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THE INTERNATIONAL REVIEW

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 INTERNATIONAL PUBLIC HEALTH

Is there a right to healthy and nutritious food?PAGE 15

To address a global phenomenon in which people are eating either too little or too much, the world community is using a broad legal framework that calls on nations to recognize and protect not only a right to adequate food, but also a right to healthy and nutritious food. Under international law, can nations regulate more actively the production of unhealthy foods and discourage people from eating them?

 COMPARATIVE LAW

Circumcision: A rite of passage or bodily harm?PAGE 2

Though circumcision has been practiced for thousands of years, contemporary societies are actively debating whether parents have a right to request nonmedical circumcision on behalf of (and without consent from) their infants and young children. How do various nations around the world regulate this practice? Does international law provide any guidance or impose any restrictions on circumcision?

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How do nations and international law address fracking?PAGE 28

While supporters of fracking say that this controversial drilling technique is safely expanding the world's energy resources, opponents believe that its long-term use will harm the environment and human health. What is fracking, and how extensive is its use? To what extent are governments around the world regulating this practice? And is there a framework to oversee fracking on a global level?

 INTERNATIONAL CIVIL LIBERTIES

Insulting religions: Allowed or prohibited under international law?PAGE 40

A terrorist attack on the staff of a French magazine that had repeatedly, in the name of freedom of expression, denigrated the extremist followers of Islam recently thrust to the forefront a long-simmering debate on whether nations should prohibit people from criticizing and insulting religions. How does international law address freedom of expression, and does it allow governments to impose restrictions on that right?

 EUROPEAN UNION LAW

Quotas for women on corporate boards?PAGE 45

The European Union is considering a law that will require all of its member nations to increase the percentage of women on the corporate boards of Europe's largest publicly listed companies. Why is the EU pushing for such a requirement? What are the exact provisions of this law? Are gender quotas an effective way to increase opportunities for women in corporate boardrooms? Where does the debate stand today?



Circumcision: A rite of passage or bodily harm?

In 2012, a ruling by a German court that said that a baby's circumcision was an illegal act of "grievous bodily harm" added fire to an already long-running debate on whether people have a right to request that procedure on behalf of those who cannot give consent, such as infants. While many argue that circumcision is an important rite of passage, which usually does not endanger the health of those who undergo the procedure, opponents believe otherwise and say that no one may consent of behalf of another person for a circumcision.

What exactly is circumcision and why do people undergo that procedure? Why did the court in Germany say that circumcision was an act of bodily harm? How do the legal systems in other nations, including the United States, address that procedure? Does international law play any role in how nations oversee and regulate circumcision?

Circumcision: A long-standing practice

Dating back at least to the time of the Egyptian pharaohs, male circumcision—the cutting and removal of the foreskin covering the penis—is "one of the oldest and most common surgical procedures worldwide," according to the World Health Organization (WHO).

Many societies carried out this practice, say some historians, as part of a tradition to increase reproductive fertility. Explains *Slate* magazine: "The practice was based on an agricultural metaphor" where people pruned "a fruit tree to increase the tree's yield in the following season."

Others say that circumcision is a religious requirement and also represents a rite of passage into manhood. One out of every three males worldwide is circumcised, largely for religious reasons, reports the WHO. (Around 70 percent of all circumcised males are Muslim and 1 percent are Jewish.) Judaism, for instance, requires a boy to undergo circumcision eight days after his birth. "The foreskin symbolizes a barrier which prevents growth," explains Rabbi Shraga Simmons. "When the Torah speaks about getting close to God, it calls upon us to 'remove the Orlah, the foreskin of your heart.'" In Islam, circumcision is known as *tahara*, meaning purification. The ritual, according to the BBC, is primarily performed for improving cleanliness. Although the practice is not compulsory, the majority of Muslim males are usually circumcised before they reach puberty.

With advances in modern surgery, non-circumcising cultures also began to carry out that practice for health-related reasons, said a 2007 WHO report. Along with the WHO, groups such as the United Nations, and also the Global Fund to Fight AIDS, Tuberculosis and Malaria "all support circumcision as a preventative measure against HIV," reported the nonprofit Bureau of Investigative Journalism. "With their financial backing, African countries have embarked on vast circumcision drives, aimed at adults and parents of newborn boys." Zambia, for example, had hosted a "Mr. Male Circumcision" contest in 2010 to increase the circumcision rate of adult men and newborn boys to 80 percent by 2020. According to the WHO, "voluntary adult medical male circumcision reduces heterosexual transmission of HIV from women to men by approximately 60%."

