs on manufactured goods. Business executives say that while industrialized countries dominate the trade in manufactured goods, these products face tariffs averaging 40 percent in the markets of developing countries. One analyst said that “agriculture continues to be the linchpin of the negotiations,” and that developing countries will not open their market to nonagricultural products and services until industrialized countries agree to reduce and eventually eliminate their agricultural subsidies.

Experts say that, in recent months, negotiators from the rich and poor WTO member nations have been unable to agree on a precise numerical formula in reducing agricultural subsidies on specific agricultural products and also tariffs on manufactured goods. For example, while some industrialized countries advocate an immediate and deep cut in the highest tariffs on manufactured goods, many developing nations are demanding similar cuts in agricultural subsidies.

This standstill has, in turn, held up negotiations in the services sector, which includes banking, health care, education, transportation, and telecommunications. In referring to the slow pace of negotiations, the WTO Director-General recently said: “Everyone has a generalized commitment to progress, but when it comes to the specifics, the familiar defensive positions take over.”

Analysts say that it will be important for the 148 member nations of the WTO to make progress in resolving these differences before the next WTO ministerial meeting takes place in Hong Kong in December 2005. (Under WTO rules, member nations must hold periodic meetings – called ministerial conferences because the attendees are trade ministers from member nations – at least once every two years to discuss any on-going negotiations.)

They note, for instance, 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. Political analysts worry that Congressional opponents of open trade will hold up a reauthorization of TPA, thus preventing the implementation of a final Doha Round agreement. They also worry that further delays in the talks could encourage countries to negotiate separate trade deals (also called “preferential trade agreements” or PTAs) outside the purvey of the WTO. (CAFTA, discussed at p. 28, is such a PTA.) ■



Undermining the Kyoto Protocol?

In July 2005, the United States and several other countries announced an initiative to help reduce the emission of greenhouse gases, which scientists say is contributing to global warming. While supporters say that the new initiative will complement an existing international treaty aimed at reducing greenhouse gases, others believe that this plan – along with other previous measures espoused by the U.S. – could actually undercut efforts to curb global warming.

Scientists say that emissions of pollutants and industrial gases – such as carbon dioxide – trap heat in the atmosphere and cause temperatures to rise around the world in a so-called “greenhouse effect,” which, they assert, could then lead to catastrophic natural disasters. Experts claim that only a sustained and coordinated international effort can reduce the emissions of these gases.

The Kyoto Protocol – an international treaty whose aim is to cut the emissions of greenhouse gases – came into force for its 130 state parties in February 2005. Under the protocol, these state parties are legally bound to cut total emissions of six greenhouse gases to five percent below 1990 levels by meeting specified targets beginning in 2008. (The treaty itself will expire in 2012.) Under the treaty, every industrialized country will require its private businesses and power plants to reduce their carbon dioxide emissions through a combination of efforts such as burning less fossil fuel, using more fuel-efficient technologies, and promoting alternative energy sources.

Although the U.S. signed the Kyoto Protocol, it announced, in March 2001, that it would not ratify the treaty. Critics argue that it will be much harder to reduce the overall emission of carbon dioxide without U.S. participation because that country is the world’s largest producer of emissions (accounting for over 36 percent of the world total).

Rather than ignoring efforts to reduce the emission of greenhouse gases, the U.S. announced its own plan – called the Global Climate Change Initiatives – to reduce its emissions by 18 percent over 10 years from the 183 metric tons of emissions per million dollars GDP (gross domestic product) that are released today to 151 metric tons per million dollars GDP in 2012. In order to reach this goal, the current administration introduced several initiatives to promote renewable energy production (such as solar and wind power), clean coal technology, nuclear power, and to improve fuel economy for cars and trucks.

The administration also hopes that tax incentives will spur investments in renewable energy sources, hybrid fuel cell for vehicles, and programs to improve energy efficiency

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and the production of cleaner fuels. Other measures include increased funding for research on advanced energy sources and the development of new technology. On the international front, the plan calls for investing \$25 million in climate observation systems in developing countries.

But scientists and other analysts say these efforts will be ineffective. Unlike the provisions of the Kyoto Protocol, these plans are mostly voluntary, and critics note that industries are not required to meet any strict targets and will not have to disclose their progress on reducing emissions.

Critics also say that basing emission reductions using GDP could actually increase emissions because a rise in GDP for a particular country will lead to a corresponding growth in emissions. International reactions to the plan have also been mostly negative. Other governments fear that the Global Climate Change Initiatives will be viewed as an alternative to the protocol. European officials have dismissed the plan as mere “window dressing.”

In July 2005, the Bush administration announced the formation of a six-nation Asia-Pacific Partnership for Clean Development and Climate to help reduce the emission of greenhouse gases. Similar to the Global Climate Change Initiatives, the administration has described these efforts as complementing – and not substituting – measures undertaken under the Kyoto Protocol. Under the partnership, the six nations – the United States, Japan, Australia, China, India, and South Korea – have pledged “enhanced cooperation” in the development of technology and other measures (such as clean coal and nuclear power) to reduce greenhouse gas emissions. But, unlike the Kyoto Protocol, the partnership will not set mandatory targets in reducing emissions.

