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# The Global Impact and Implementation of Human Rights Norms Introduction

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# The Global Impact and Implementation of Human Rights Norms

## Introduction

*Linda Carter\**

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On March 11-12, 2011, the Global Center at Pacific McGeorge, the World Affairs Council of Northern California–Sacramento Chapter, the McGeorge International Law Society, and the American Branch of the International Law Association co-sponsored a symposium on the impact and implementation of human rights norms in substantive areas of law. Experts in different legal fields from around the United States and abroad were invited to exchange ideas on human rights norms in their substantive areas.

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\* Professor of Law and Director, Legal Infrastructure and International Justice Institute. I would like to express my appreciation to Dean Elizabeth Rindskopf Parker, Clémence Kucera, The Globe editors Micaela Neal and Darren Sweetwood, The Globe staff, and the support staff at Pacific McGeorge.

Usually when we consider human rights, we think of specific international instruments and courts. The Universal Declaration of Human Rights<sup>1</sup> and the International Covenant on Civil and Political Rights (“ICCPR”)<sup>2</sup> are two widely known instruments that provide comprehensive statements of human rights norms. There are also human rights treaties that detail human rights in specific contexts, such as the rights of specific persons, such as women<sup>3</sup> and children,<sup>4</sup> or particular areas, such as employment,<sup>5</sup> education,<sup>6</sup> or economic and social rights.<sup>7</sup> We additionally tend to think of human rights issues coming up in specialized tribunals, such as the European Court of Human Rights, the Inter-American Commission and Court of Human Rights, the African Commission and Court of Human and Peoples’ Rights, or the Human Rights Committee. We are also acutely aware of the hunger for fundamental rights and opportunities in the events that occurred during the last year in Tunisia, Egypt, Libya, and other parts of the world. What is less apparent to us is whether these international human rights norms have an impact on the development of substantive law in domestic jurisdictions.

To explore the impact and implementation of human rights norms in substantive fields of law, we had two primary areas of inquiry.

1. What is the impact of human rights norms in the development of the law in specific substantive areas? Do the norms have a role in law reform? Are human rights internalized into substantive areas of domestic law?
2. What is the effect of this increased incorporation of human rights norms in diverse areas? Is the dispersion of human rights norms a unifying force or a fragmenting one?

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1. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. GAOR, 3d Sess., Supp. No. 13, U.N. Doc. A/810 (Dec. 12, 1948).

2. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

3. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. No. 46, U.N. Doc. A/34/46, at 193 (Sept. 3, 1981).

4. Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. No. 49, U.N. Doc. A/44/49, at 167 (Nov. 20, 1989) (Sept. 2, 1990).

5. See, e.g., Convention Concerning Forced or Compulsory Labour (ILO No. 29), June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932); Discrimination (Employment and Occupation) Convention (ILO No. 111), June 25, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960); Convention Concerning Employment Promotion and Protection Against Unemployment (ILO No. 168), June 21, 1988, 71 ILO Official Bull. 80 (entered into force Oct. 17, 1991).

6. Convention Against Discrimination in Education, Dec. 15, 1960, 429 U.N.T.S. 93 (entered into force May 22, 1962).

7. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 49 (1966).

In order to assess how broadly human rights norms may affect the development of specific areas of substantive law, we had expert panels on corporate governance, labor law, environmental law, intellectual property, torts, and the law of armed conflict and security. The issue of the general effect of increased incorporation of human rights norms was accomplished with two panels. The first was a panel of distinguished jurists, who have been involved in human rights issues for decades. The second was a panel of experts on whether the current dynamic is a unifying or fragmenting force for human rights norms.

My colleagues, **Professors Franklin Gevurtz** (Corporate Governance), **Raquel Aldana** (Labor Law), **Rachael Salcido** (Environmental Law), **Michael Mireles** (Intellectual Property Law), **Julie Davies** (Tort Law), **John Sims** (Armed Conflict and Security Law), **Omar Dajani** (Unity or Fragmentation), and I (Distinguished Jurist Panel) served as the moderators for the panels. In the pages that follow, each of us will review the issues that were discussed by his or her particular panel and the contributions of that panel to the discourse on human rights norms.

## I. DISTINGUISHED JURIST PANEL

Professor Linda Carter, Moderator

In planning the symposium, we believed that it was important to consider the past, the present, and the future of human rights norms and developments. Both **Justice Richard Goldstone** and **Judge Fausto Pocar**, our two distinguished jurists, have lived human rights issues for many years.

Justice Goldstone's career has spanned the decades of anti-apartheid efforts and the development of international criminal justice. While a judge in South Africa, he chaired the Commission of Inquiry regarding Public Violence and Intimidation from 1991-1994, which uncovered serious abuses by police and officials, and came to be known as the Goldstone Commission. He served as a justice of the Constitutional Court of South Africa in its initial years, from 1994-2003. In 1994, Justice Goldstone was appointed as the first Chief Prosecutor for the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. He led the Office of the Prosecutor through its initial cases until 1996. Highly respected in international human rights circles, Justice Goldstone has participated in challenging inquiries, such as the Oil-for-Food and Gaza investigations. He has continued to be involved in many human rights activities with organizations around the world and through legal education.

Judge Fausto Pocar similarly has a highly distinguished career and experience in human rights and international criminal justice. While a professor of international law at the University of Milan, Judge Pocar was appointed to the Human Rights Committee, which handles matters under the International Covenant on Civil and Political Rights. He served for sixteen years as a member

(1984-2000), Rapporteur (1989-90), and Chair (1991-92) of the Committee. In 2000, Judge Pocar was appointed as a judge to the International Criminal Tribunal for the former Yugoslavia (“ICTY”). He served as President of the tribunal from 2005-2008 and is presently a member of the Appeals Chamber of the ICTY, which also serves as the Appeals Chamber for the International Criminal Tribunal for Rwanda (“ICTR”). Throughout his career, Judge Pocar has been active in special assignments for the United Nations, including the Committee on the Peaceful Uses of Outer Space, and many international law organizations and journals.

Drawing upon the expertise of both distinguished panelists, the session proceeded as a conversation about human rights historically and developments today. The first topic was how each had become involved in human rights issues and what issues were current at that time. Justice Goldstone discussed his early involvement in the anti-apartheid movement and Judge Pocar discussed his beginning days at the Human Rights Committee in the middle of the Cold War.