But not all medical associations recommend circumcision for health reasons. The Royal Australasian College of Physicians said that "the frequency of diseases modifiable by circumcision, the level of protection offered by circumcision, and the complication rates of circumcision do not warrant routine infant circumcision." Still, other organizations such as the American Academy of Pediatrics believe that parents may take into account "cultural, religious, and ethnic traditions, in addition to medical factors," in deciding whether to circumcise their child.

Is circumcision safe? "Circumcision in infancy is very safe," said Deborah Tolmach Sugarman in the *Journal of the American Medical Association*. "When it is performed by a trained professional under sterile conditions, few babies have complications and these (bleeding, infection, scarring) are typically minor." On the other hand, opponents of circumcision believe that the procedure entails a high degree of pain and a large risk of bleeding and infection, which can lead to other health complications.



Circumcision in Germany: An act of bodily harm?

While circumcision has existed for thousands of years, contemporary societies are actively debating whether parents have a right to request nonmedical circumcision on behalf of (and without consent from) their infants and young children.

This ongoing legal debate attracted worldwide media attention in a recent circumcision carried out in Germany. In November 2010, a doctor circumcised a four-year-old boy—known only as “K1” in legal documents—under the direction of his parents for religious reasons. (They are adherents of the Islamic faith.) Two days after the procedure, the boy’s penis continued to bleed. So his parents took him to University Hospital Cologne, according to reporting from the *Guardian*, a British daily.

After a German court declared that carrying out a medically unnecessary circumcision on a young boy without his consent was illegal and punishable by law, Germany passed a regulation to legalize that procedure in certain situations.

Circumcision is not a common practice in Germany. A little over 10 percent of males in Germany are circumcised. According to a survey carried out in 2011 by the *Daily Mail* (another British daily), 60 percent of Germans equated circumcision with genital mutilation.

While no law in Germany expressly forbids or allows circumcision, doctors do perform the procedure specifically for medical reasons once they receive permission from the patient, say observers. But what about cases where infants and children undergo circumcisions (without their consent) for nonmedical reasons, including religious ones? Experts note that Germany’s Criminal Code, Section 223 (Bodily harm) states that “anyone who physically maltreats or harms the health of another shall be punished.” Others point out that under Germany’s constitution—formally known as the Basic Law for the Federal Republic of Germany—Article 2 (Personal freedoms) says that “every person shall have the right to life and physical integrity.”

So under these laws, would authorities view a circumcision as an act of bodily harm when it is carried out (for religious reasons) on children without their consent? Experts say that the law is not clear on this point. As a result, “for decades, doctors in Germany operated in a legal grey area when they circumcised boys for purely religious reasons, without medical necessity,” according to *Financial Times Deutschland*.

In the case of K1, the staff at University Hospital Cologne, for undisclosed reasons, alerted the police. Authorities investigated the doctor (known only as “Dr. K”) who had carried out the circumcision and then charged him with bodily harm, although they noted that Dr. K’s surgery was “done correctly.”

Circumcision supporters point out that under Article 4 (Freedom of faith and conscience) of Germany’s constitution, “the undisturbed practice of religion shall be guaranteed.” They also note that Article 6 (Marriage-Family-Children) says that “the care and upbringing of children [in matters such as education and religion] is the natural right of parents and a duty primarily incumbent upon them,” though it adds that the “state shall watch

over them in the performance of this duty.”

In the case of Dr. K’s patient, whose fundamental rights carry more weight: the parents’ right to religious freedom along with their right on how to raise their children, or the child’s right to his physical integrity?

In September 2011, a district court in Cologne ruled that circumcising a boy without his consent was an act of bodily harm (a crime), but it dismissed the charge against Dr. K.

How did the district court justify its acquittal? It declared that, in this particular case, the circumcision was carried out for the “child’s well-being” (or best interests). The ruling described the procedure as a “traditional-ritual course of action for documenting belonging culturally and religiously to the Muslim community.” So

the circumcision, reasoned the district court, would “prevent the threat of stigmatization for the child among his [Muslim] peers,” reported *Speigel Online*. The decision also noted that “the parents had given their approval for the procedure.”