Critics say that the partnership could also undermine future efforts in reducing greenhouse gas emissions. Political analysts say that the signatory nations of the Kyoto Protocol will meet in November 2005 to debate whether to extend or even widen that treaty’s requirements after 2012. They worry that the U.S. could argue that measures taken outside of the protocol – such as those taken under the Global Climate Change Initiatives and the Asia-Pacific Partnership – would make an extension of that protocol unnecessary. ■



A WTO open to the public?

Is one of the world’s most powerful international organizations finally lifting what critics say is a veil of secrecy surrounding its inner workings? In September 2005, the World Trade Organization (WTO) – for the first time in its 10-year history – opened one of its legal proceedings to public viewing. Is this the start of a new policy of openness at the WTO?

The WTO, based in Geneva, Switzerland, is the premier international organization that sets the rules for international trade and the settlement of trade disputes. Unlike other international organizations whose provisions are voluntary, the WTO’s 148 member nations are legally required to comply with that organization’s rulings. In the event of an actual trade conflict, the WTO creates a dispute settlement panel to resolve the dispute.

Under WTO rules, only member governments can participate in dispute settlement proceedings and review submissions made by parties to a particular dispute. Supporters of this policy, drawn mostly from the developing world and some industrialized countries, say that dispute settlement proceedings often involve the airing of confidential business information and that opening up the process to public view would discourage candid discussions between the disputing parties. Others say that allowing the participation of unaccountable groups – such as non-governmental organizations (NGOs) whose membership can range from a few people to several thousand – could undermine the integrity of the dispute settlement process.

On the other hand, critics respond that a closed-door policy where very little information is released for outside scrutiny undermines public confidence in the WTO. Many NGOs argue that because the WTO adjudicates disputes which could have serious implications for public policy, outside organizations should be allowed to attend its proceedings to ensure accountability. Others say that the WTO should, at a minimum, allow the public to attend non-confidential proceedings to dispel the notion that the WTO operates in secrecy.

On September 12, 2005, the WTO allowed the public to view a dispute settlement proceeding between Canada and the United States, and the European Union.

Analysts noted that members of the public were only able to watch the hearing – which focused mostly on opening statements – through a closed circuit broadcast in a separate room. Some restrictions included a background check on visitors and a ban on recording devices. Others noted that although the WTO had set aside 400 places for the public, only 65 people had attended the proceedings, almost half of whom were staff members of WTO member governments and WTO staffers themselves.

Many attributed the low turnout to the fact that the WTO had announced the open hearings in early August, a time when many people are on vacation. Some officials said that the low turnout “confirmed suspicions that public demand for greater transparency in WTO dispute proceedings was highly overblown.” Supporters of the open hearings say that public interest will eventually grow.

Will the WTO open more dispute settlement hearings to the public? Some analysts are doubtful. They note that all three parties to this particular dispute had asked the WTO to open the proceedings to the public. Legal experts say that, without such unanimity among disputing parties in the future, it is unlikely that the WTO will open other proceedings in the future. ■



Fall 2005: Two C.V. Starr Lectures on China

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November 9, 2005: China's Place in World Trade and Finance with ROBERT L. HOWSE, Alene and Allan F. Smith Professor of Law at the University of Michigan Law School. Developments concerning China have ignited a debate on the economic ambitions of that country on the world stage. The China National Offshore Oil Corporation recently tried, and failed, to acquire Unocal, an American company based in California. Earlier this year, the United States and the European Union imposed emergency restrictions against a surge of textile exports from China. And late last year, China's largest manufacturer of computers, Lenovo, bought IBM's personal computer division. The U.S. trade deficit with China reached a record \$162 billion last year, and is on pace to increase further this year. In 2001, the members of the World Trade Organization (WTO) admitted China into its ranks in what many legal analysts say was an attempt, in part, to bring the rule of law to that country in matters concerning international trade. Yet some critics – including policymakers and members of the business community – have questioned China's commitment to fulfilling its WTO obligations. In the realm of monetary policy, the Chinese government recently allowed its currency – the renminbi – to rise slowly against the U.S. dollar, but have resisted calls for more loosening. What plans does China have for its future in the governance of world trade and monetary policy? Will the years ahead see more economic conflict between China and the United States? Are there areas where both countries can work together? Professor Robert Howse will answer these and other questions.



November 16, 2005: Legitimacy Through Law in China with BENJAMIN L. LIEBMAN, Associate Professor of Law and Director of the Center for Chinese Legal Studies at Columbia Law School. China has undergone massive transformation over the past 27 years, beginning with its emergence from the Cultural Revolution and re-engagement with the international community. A crucial part of China's reform process has been the effort to develop its legal system. Although China has a rich legal history stretching back thousands of years, its legal system nearly ceased to function during the Cultural Revolution. The changes over the past three decades have been remarkable. Thousands of new laws and regulations have been enacted, significant reforms have taken place in China's courts, and legal education has grown dramatically. Despite this progress, significant problems remain. China's laws protecting individual rights are often ignored, and human rights abuses continue. Notwithstanding improvements in the quality of lawmaking, many laws are unclear, or lack significant detail. The judiciary's power is constrained, and courts are subject to extensive oversight and interference by Communist Party and government officials. Chinese legal experts and officials acknowledge the problems that continue to undermine the effectiveness of China's legal system. Yet there are a variety of differing views on the best steps forward. In his lecture, Professor Liebman will discuss China's recent rapid development, with particular attention to the role of legal reforms in furthering the legitimacy of the Chinese party-state.