The role of politics emerged as a factor in the development of human rights instruments and acceptance. The post-World War II and decolonization periods were highlighted as historical points that spurred the development of human rights treaties. Despite these significant human rights developments, the speakers also noted the contradictory positions of governments, including the United States, in espousing human rights abroad, but not necessarily at home. The European Court of Human Rights (“ECHR”) was identified as one of the great achievements collectively across borders to enforce human rights norms. In response to a question about the failure to incorporate human rights into discussions about policy or security, Justice Goldstone emphasized the impact that individuals can have on decisions and the need for great leaders on a government level.

With regard to the record of the United States on human rights issues, Justice Goldstone and Judge Pocar noted achievements as well as recalcitrance. Justice Goldstone distinguished governments from civil society and commented on how helpful the American Bar Association and individuals from the United States were in assisting those opposing apartheid. Judge Pocar pointed out the support of the United States for the ICCPR and yet the major reservations that the United States took to the treaty, such as reserving the right to execute those who were minors at the time of the crime.<sup>8</sup> In response to a question about the lack of U.S. response to the revolutions presently occurring in the Middle East, Justice Goldstone remarked on the importance of thinking beyond one’s own borders, even though there is a tendency throughout the world to pay less attention to what is happening elsewhere. The full implementation of human rights is dependent upon efforts across the globe.

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8. The execution of those who were juveniles at the time of the crime was held unconstitutional by the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

The interplay of domestic and international efforts also came through as a theme as a necessity in the global implementation of human rights norms. Justice Goldstone emphasized how important national governments are to any international efforts, such as the International Criminal Court, which does not have its own police force. Judge Pocar commented on the importance of national judiciaries in interpreting and enforcing human rights norms, and the need for cooperation and dialogue between international and national judiciaries. Concurring with Judge Pocar, Justice Goldstone noted the South African Constitutional Court's use of international and foreign law generally, and specifically, the jurisprudence of the ICTY when the Court extended the common law definition of rape.

A number of significant developments that are taking place or need to take place were also discussed. Judge Pocar observed the major developments on adjudicating gender-based crimes in the international criminal tribunals. Justice Goldstone noted the importance of an increased emphasis on human dignity in human rights discourse. In response to a question, Justice Goldstone expanded on the need to respect human dignity in all contexts by giving the example of gay and lesbian rights, which have been enforced in South Africa through constitutional decisions. His point also brought out again the importance of the judiciary as he noted that, if the issue had been left to a vote by the public, the rights would not have been honored. The Constitution and the Constitutional Court were essential. In response to another question, both speakers also commented on the growing focus on the responsibility of transnational corporations to respect human rights, especially with regard to environmental issues. Judge Pocar also raised the need for better mechanisms to adjudicate environmental issues.

The session was an excellent overview of the road from early human rights treaties to today and it set the stage for the discussions that followed of the impact of human rights norms on substantive areas of law.

## II. THE RELATIONSHIP BETWEEN HUMAN RIGHTS NORMS AND CORPORATE GOVERNANCE

Professor Franklin Gevurtz, Moderator<sup>9</sup>

The intersection of human rights norms and corporate law creates issues going to the underlying conception of international law. The traditional Westphalian view of international law focused essentially on nation states as the only actors of relevance.<sup>10</sup> International human rights law introduces individual

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9. Distinguished Professor and Scholar, University of the Pacific, McGeorge School of Law; Director, Pacific McGeorge Global Center for Business & Development.

10. Robert A. Schapiro, *In the Twilight of the Nation-State: Subnational Constitutions in the New World*

humans, as well as nation states, as parties both subject to and protected by international law.<sup>11</sup> The increasingly global role of business corporations, and the impact of their activities on human rights, however, challenges even this expanded view.

The very term “corporation” conveys the concept of person in the eyes of the law.<sup>12</sup> Perhaps, therefore, corporations fit within international human rights law as the equivalent to any human being. On the other hand, the traditional legal view is that corporations only exist by virtue of the action of a national (or even sub-national) government.<sup>13</sup> Does this mean that regulation of corporations under the international human rights regime falls to the jurisdiction under whose laws the corporation receives its existence? If so, what responsibilities does this jurisdiction have to ensure corporate actors do not conduct themselves in ways that violate international human rights norms, and what consequences should befall jurisdictions that fail to carry out such responsibilities? Since corporations come into existence by virtue of a state’s law, does this give the state an unqualified license to limit the rights of corporations, or do corporations themselves have human rights? Turning from legal form to underlying reality, large multinational corporations commonly command more resources than many nations.<sup>14</sup> This may make it difficult for either the state under whose law the corporation receives its legal existence, or the states in which the corporation conducts its operations, to control the activities of such large organizations that threaten human rights. Accordingly, perhaps a more pragmatic approach to international human rights law might view corporations as almost equivalent to nation states.

The three articles in this symposium dealing with the intersection of human rights norms and corporate law have embedded within them different perspectives on these questions. In his article, *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nation’s “Protect, Respect and Remedy” and the Construction of Inter-Systemic Global Governance*, **Professor Larry Backer** takes a comprehensive look at a framework established under the auspices of the United Nations for ensuring corporations respect human rights. As Professor Backer explains, this framework seeks to respond to the growing impact of

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*Order*, 39 RUTGERS L.J. 801, 801 (2008).

11. INTERNATIONAL LAW ANTHOLOGY 205 (Anthony D’Amato ed., 1994); Merja Pentikäinen, *Changing International ‘Subjectivity’ and Rights and Obligations Under International Law – Status of Corporations*, 8 UTRICHT L. REV. 145, 146 (2012).

12. *Corporation Definition*, DUHAIME, <http://www.duhaime.org/LegalDictionary/C/Corporation.aspx> (last visited Mar. 27, 2012).

13. *See, e.g.*, *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819) (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it.”).