In summarizing the ruling, analysts said that, in Germany, a circumcision may be carried out for religious reasons without a child’s consent only if both parents gave permission and if doing so was in the child’s best interests.

On appeal at a regional court, the prosecutors again charged Dr. K with bodily harm. As in the case of the district court, the regional court ruled in June 2012 that the physician had carried out bodily harm (again a crime) when he circumcised the young boy—without his permission—for religious reasons at his parents’ request.

But unlike the district court, the regional court said that parental consent did not justify the circumcision. “Parental consent to the circumcision is considered to be inconsistent with the well-being of the child,” decided the regional court. It also said that religious tradition and social acceptance (also called “social adequacy”) did not justify what it considered to be a criminal act. “The circumcision of a boy unable to consent to the operation is not in accordance with the best interests of the child,” it ruled, “even for the purposes of avoiding a possible exclusion from their religious community and the parental right of [say, religious] education.”

How did the regional court come to these conclusions? The ruling said that “the right of the parents to raise their child in their religious faith does not take precedence over the right of the child to bodily integrity.” When balancing conflicting fundamental rights, the regional court explained that it would not place a disproportionate emphasis on one set of rights (such as those of the parents) over all other rights (such as those belonging to a child).

Using this principle in the current case, the regional court said that ruling in favor of the parents would disproportionately (and adversely) affect the rights of the child to his physical integrity. After undergoing a circumcision, a child’s body would be “permanently and irreparably” changed, explained the decision. (Why? Circumcisions cannot be reversed.) Also, said the ruling,

this physical alteration would run “contrary to the interests of the child in deciding his religious affiliation independently later in life.”

On the other hand, a ruling in favor of the child’s physical integrity (where he himself would decide whether to be circumcised at a later age) would not unreasonably or adversely diminish the rights of the parents to religious freedom or to raise their child as they see fit. Although the parents would have to wait until their son was older before deciding on circumcision, explained the ruling, they would still be able to exercise their right to religious freedom and to raise their children by providing their son with religious instruction until he reached that point in life.

But in the case of K1, the doctor had already carried out the circumcision, noted the regional court. Therefore, it found him guilty of bodily harm. Yet (as in the case of the district court), it acquitted him of that crime. Why? Under the German Criminal Code, Section 17 (Mistake of Law) says a court cannot find a defendant guilty of a certain act if the law is not clear on whether that act is criminal in the first place. In the case of K1, the regional court said that even if Dr. K had sought legal advice (which he didn’t do) before performing the circumcision, the law would not have been clear on whether it would punish him for carrying out a circumcision for religious reasons on a child who did not or could not give his consent.

Responding to the decision of the regional court, analysts such as Holm Putzke (a law professor at the University of Passau and also an opponent of nonmedical circumcisions) said that “for the first time, a [German] court has declared—no ifs, ands, or buts about it—that medically unnecessary circumcision on nonconsenting boys is illegal, and in fact punishable by law.” So until a boy is old enough to give consent (an age not defined by the regional court), doctors performing nonmedical circumcisions could risk their licenses and liberty, said observers. Putzke added that “nobody wants to ban religious circumcision in Islam and Judaism, not at all. It should just be decided by those who undergo it.”

Although he noted that “the ruling is not binding on other courts” outside of the German state of Cologne (or nations outside of Germany for that matter), “it will have the effect of a warning signal.” In fact, the *New York Times* reported that “Germany’s

Medical Association warned doctors not to carry out circumcisions for religious reasons until the ruling was clarified.”

Many organizations—arguing that the ruling was a blow to religious freedom—called on the German government to legalize the circumcision of children for religious reasons at the request of their parents. “This religious right is respected in every part of the world,” said Dieter Graumann, president of the German Central Council of Jews. Ali Demir, the Chairman of the Religious Community of Islam in Germany, said that the decision was “a wholly inappropriate interference with freedom of religion. I feel the ruling is hostile to integration and discriminatory for those affected.” According to MSNBC, four million Muslims and 120,000 Jews live in Germany.

In December 2012, the parliament overwhelmingly passed a federal law (applying to all 15 states in Germany) which oversees circumcisions carried out for nonmedical reasons. Under the German Civil Code (§1631d – “Circumcision of the Male Child”), doctors or other practitioners who received special training may carry out a circumcision on a child during the first six months of his life, according to reporting from various media outlets. But after this six-month period, only a medical doctor must perform the procedure. Also, both parents must give permission for the circumcision, though they don’t have to give any specific reason to carry it out.

Circumcision in the United States

While circumcision rates have declined in the United States during the last 30 years (from 64.5 percent in 1979 to 58.3 percent in 2010), a study by the National Center for Health Statistics shows that the rates vary among different regions. In 2010, the highest rate of circumcision of babies (71 percent) occurred in the Midwest while the lowest was in the West at 40.2 percent. Also, more babies in the Northeast (66.3 percent) were circumcised than babies in the South (58.4 percent).

Circumcision and the law: In the United States, no law requires or forbids circumcision outright, said Sally Steenland—the director of the Faith and Progressive Policy Initiative at the Center for American Progress, a think tank—to the *New York Times* in an interview. Instead, an adult may decide on his own to



get circumcised for various personal reasons. After considering the procedure's risks and benefits, he will give formal permission (that is to say, his "informed consent") to a doctor or other professional. "Circumcision of adults who grant personal informed consent for the surgical operation is not at issue and is unquestionably lawful," according to one analyst.

On the other hand, observers say that a doctor who circumcises a competent individual who had refused that procedure (in a situation which was not medically necessary) could—under certain circumstances—face charges of assault and battery, among others. Analysts note that people regularly file lawsuits against doctors

In the United States, parents may lawfully give permission to a medical or other professional to carry out a circumcision on their infants and young children. No law or regulation at the local, state, or federal level requires them to obtain permission from, say, an official or a government agency.

and hospitals for carrying out circumcisions (usually by accident) without the patient's informed consent.

What if a person is no longer able to give informed consent on his own? (That person could be suffering from, say, mental deterioration caused by disease.) In such cases, a family member or an individual appointed by a court will support that person's best interests, including what is best for that person's health, well-being, and various other needs.

What about situations in which a person is not yet mentally capable of giving informed consent? An infant or young child, for example, usually can't understand or has difficulty comprehending what people are saying to him. In these cases, parents have "extremely wide latitude on the decisions they can make on behalf of the child," said attorney Ken LaMance, adding that the law "treats the parent's decision as the child's decision." In cases of *medical necessity*, parents will give consent on behalf of an infant or child, and then allow a doctor to carry out, for instance, life-saving surgery, say analysts. Postponing needed medical care for several years until an infant or child can make his own informed decision could endanger his health or may even lead to his death.

But what about cases where a medical procedure is usually not necessary, such as circumcision? In the United States, parents may lawfully give permission to a medical or other professional to carry out a circumcision on their infants and young children. No law or regulation at the local, state, or federal level requires them to obtain permission from, say, an official or a government agency. (The parents usually say that the circumcision is in the best interests of their children.)

On the other hand, "voluntary circumcision for adolescents requires both consent from the parent or guardian and from the adolescent himself," said Emmanuel Njeuhmeli, the Senior Biomedical Prevention Advisor in the USAID Office of HIV/AIDS. Unlike infants, older children and adolescents have a better ability to give informed consent, say observers, and they may ultimately decide to refuse the circumcision after considering its risks and benefits.

Just because parents may give their permission for a child to undergo a circumcision does not mean that the procedure may be carried

out in any manner whatsoever. Currently, no local, state, or federal law specifically legalizes or comprehensively regulates all aspects of circumcision such as at which age and exactly how to carry out that procedure. "The United States has not enacted a comprehensive circumcision regulatory regime," said a law commission.

Rather, certain regulations—at the local level, for instance—may oversee specific aspects of circumcision. For example, in September 2012, the New York City Board of Health passed a regulation (now §181.21 of the city's Health Code) requiring parents to sign a consent form before their children undergo a particular Jewish ritual circumcision—performed around 3,600 times every year—

where a rabbi sucks the blood from the circumcised penis. The Board of Health said that the law would prevent the spread of oral herpes to infants. From 2004 to 2011, 11 babies had contracted herpes during the procedure, it said to the *New York Times*. Two of them later died from the infection, and two others had suffered brain damage. But in February 2015, the mayor of New York City and the Orthodox Jewish community had reached an agreement—which has not yet been approved by the Board of Health—to make the regulation voluntary.