14. Rhett A. Butler, *Corporations Among Largest Global Economic Entities, Rank Above Many Countries*, MONGABAY (July 18, 2005), [http://news.mongabay.com/2005/0718-worlds\\_largest.html](http://news.mongabay.com/2005/0718-worlds_largest.html).

global corporations on issues of human rights and the difficulties in determining who, as between the state under whose law the corporation comes into existence, the state(s) in which the corporation conducts operations potentially impacting human rights, and those responsible for managing the corporation, is responsible for ensuring corporate activities do not harm human rights. This framework, labeled “Protect, Respect and Remedy,” is, whatever its merits, complex. Admirably addressing this complexity, Professor Backer’s analysis of the Protect, Respect and Remedy framework promises to become a standard reference in this area. It provides the reader the basis for understanding the “dense principles” of the framework and for appreciating both the specific shortcomings and the overarching achievement of this framework.

**Professor David Millon** takes a very different focus in his article, *Human Rights & Delaware Corporate Law*. Instead of looking at a proposed overall framework addressing who is responsible for ensuring corporations respect human rights, Professor Millon looks at the law of one critical jurisdiction when it comes to corporate law. This is the state of Delaware, which is the official home of most of the largest corporations in the United States.<sup>15</sup> Professor Millon explains that Delaware law unquestionably allows corporate managers to sacrifice profit maximization in favor of operating corporations in a socially responsible manner—including respecting human rights. In addition, he explores a variety of hard and soft laws that might prompt corporate managers to ensure their corporations act responsibly when it comes to human rights. Most provocatively in this regard, he raises the prospect that the duty of corporate managers under Delaware law to ensure that their corporations act lawfully may encompass a duty to ensure compliance with international human rights law. If so, we may one day see Delaware courts applying international human rights law in a shareholder derivative suit seeking to hold directors liable for allowing their corporation to violate such law.

**Winfried H.A.M. van den Muijsenbergh** and **Sam Rezai** bring a very different perspective to their article, *Corporations and the European Convention on Human Rights*. Instead of the corporation as violator of the human rights of others, they examine situations in which the corporation may be the victim of human rights violations. The article does this through the prism of litigation before the ECHR—in which the authors represent plaintiffs—regarding the Russian government’s seizure of the assets of the Yukos Oil Company. Here, the conception of corporation as a legal person becomes the focus for introducing human rights norms into the corporate world. The idea that “corporations are people too” when it comes to human rights is a controversial proposition—witness the debate about the *Citizens United* decision<sup>16</sup> in this country—and van

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15. *About Agency*, ST. DEL. (Feb. 23, 2012, 3:21 PM), <http://www.corp.delaware.gov/aboutagency.shtml>.

16. *See Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).



den Muijsenbergh and Rezai's examination of the state of European law on this front provides a useful comparison.

### III. HUMAN RIGHTS AND LABOR LAW

Professor Raquel Aldana, Moderator<sup>17</sup>

For at least the last two decades, most Latin American nations have debated whether and how to reform their labor codes in response to globalization market forces, which have been characterized by liberalizing policies and a demand for cheaper labor across borders. The debate has rightly encountered tensions around several competing goals for these nations. These goals include the achievement of global economic integration and the alleviation of poverty and unemployment, the protection of individual and collective rights of workers, and the individual demands from employers for greater flexibilization of the labor codes in order to remain competitive.

In much of Latin America, often as a result of hard-fought revolutions and great human sacrifice, workers enjoy significant labor and worker rights through provisions found in their constitutions and labor codes and a vast number of ILO Conventions and human rights treaties.<sup>18</sup> Yet, deep disagreements have surfaced around the value or harm of these traditionally highly worker protective norms when such laws are commonly under-complied, under-enforced, or are inapplicable to the majority of workers.<sup>19</sup> In Mexico, for example, the significant constitutional worker protections that emerged from the 1917 Revolution were simply co-opted by a corporatist culture that undermined the role of unions and repressed the enforcement of these laws.<sup>20</sup> In Guatemala, more repressive tactics against unions combined with institutional corruption and incompetence to severely weaken the significant rights of workers in the books.<sup>21</sup>

It is in this context that this panel came together to explore the role of regional trade agreements in the protection of worker rights in the Americas. The connection of trade agreements to human rights may not be most immediately obvious; indeed, until today the World Trade Organization refuses to link trade

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17. I thank Elizabeth Parker and Frank Gevurtz for their intellectual enthusiasm and financial support of this conference. I am especially grateful to Linda Carter, who was the visionary behind this program for the opportunity to bring together wonderful scholars on issues of great importance to the protection of human rights. Thanks also to Erika González, my wonderful research assistant.

18. See, e.g., Ranko Shiraki Oliver, *Mexico's Dilemma: Workers' Rights or Workers' Comparative Advantage in the Age of Globalization?*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 195 (2012) (discussing Mexico's civil revolution that led to the adoption of a highly worker protective constitution).

19. See, e.g., LAW AND EMPLOYMENT: LESSONS FROM LATIN AMERICA AND THE CARIBBEAN (James J. Heckman & Carmen Pagés eds., 2004); see also Oliver, *supra* note 18, at 214-16.

20. Oliver, *supra* note 18, at 216-32.

21. See generally DEBORAH LEVENSON-ESTRADA, *TRADE UNIONISTS AGAINST TERROR: GUATEMALA CITY 1954-1985* (1994).

and labor rights insisting on the untenable position that labor rights and trade are unrelated.<sup>22</sup> However, in the Americas at least, that position was put to rest when the North American Free Trade Agreement (“NAFTA”)<sup>23</sup> became the first regional trade agreement that included for the first time a side-agreement that linked labor and trade, due to significant pressures from labor unions in all three signatory countries.<sup>24</sup> Since then, of course, many more regional or bilateral trade agreements have solidified this linkage, leaving the WTO lagging behind in this regard.<sup>25</sup>

**Professor Jorge Esquirol**, a critical scholar of rule of law reforms in Latin America,<sup>26</sup> opened the session by placing this marriage of trade and labor into a broader socio-economic context of rule of law reforms in Latin America. Professor Esquirol explained, for instance, that NAFTA and those treaties that came later were not the impetus of reforms already underway in many parts of Latin America to “flexibilize” the labor codes by eroding the degree of worker protections under existing codes. Those efforts, which had largely begun in the Southern Cone (e.g., Chile and Argentina)<sup>27</sup> were already responding independently to the need to remain competitive in the world market through the production of cheap goods and labor and to liberalizing policies promoted by International Financial Institutions and development agencies.<sup>28</sup> Of course, also in this context, the large gap between aspirational and implementable laws became a moral argument also for reconciling the labor codes to the reality of most workers.<sup>29</sup> The labor provisions in these trade agreements, thus, Professor

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22. See KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 73 (2003).

23. North American Free Trade Agreement, U.S.-Can.-Mex., Sept. 13, 1992, 32 I.L.M. 1499 (1993).

24. Oliver, *supra* note 18, at 232-42.

25. *Id.* at 221-24.

26. See Jorge L. Esquirol, *The Turn to Legal Interpretation in Latin America*, 26 AM. U. INT'L L. REV. 1031 (2011); see also Jorge L. Esquirol, *Writing the Law of Latin America*, 40 GEO. WASH. INT'L L. REV. 693 (2009); see also Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75 (2008); see also Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41 (2003); see also Jorge L. Esquirol, *Where is Latin America Headed? A Critique of the Sociolegal Approach to Latin America*, 9 BEYOND L. 115 (2003); see also Jorge L. Esquirol, *The Fictions of Latin American Law (Part I)*, 1997 UTAH L. REV. 425 (1997); see also Jorge L. Esquirol, *Il fallimento del diritto latino americano come tradizione [Constructing Latin America's Failed Legal Tradition]*, 29 RIVISTA CRITICA DEL DIRITTO PRIVATO 247 (2011) (It.).

27. See, e.g., César F. Rosado Marzán, *Of Labor Inspectors and Judges: Chilean Labor Law Enforcement After Pinochet (And What the United States Can Do to Help)*, 54 ST. LOUIS U. L.J. 497, 500-01 (2010); see also Guillermo Campero, *La Economía Política de las Relaciones Laborales 1990-2006*, 37 SERIE ESTUDIOS SOCIO/ECONÓMICOS 28-30 (2007), available at [http://www.cieplan.org/media/publicaciones/archivos/151/Capitulo\\_1.pdf](http://www.cieplan.org/media/publicaciones/archivos/151/Capitulo_1.pdf); see also Christopher Sabatini, *Labor Reform: Undercompetitive Economies and Unprotected Workforce*, in CAN LATIN AMERICA COMPETE? CONFRONTING THE CHALLENGES OF GLOBALIZATION 239 (James Haar & John Price eds., 2009), available at <http://www.as-coa.org/article.php?id=867>.

28. See, e.g., INTER-AMERICAN DEVELOPMENT BANK, COMPETITIVENESS: THE BUSINESS OF GROWTH -- ECONOMIC AND SOCIAL PROGRESS IN LATIN AMERICA, 2001 REPORT (2001), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1640411>.

29. See, e.g., MARINA LORENA COOK, THE POLITICS OF LABOR REFORM IN LATIN AMERICA: BETWEEN

Esquirol explained, needed to be understood nonetheless in a context in which protectionist norms lacked validity and were under pressure to change. Moreover, these regional trade agreements did nothing to change the pressures of change. Why? Because Latin American nations continued to offer primarily cheaper labor to achieve competitive advantage, in contrast to more developed nations.

**Professor Ranko Oliver** and I followed Professor Esquirol to address largely these same themes in the context of Mexico and NAFTA, and Guatemala and the Central American Free Trade Agreement-Dominican Republic (“CAFTA-DR”). These two case studies revealed commonalities in the treatment of labor norms in these trade agreements, which largely deferred to domestic norms and domestic mechanisms of enforcement for compliance.<sup>30</sup> In the socio-economic context explained by Professor Esquirol, two obvious shared critiques of NAFTA and CAFTA emerged: each largely ignored that intractable problems leading to under-enforcement of labor protections in the domestic sphere made reliance on domestic compliance unrealistic and each also failed to address that larger market forces on a global scale—namely the race-to-the-bottom phenomena of a globalized workforce—would continue to exert such pressures on developing nations to offer cheap labor that flexibilization of labor protections would continue to be the trend. This is well documented in Professor Oliver’s discussion, for example, of Mexico’s labor legal reform efforts post-NAFTA.<sup>31</sup>

This volume includes a very thoughtful and insightful essay by Professor Oliver which focuses on Mexico’s experience with labor rights and their future of these rights in the country. Professor Oliver’s conclusion is not hopeful: “I conclude that the likelihood of near-term improvement in the rights of Mexican workers is minimal. I further conclude that, given Mexico’s very real need to attract investment and thus increase employment, furthering worker’s rights is not feasible presently. I am not happy with either of these conclusions.”

I admit that in my presentation of CAFTA and Guatemala at the conference, I was equally pessimistic for many of the same reasons Professor Oliver explores related to Mexico. I was challenged recently in my pessimism while in Guatemala directing our Inter-American program this summer by recent events. A mission from the U.S. Department of Commerce arrived in Guatemala in June to hold ministerial meetings with the Guatemalan government in the first CAFTA-DR complaint filed with the United States by the AFL-CIO and six labor organizations under its labor provisions for the lack of investigation and prosecution into the murder of several labor organizers by private employers.<sup>32</sup> In

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FLEXIBILITY AND RIGHTS (2007).

30. Oliver *supra* note 19 at 236-42; see also Marisa Anne Pagnattaro, *Leveling the Playing Field: Labor Provisions in CAFTA*, 29 *FORDHAM INT’L L.J.* 386 (2006).

31. Oliver, *supra* note 19; at 242-44.

32. Urías Gamarro, *Misión Arriba al País el 6 de Junio Próximo* [Mission up the Country on June 6 Next], *PRENSA LIBRE* (May 28, 2011), [http://www.prensalibre.com/economia/Mision-arriba-pais-junio-proximo\\_0\\_488951113.html](http://www.prensalibre.com/economia/Mision-arriba-pais-junio-proximo_0_488951113.html); see also *First CAFTA Complaint Filed; Upsurge in Violence Against Guatemalan*

a talk delivered as part of the Inter-American program, Mr. Jorge Guzman, General Coordinator of the Secretariat for CAFTA-DR Environmental Matters, said how this moment highlighted the significant space that CAFTA-DR has opened in the region for greater cross-border oversight and accountability, which he thought would ultimately improve the governmental institutions charged with oversight over matters of labor and environment in the region. I could not help but take this up with Mr. Guzman at lunch. I repeated my same reservations over the ability of mechanisms such as the White Paper and Verification Reports<sup>33</sup> adopted as part of CAFTA or the arbitration mechanisms in CAFTA's labor provisions to really change the deep structural and systemic problems of Guatemala's labor situation.<sup>34</sup> Mr. Guzman reminded me that change comes slowly. Mr. Guzman had witnessed the implementation of the White Book in El Salvador, his native country, as a government official, and he said that suddenly labor agencies in El Salvador could no longer act in isolation and that having to report to an outside body, here the ILO, forced a process of reflection and accountability, which he felt would ultimately improve those agencies. I hope he is right.