Circumcision is a divisive topic not just in other nations, but also in the United States. Opponents argue that for nonmedical circumcisions, parents should wait until an infant is older to make his own informed decision on whether to undergo that procedure. (Postponing a circumcision until much later, they say, will not threaten a child's health.) They also believe that parents don't even have a legal right to give consent to a medically unnecessary circumcision. The procedure has few benefits but entails significant health risks, claim opponents. Given these risks, they have concluded that carrying out a circumcision could never be in an infant's or a child's best interests. And if circumcision is not in the child's best interests, parents don't have a legal right to give consent to the procedure in the first place.

Circumcision opponents further claim that existing laws give a right to infants and young children to decide later for themselves whether to get circumcised. For example, legal analyst Peter Adler believes that under the general right of liberty in common law, "circumcision violates a boy's right to be let alone, free from interference, and to control his own person in the future." He also believes that carrying out circumcisions without the consent of children violates the right to privacy under the U.S. Constitution. "Medical treatment decisions are, to an extraordinary degree, intrinsically personal," he says. As a result, "the decision to remove a foreskin is of profound importance. Under the privacy clauses of federal and state constitutions, boys have a constitutional or absolute right to make a choice about circumcision without government interference."

Circumcision and the courts: Have courts in the United States ever addressed whether parents have a right (under current laws or

the Constitution) to consent on behalf of their infants and young children for a voluntary circumcision?

In 1987, the parents of Adam London filed a lawsuit in Superior Court of California in Marin County against a physician and his employer (Permanente Medical Group) for carrying out a circumcision—without their consent—on their son when he was a newborn baby. While the defendants said that the mother had signed an “informed consent” form, she replied that she did not remember doing so. Her lawyer also pointed out that, according to the form itself, “there was no medical purpose for circumcision.” Still, the court dismissed the lawsuit, noting that the mother did sign a consent form for the circumcision.

The parents then asked an appeals court to decide (in *London v. Glassner et al.*, California Court of Appeal, 1st District, No. A032040) whether a parent has “the legal power to consent to a surgical procedure which has no medical purpose.” In affirming the lower court’s ruling, the Court of Appeal said in an unpublished ruling: “Plaintiff’s public policy argument—that children should be protected from suffering unjustifiable pain or risks—is based on the premise that parents cannot consent to surgical procedures which have no medical purpose. Section 25.8 [of the California Civil Code], however, permits parents to consent to any surgical procedure, regardless of purpose.” After the Supreme Court of California declined to review the case without any comment, the parents decided not to appeal to the United States Supreme Court.

Has the U.S. Supreme Court ever accepted a case directly concerning any aspect of circumcision? Not yet, say observers. One analyst said that “in the absence of definitive legislation or court rulings regarding the lawfulness of nontherapeutic [i.e., nonmedical] circumcision of male children within United States law, there is some latitude for different opinions regarding its lawfulness.”

On the other hand, lower courts have addressed (and continue to address) disputes in which two parents have disagreed on whether to circumcise their child. “Circumcision requires the consent of both parents,” said attorney Ken LaMance.” So when parents disagree on whether to carry out a circumcision on their son and are unable to resolve their dispute privately, they have asked the courts to intervene.

In a 2006 case (*Schmidt v. Niznik*, Cook County Illinois, NO. 00 D 18272), the divorced parents of an eight-year-old boy in Chicago could not agree on whether to circumcise their son. While the mother wanted to circumcise her son to prevent “recurring, painful inflammation,” the father argued that the procedure was medically unnecessary, reported the Associated Press. Under the terms of the couple’s divorce, the mother had to consult with the father before their son underwent any “extraordinary” non-emergency procedure, noted analysts. The judge in the case ruled that a circumcision was an “extraordinary medical procedure,” and that the young boy should decide whether to get circumcised at the age of 18.

In 2008, the Supreme Court of the State of Oregon had to resolve a case—*In re: the Marriage of James H. Boldt, and Lia Boldt* (CC No. 98-2318-D(3))—in which a divorced couple gave contradictory claims on whether their 13-year-old son wanted a circumcision. The father (who had custody) claimed that his son wanted to undergo the procedure to convert to Judaism. But his mother said that the son had told her otherwise.