On August 9, 2011, the U.S. Trade Representative announced as part of the same AFL-CIO-Guatemala complaint that it was "requesting the establishment of an arbitral panel under CAFTA-DR in order to discuss the Guatemalan government's failure to enforce its labor laws, including the right to association and collective bargaining."<sup>35</sup> So far, the Guatemalan government has strongly denounced the U.S. Government's decision, calling it "la ley del más fuerte" [the law of the strongest] and an unfair imposition into Guatemala's sovereignty.<sup>36</sup> No doubt, one could unpack this statement and find a great deal of validity at least as to the first point, namely that labor agreements within trade are truly one-sided and impose the will of powerful and rich nations unto the poor. The second,

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*Unionists Denounced*, US LEAP (Apr. 29, 2008), <http://usleap.org/first-cafta-complaint-filed-upturge-violence-against-guatemalan-unionists-denounced>.

33. For a description of the White Papers and Verification Reports, see *CAFTA-DR: White Paper and Verification Reports*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/labor/bilateral-and-regional-trade-agreements/cafta-dr-white-paper-and-verification-rep> (last visited Mar. 27, 2012). Essentially, the inclusion of certain nations in CAFTA-DR, including Guatemala, was conditioned on their agreement to subject themselves to the oversight of the International Labor Organization in several areas that had been identified as weak in terms of labor protections in the country.

34. See, e.g., Pagnattaro, *supra* note 30; see also Marisa Anne Pagnattaro, *The "Helping Hand" in Trade Agreements: An Analysis of and Proposal for Labor Provisions in the U.S. Free Trade Agreements*, 16 FLA. J. INT'L L. 845 (2004); see also Thomas J. Manley & Luis Laurodo, *International Labor Standards in Free Trade Agreements of the Americas*, 18 EMORY INT'L L. REV. 85 (2004).

35. *United States Seeks Arbitration with Guatemalan Government over CAFTA Labor Violations*, USLEAP (Aug. 12, 2011), <http://usleap.org/united-states-seeks-arbitration-guatemalan-government-over-cafta-labor-violations>.

36. Urías Gamarro, *Gobierno Rechaza Arbitraje Laboral que Solicitó EE. UU. [Government Rejects U.S. Labor Arbitration Requested]*, PRENSA LIBRE (Aug. 11, 2011), [http://www.prensalibre.com/economia/Gobierno-arbitraje-solicitado-EE-UU\\_0\\_533946613.html](http://www.prensalibre.com/economia/Gobierno-arbitraje-solicitado-EE-UU_0_533946613.html).

however, related to sovereignty is more questionable. We are not there yet, but labor rights and enforcement can no longer be local.

#### IV. THE ENVIRONMENT AND HUMAN RIGHTS

Professor Rachael E. Salcido, Moderator<sup>37</sup>

Applying a human rights framework to address the shortage of natural resources or negative effects of environmental degradation is seen by some as an odd fit.<sup>38</sup> Nonetheless, advocates are drawing on human rights instruments and related tribunals to advocate for a healthy environment.<sup>39</sup> The symposium panelists illustrated that although some existing legal instruments may be, in fact, legally sufficient to support protection of the environment, practical problems still must be confronted to fully realize their utility.

This general topic was explored internationally as early as the Stockholm Conference on the Human Environment in 1972, which clearly linked human rights and the environment. Today, many international and regional instruments, as well as national constitutions, now recognize a right to a healthy environment.<sup>40</sup> Other legal instruments have been used to address environmental harms by focusing on the human right to property, to family, and to life itself. Notwithstanding the divergence in opinion over the compelling rationale for protection of the environment—be it human-centered or nature-centered—in fact, the increasing depletion of resources and decline in the health of the environment have highlighted the common destinies of all beings that share the Earth.<sup>41</sup> As one scholar explained, “[i]n reality, the apparent conflict between human utility and

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37. Professor of Law, University of the Pacific, McGeorge School of Law. The author would like to thank the panelists for their contributions, Kristian Corby for research assistance, Micaela Neal and the Globe editors for their hard work and Linda Carter for her leadership and inspiration. We also celebrate the life of Svitlana Kravchenko, advocate for human rights and environmental protection. Her tireless work and achievements will continue to inspire others.

38. One of the first areas of disagreement is over the expansion of basic human rights beyond the fundamental civil and political rights, without universal acknowledgement that a healthy environment is vital to the enjoyment of these rights. See Judith Kimerling, *Rights, Responsibilities, and Realities: Environmental Protection law in Ecuador's Amazon Oil Fields*, 2 SW. J.L. & TRADE AM. 293, 309-11 (1995).

39. Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?*, 35 DENV. J. INT'L L. & POL'Y 129, 129-30 (2006).

40. See Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 103, 103 n.5, 104 (1991) (emphasizing that nearly all constitutions ratified or amended since the 1960s address the issue); see also James R. May & Erin Daly, *Vindicating Fundamental Environmental Rights Worldwide*, 11 OR. REV. INT'L L. 365, 366-67 (2009) (examination of cases and the role of courts in litigation over environmental human rights violations).

41. In explaining how the two areas, human rights and environmental protection, are integrated, Dinah Shelton asserts that “[a] human rights approach to environmental protection . . . is thus instrumental, not an end in itself.” Dinah Shelton, *The Environmental Jurisprudence of International Human Rights Tribunals*, in LINKING HUMAN RIGHTS AND THE ENVIRONMENT 1 (Romina Picolotti & Jorge Daniel Taillant eds., 2003).

intrinsic value of the environment does not exist because it is impossible to separate the interests of mankind from protection of the environment.”<sup>42</sup>

**Professor John Sprankling** opened the session by focusing on the right to property and its relation to climate change and environmental protection. Climate change will cause a range of environmental impacts that will harm human societies. Professor Sprankling initially emphasized that we often think first of an individual right to property. However, in the context of indigenous groups that may be best equipped to preserve forests (which are critical carbon sinks) the group right to property can be used as an effective conservation tool. **Professor Stephen McCaffrey** then examined the practical dimension of ensuring access to freshwater.<sup>43</sup> In 2010, the United Nations General Assembly adopted a resolution recognizing explicitly a human right to water and sanitation. But Professor McCaffrey called attention to the practical challenges of implementing this right—how will this vital resource be provided to all who are in need?

In her presentation, **Professor Svitlana Kravchenko** explored multiple cases in the ECHR that vindicate a right to a healthy environment. **Professor John Bonine** followed by emphasizing the paramount importance of access to courts to pursue injustices. Their article, *Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights*, examines several cases heard over nearly two decades in the ECHR. They argue and conclude that strategic litigation can inform judges of the rulings in other courts, and thus expand the utility of cases beyond the individuals involved. Their work supports the argument that courts play an important role in the development of environmental protections to support human well-being.<sup>44</sup> It also addresses the persistent challenge of reconciling the individual nature of human rights litigation with the more publicly oriented environmental harms that may be at the center of particular cases.

This panel showed the many ways in which a focus on the human right to a healthy environment, either by itself or as a precondition to the enjoyment of other human rights, could bring necessary attention and scrutiny where the essential components of a healthy environment are lacking or where the environment needs safeguarding for the future.

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42. Shelton, *supra* note 40, at 109.

43. His scholarship had already explored the right to water as a human right. Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 *GEO. INT’L ENVTL. L. REV.* 1, 1-2 (1992) (explaining its connection to the right to food or sustenance, health or right to life).

44. See also May & Daly, *supra* note 40, at 439 (noting that litigation may be necessary to “move the issue of environmental protection to the fore”).

V. THE IMPACT OF HUMAN RIGHTS NORMS ON THE LAW  
OF INTELLECTUAL PROPERTY

Professor Michael S. Mireles<sup>45</sup>

As part of Pacific McGeorge's conference on *The Global Impact and Implementation of Human Rights Norms*, held on March 11-12, 2011, a panel of intellectual property law scholars presented papers concerning the impact of human rights norms on intellectual property law. The panelists included **Kristen Jakobsen Osenga**, Associate Professor of Law and a member of the IP Institute of the University of Richmond School of Law; **Steven D. Jamar**, Professor of Law and the Associate Director of Intellectual Property and Social Justice at Howard University School of Law; and **V.K. Unni**, Associate Professor of Public Policy and Management at the Indian Institute of Management-Calcutta. The panel's discussion ranged from the flexibility of intellectual property law doctrine, including within the Trade Related Aspects of Intellectual Property Rights agreement ("TRIPS"), to account for access to knowledge, medicine, and food, all of which find support as human rights in numerous treaties, and the need to maintain incentives to encourage invention, creation, distribution, and innovation. A common theme amongst the panel's contributions is the attempt to find a practical balance between the two important fields, whether by suggesting that human rights activists and pharmaceutical companies work together, using a social justice lens to view and adjust copyright doctrine's flexibilities to account for human rights, or by a measured approach working within TRIPS to adapt intellectual property law to human rights concerns. Notably, two of the papers provide a hint of caution that the over-zealous protection of human rights may lead to a weakening of intellectual property rights in industries where those rights importantly provide an incentive to invent and innovate which may lead to a less than optimal result for society. The intersection of intellectual property law and human rights is one of the emerging fields in legal scholarship and practice<sup>46</sup> and the confluence of the two fields will impact the lives of billions of people around the world. The papers in this symposium provide additional insight into this important area.

The first essay is *Get the Balance Right!: Squaring Access with Patent Protection* by Professor Osenga. Professor Osenga argues that instead of viewing patent rights and human rights as conflicting, the two fields should be harmonized. First, she highlights the benefits of patents to the public and explains

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45. Associate Professor, University of the Pacific, McGeorge School of Law. The author is grateful for the support of the editorial staff of Pacific McGeorge's *Global Business and Development Law Journal*.

46. See, e.g., *INTELLECTUAL PROPERTY AND HUMAN RIGHTS: ENHANCED EDITION OF COPYRIGHT AND HUMAN RIGHTS* (Paul L.C. Torremans ed., 2008); *INTELLECTUAL PROPERTY AND HUMAN RIGHTS: A PARADOX* (Willem Grosheide ed., 2010); LAURENCE R. HELFER & GRAEME W. AUSTIN, *HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE* (2011).

how problems with access to medicines or other technology may exist even without a patent system—such as distribution problems. Next, she analyzes the flexibilities in the TRIPS Agreement and how these provisions have been used to increase access to patented inventions. She provides Thailand's use of compulsory licenses for multiple medications as an example of how the use of TRIPS flexibilities, particularly Article 31, may lead to non-generic pharmaceutical companies and human rights activists taking extreme positions. She advances several proposals for the opposing sides to find the correct balance between the two positions that benefits overall public health, such as patent holders not taking extreme positions against compulsory licensing given the fact that TRIPS increased the level of patent protection and there is a lack of clear empirical evidence of whether compulsory licensing lessens innovation; and that both patent holders and human rights advocates should understand that compulsory licensing can be used with not only pharmaceuticals which concern human health, but also other human rights. She also suggests that both sides should focus on working together to address issues concerning grey market goods, the need for the development of medicines for diseases that primarily impact developing and least developed countries, and distribution issues.

The next contribution to this panel's papers is by Professor Steven Jamar and is titled, *A Social Justice Perspective on the Role of Copyright in Realizing International Human Rights*. Professor Jamar argues that copyright law has the potential to serve as a means for empowerment and inclusion, but also could hinder the ability to fully recognize civil and political rights as well as economic, social, and cultural rights. He discusses how the ability to access information is fundamental to the exercise of other human rights and the legal instruments that include those rights. He notes that any human right in intellectual property is, at least, impliedly, in those instruments, limited by the overall public good. He further discusses natural law and utilitarian justifications for intellectual property rights and concludes that both theories allow for limits based on the public good. He then explains some of the limits of substantive copyright law that may allow access to information. He also provides three examples to demonstrate why access to information is critical to the realization of human rights, and how copyright law can effectively balance the need to incentivize creation of information and at the same time provide access to that information. Importantly, he raises the danger of copyright law's ability to suppress speech—government sanctioned suppression of speech—and at the same time copyright's function of incentivizing the creation and distribution of that content. He also provides specific proposals guided by the social justice goals of inclusion and empowerment to realize the optimal level of access to information to provide a strong foundation for human rights, including freedom of expression, participation in governance, the right of economic development, the right to a healthy environment, and the right to participate in social and cultural activity.