In its ruling, the Supreme Court said that “the decision to have a male child circumcised for medical or religious reasons is one that is commonly and historically made by parents in the United States.” It added that “the decision to circumcise a male child is one that generally falls within a custodial parent’s authority, unfettered by a noncustodial parent’s concerns or beliefs—medical, religious or otherwise.” Still, it ordered the trial court to determine whether the son actually wanted circumcision. Why? Forcing the teenage son to get circumcised against his will could negatively affect his relationship with the custodial father, which could then compel the trial court to give custody to his mother. The father appealed the ruling to the U.S. Supreme Court, which declined to review the case. At a hearing in 2009, media reports say that the trial court judge decided that the son would not undergo circumcision because, according to the judge, he neither wanted to get circumcised nor wanted to convert to Judaism.

Have cities and other municipalities ever tried to restrict circumcisions? In May 2011, anti-circumcision activists in San Francisco had gathered enough signatures to place a measure on an election ballot that would have prohibited any person from circumcising, excising, cutting, or mutilating the foreskin, testicles, or penis of another person who is not at least 18 years old. Prosecutors could charge violators with a misdemeanor, impose a fine not exceeding \$1,000, and even imprison them for up to one year. While the measure would have made exceptions for those procedures carried out because of a “clear, compelling, and immediate medical need,” it would not have done so for procedures “required as a matter of custom or ritual.”

Opponents in June 2011 filed a lawsuit (*Jewish Community Relations Council of San Francisco et al. v. John Arntz in his capacity of Director of Elections*) to remove the measure from the ballot.

In July 2011, Superior Court Judge Loretta Giorgi ordered the San Francisco Department of Elections to remove the anti-circumcision measure from the election ballot. In her ruling, she noted that an existing statute (Business and Professions Code § 460(b)) gave primary authority to the state, and not municipalities such as cities and counties, to regulate medical procedures.

To protect circumcision from similar ballot measures, California in October 2011 enacted a law (AB768) that says that “no city, county, or city and county ordinance, regulation, or administrative action shall prohibit or restrict the practice of male circumcision, or the exercise of a parent’s authority to have a child circumcised.”

Circumcision and the right to free exercise of religion: While people give permission to medical professionals to circumcise their infants and young children for health reasons, many others do so for religious ones. And they argue that the First Amendment of the U.S. Constitution protects their right to exercise their religious beliefs. That amendment says, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” Analysts refer to this excerpt as the “free exercise” clause.

They point to several U.S. Supreme Court decisions that they say implicitly give parents the right to consent to circumcision on behalf of their children. For example, in a 1972 decision (*Wisconsin v. Yoder* (406 U.S. 205)), which the high court said “[involved] the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children,” it ruled that Wisconsin’s compulsory school attendance law—requiring

children to attend school until the age of 16—violated the rights of members of the Old Order Amish religion to exercise their religion under the First Amendment. (The case did not involve circumcision or any aspect of it.) The members of that order said that they did want their children to attend public school past the age of 14 because doing so would expose them to “worldly influences,” which conflicted with their religious values. The Civil Liberties Union of Northern California said the law had “impermissibly [infringed] upon the fundamental interest of parents to guide the religious future of their children.” In the same way, people who carry out circumcision for religious reasons say that a law that limits or even prohibits circumcision for such reasons would interfere with their right to exercise their religion under the First Amendment.

In a 1979 decision, the Supreme Court ruled in *Parham v. J.R.* (442 U.S. 584) that allowing parents in Georgia to commit minors (i.e., those under the age of 18) to state mental hospitals without an initial fact-finding hearing carried out by an impartial tribunal does not violate the due process rights of those minors under the U.S. Constitution. (This case—just like the *Wisconsin* decision—did not involve circumcision.) “Simply because the decision of a parent is not agreeable to a child, or because it involves risks, does not automatically transfer the power to make that decision from the parents to some agency or officer of the state,” ruled the high court. “The same characterizations can be made for a tonsillectomy, appendectomy, or other medical procedure. Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.”