The final essay, *Indian Patent Law and TRIPS: Redrawing the Flexibility Framework in the Context of Public Policy and Health*, by Professor V.K. Unni, provides an analysis of the flexibilities allowing for access to patented pharmaceuticals and other technologies. In this article, he notes that India currently has multiple processes in its patent laws allowed by TRIPS to provide needed flexibility if there are problems with access to needed pharmaceuticals in the future; however, he also recognizes that advocates for weaker patent protection may seek to exploit the lack of clarity in some of the legislated flexibilities which may result in less indigenous innovation. He provides a fascinating discussion of the evolution of India's patent law and innovation policy, including the enactment of India's 1970 Patents Act, which prohibited the patenting of processes to create pharmaceuticals, to India's entry into the World Trade Organization and its consequent acceptance of TRIPS through the adoption and implementation of amendments to its patent laws. He then addresses the flexibilities in India's current law allowed by TRIPs with an analysis of some relevant analogous U.S. and U.K. case law. Notably, he discusses India's compulsory licensing provisions, India's laws concerning experimental use—which appear broader than its U.S. counterparts, and India's adoption of a principle of international exhaustion.

#### VI. THE ROLE OF TORT LAW IN IMPLEMENTING HUMAN RIGHTS NORMS

Professor Julie Davies, Moderator<sup>47</sup>

In Panel Six, **Professors Ronald Krotocynski, David Partlett, and Adrienne Stone** discussed the Influence of Human Rights Law on Tort Law. The panel's emphasis was on the tension between the legal deference that is afforded freedom of expression under U.S. law, and the protection of dignity, personality, and privacy, which receive limited protection under U.S. tort law but much greater legal protection elsewhere in the world. For many centuries, the torts of libel and slander protected a person's reputation throughout the United Kingdom and in the countries that derive their legal heritage from England. The United States Supreme Court undercut that protection, however, in *New York Times v. Sullivan*,<sup>48</sup> when it held that in order to recover damages for defamation, a public official had to prove reckless disregard for the truth or falsity of the statement on the part of the defendant. Over time, the *New York Times* rule has been expanded by the U.S. Supreme Court to cover a broader array of factual circumstances, including a requirement that a plaintiff must prove reckless disregard for truth in an action based on the torts of intentional infliction of emotional distress or

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47. Professor of Law and Associate Dean for Academic Affairs, University of the Pacific, McGeorge School of Law.

48. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

invasion of privacy.<sup>49</sup> This was the situation the Supreme Court encountered in *Snyder v. Phelps*,<sup>50</sup> in which a strong majority of the Court held that the Westboro Baptist Church could not be held liable for the distress parents suffered when members of the controversial church picketed at the funeral of their son, a service member killed in Iraq. The panelists used *Snyder* to set the stage for a discussion of the U.S. position as compared to the view many other countries would take when faced with the choice between protecting speech and privacy, dignity, tolerance, and other values.

Professor Krotocynski's presentation set the stage by tracing the development of constitutional protection in cases of libel and slander from *New York Times* up through *Snyder v. Phelps* and the Court's conclusion there that Maryland tort law must yield to the protection of freedom of expression. Noting that the wider world, including the United Kingdom, Japan, and Germany believe *Sullivan* gives too much protection to speech at the expense of other values, Professor Krotocynski explained that U.S. law reflects fundamental mistrust of government, a hostility "bordering on paranoia about government and its institutions." Thus, the paramount protection of speech at the expense of tort law and the values it protects is completely consistent, and correct, if the premise of one's legal system is distrust of government.

Professor Partlett's contribution highlighted the irony of protecting speech while trampling the protection of tort law. Pointing out that tort law protects human rights, and that prior to the Bill of Rights the common law served that purpose through its protection of the private person, Partlett saw the *New York Times* and *Snyder* decisions as premised on confused contradictions. Whereas the common law had developed slowly and incrementally to encompass individual protections through tort law, the U.S. Supreme Court discredited the ability of the common law to filter and distinguish claims while adopting a constitutional analysis that was equally, if not more, vulnerable to criticism for overbreadth and meaningless distinctions. Partlett noted the propensity of the U.S. Congress and Courts to assert the superiority of the *Times* rule, and to criticize other countries for failing to embrace it. He referenced recent federal legislation that will invalidate the judgments against U.S. citizens in foreign courts that do not utilize the rule. Partlett cautioned that the United States was depriving itself of the wisdom of many other courts that do not strike the balance between protection of the individual and free speech in the same way.

Professor Stone sought to emphasize not what divides the United States from other countries, but the values we all share. Many countries around the world embrace freedom of expression as a human right, even if they do not have constitutions that enumerate it as a distinct right. While it is true that the *New York Times* rule has not been adopted elsewhere—even in countries that share a

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49. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

50. *Snyder v. Phelps*, 131 S. Ct. 1207, 1213, 1215, 1220 (2011).

common legal heritage—all of these countries have considered the same question about the competing values of reputational protection as opposed to freedom of expression. Professor Stone asserted that in those countries, a belief that there is no constitutional value in false statements of fact and in the importance of protecting personal dignity as embodied in reputation has led to adoption of more tempered free speech protection. She noted that the American position protecting hate speech such as that exhibited by the Westboro church is unique among the countries of the world, and that other countries protect different values: equality, multiculturalism, and dignity. Professor Stone thus suggested that where the United States differs from other countries is not in recognizing these diverse and sometimes contradictory values, but in how we achieve their protection. Agreeing with Professor Krotocynski, she concluded that the real point of disagreement centers on the role of law and government. Some countries, such as Australia, view government action and law as a productive way to protect human rights. Indeed, they believe that social transformation requires state action. The United States sees state intervention as incompetent at best and self-interested at worst. Professor Stone closed by criticizing American exceptionalism because it creates no incentive to look anywhere else to interpret these competing values. Further, she cautioned that unless the United States shows an inclination to listen to others, it will have little credence in advocating the strong protection of freedom of expression it espouses.

#### VII. HUMAN RIGHTS NORMS IN THE CONTEXT OF AN ARMED CONFLICT AND SECURITY ISSUES

Professor John Cary Sims, Moderator<sup>51</sup>

Our panel on human rights law in the context of an armed conflict, and related security issues such as self-defense, took a somewhat different approach than the other panels in the symposium. Rather than exploring an array of human rights problems arising within a particular field of substantive law, this panel chose to address a single problem as to which human rights law is an important, but not the only, frame of reference. The topic considered by the panel was the urgent one of the aggressive use by the Obama administration of unmanned aerial vehicles (“UAVs”, which are often referred to as “drones”) to carry out lethal missile attacks against those thought to be participating in terrorism against the United States.

**Professor David Kaye** and I introduced the problem and described the basic principles governing its resolution. The Predator drones used by U.S. armed forces and by the Central Intelligence Agency, and the larger and more heavily armed Reapers that have come into service more recently, have the capacity to

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51. Professor of Law, University of the Pacific, McGeorge School of Law.

launch very deadly and generally accurate attacks, usually from a control station far away from any battlefield. Because drones are very close to their potential targets, once a command to launch missiles is given, the time between the order and completion of the attack is very short. Professor Kaye explored the implications of this reality, comparing the use of drones with use of more traditional weapons that have a high degree of automaticity. The Aegis combat system used to protect ships against missile attacks, the hair-trigger munitions that would be used if North Korea attacked South Korea across the DMZ, and cluster bombs all represent weapons whose characteristics merit comparison to drones.

Professor Kaye, in describing circumstances in which he assumed that the Law of Armed Conflict (“LOAC”) would apply, emphasized that use of drones would need to be analyzed under the same principles that govern more traditional weapons. The principle of distinction must be followed. Civilians cannot be targeted. Indiscriminate attacks are forbidden. Moreover, the principle of proportionality should be applied in an effort to assure that the risk of harm to civilians is not excessive relative to the military advantage expected to be gained in the attack. Much of the discussion among the panel members, and later in relation to questions from the audience, concerned the distinctive characteristics of drones and how their capabilities and limitations compared to the possible use of other weapons systems (or even to a raid conducted by special forces) to accomplish the same mission.

**Professor Wayne McCormack** analyzed the use of drones in relation to a number of the aspects of the LOAC and to the principle of self-defense under Article 51 of the United Nations Charter. The Article presented here sets out, and in certain respects expands upon, that analysis. Professor McCormack correlates international standards of self-defense with ordinary understandings of the same principle, and he draws heavily upon the Israeli experience.

At the time of the symposium, the United Nations Security Council was within a few days of the adoption of Resolution 1973, which on March 17, 2011, authorized the use of military force to protect civilians against the attacks being carried out by the regime of Muammar Gaddafi. Thus, a good deal of the discussion involved the question of whether—assuming that military action by NATO forces were authorized by the Security Council, as it later was—use of drones in an attempt to remove Gaddafi from command of his forces would be appropriate.

The time available for discussion of the myriad human rights and other issues raised by the use of drones was limited, so a number of other issues were identified without being fully explored. Very little is known about the procedures used by the United States to add an individual to the list of those who may be targeted for lethal attack (by drones or other means), but certainly it is important that the process be highly accurate and subject to appropriate, informed direction by the President and his principal security advisers. It is impossible to assess

whether the procedures are legal when almost nothing is publicly known about how the targeting is being done. Anwar Al-Aulaqi, a dual U.S.-Yemeni citizen, was considered by the United States to be active in al Qaeda in the Arabian Peninsula, and he was ultimately killed in a drone attack. Earlier, his father had attempted to challenge the legality of any decision by the United States to target him for a lethal attack. It is not particularly surprising that the federal district judge to whom the case was assigned found that the matter was not justiciable,<sup>52</sup> but this means that, at least for now, individuals (including U.S. citizens) may be added to a list of those to be killed, with all aspects of the general procedures to be followed, as well as of the proof presented against the individuals, known to and reviewable by no one outside the executive branch.

#### VIII. THE IMPACT OF A WIDER DISSEMINATION OF HUMAN RIGHTS NORMS: FRAGMENTATION OR UNITY?

Professor Omar Dajani, Moderator<sup>53</sup>

The final panel explored the systemic implications of the dissemination of human rights norms across the variety of fields considered during the symposium. The panel focused in particular on the issue of fragmentation. Offering a framework for the discussion, **Professor Harlan Cohen** observed that the concept of fragmentation comprises three distinct phenomena: fragmentation of interpretation or jurisdiction, where a single body of law is interpreted in varying ways by different international bodies; fragmentation of regulation, where different legal regimes govern the same conduct and impose sometimes conflicting demands on the parties they are regulating; and fragmentation of community, whereby different fields establish divergent “legitimacy rules” for determining which norms count as law. Arguing that the field of human rights law has come to represent a community with its own distinct legitimacy rules, Professor Cohen suggested that tools may be borrowed from constitutional law for reconciling human rights and other norms of international law, including comity rules, hierarchy rules, and abstention doctrines. **Professor Kristen Boon** agreed with Professor Cohen that some degree of fragmentation is inherent in international human rights law, but she argued that the law of state responsibility has served to give the field a degree of coherence. Notwithstanding enduring disagreements regarding the content of certain substantive norms, she pointed to a growing convergence with respect to the attribution of state responsibility for unlawful acts, the allocation of responsibility *erga omnes* for enforcement of human rights norms, and the elaboration of remedies for breaches. Finally, **Professor Sabine Schlemmer-Schulte** offered a poignant case study of the

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52. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010).

53. Professor of Law, University of the Pacific, McGeorge School of Law.

consequences of fragmentation in this field, as well as a number of suggested responses to it. Noting that Argentina's debt crisis pitted the rights of investors against the Argentine government's need to protect the human rights of constituents faced with the prospect of economic and political instability, Professor Schlemmer-Schulte suggested a number of means—some rooted in existing law, some representing progressive development—of remedying the divergence between investment law and human rights law as applied in the context of financial crises.