Taken together with other court decisions, various religious groups in the United States—such as those of the Christian, Jewish, and Muslim faiths—argue that the right to exercise their religion

implicitly includes a right of parents to guide the religious future of their children by giving informed consent (on their children’s behalf) for circumcisions.

But opponents of circumcision point to several U.S. Supreme Court decisions that say, in part, that the right to exercise religious beliefs does have limits in certain situations, and that these limits—under their own interpretation—implicitly prohibit the circumcision of children without their informed consent.

In 1878, the U.S. Supreme Court addressed, for the first time, the free exercise clause of the First Amendment. In *Reynolds v. United States* (98 U.S. 145), it ruled that a federal law that criminalizes polygamy did not violate a person’s First Amendment right to exercise his religion, and that the government may place limits on the exercise of that right. The plaintiff, George Reynolds, already had a spouse when he married another woman. He argued that his religion required him to do so, and that the federal law criminalizing polygamy violated his First Amendment right to exercise his religion.

In its unanimous decision, the high court said that while federal laws “cannot interfere with mere religious belief and opinions, they may with practices.” Giving an example, it said, “Suppose one believed that human sacrifices were a necessary part of religious worship; would it be seriously contended that the civil government . . . could not interfere to prevent a sacrifice?” But the ruling itself did not give any list of religious practices which people may or may not carry out as part of their First Amendment right to exercise their religion.

While the *Reynolds* decision did not involve circumcision or any aspect of it, opponents such as legal analyst Peter Adler say it suggests that the government should restrict that procedure (given what they claim to be its harmful consequences) when people try



to carry it out as part of a religious practice on infants and young children. In response, supporters of circumcision point out that while the United States has long outlawed polygamy, it neither requires nor prohibits the circumcision of infants and young children as a religious practice.

In a 1944 decision cited by circumcision opponents, the Supreme Court ruled in *Prince v. Massachusetts* (321 U.S. 158) that a Massachusetts labor law that prohibited children under certain

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ages from selling goods in particular public spaces did not violate a person’s right to practice religion under the First Amendment, and that, in this particular case, the state had the authority to protect the health and welfare of children. The plaintiff, Sarah Prince (a minister) was preaching in public—along with a nine-year-old girl—and also giving out religious literature. By prosecuting her for breaking child labor laws, Prince said that the state had violated her First Amendment right to exercise her religion.

In its 5-4 ruling, the high court said that “the right to practice religion freely does not include the right to expose the community or the child to communicable disease or the latter to ill-health or death.” It also said that “parents may be free to become martyrs themselves,” but that “it does not follow they are free . . . to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”

As in the case of the 1878 *Reynolds* decision, this ruling did not involve circumcision. Yet opponents say that its reasoning should also extend to the practice of circumcising infants and young children because, they believe, that procedure does lead to ill-health or death. But supporters of circumcision respond that it usually does not.

In the previous discussion of *Wisconsin v. Yoder*, the high court said that Wisconsin’s compulsory school attendance law—requiring children to attend school until the age of 16—violated the rights of members of the Old Order Amish religion to exercise their religion under the First Amendment. While the case did not involve circumcision in any respect, circumcision opponents point out that the decision says, in part, that the government may limit a parent’s exercise of religious beliefs “if it appears that the parental decision will jeopardize the health and safety of the child.” In the case of circumcision, opponents believe that circumcision does jeopardize the health and safety of the child. Because it does, they argue, the government should limit that procedure when used by parents during the exercise of their religious beliefs.

When viewed collectively, these decisions “suggest that parents do not have the legal right to order the circumcision of their children for religious reasons,” said one circumcision opponent. But supporters say that this argument would be true only if circumcision regularly exposed children to ill health, which they believe is not the case in the United States.

Circumcision in other nations

Germany and the United States are not the only nations that practice circumcision and are debating the legality of carrying out the procedure on those who cannot give consent. According to the WHO, “male circumcision is almost universal in much of the Middle East, North and West Africa, and Central Asia, and is common in other countries, including Australia, Bangladesh, Canada, Indonesia, Pakistan, the Philippines, the Republic of

Korea, [and] Turkey.” On the other hand, that procedure is rarely performed in Europe, South America, or East Asia. How do specific nations regulate circumcision? Below are some examples.

Nations that don’t comprehensively regulate circumcision: Several nations, such as Australia and the United Kingdom, oversee circumcision in a way similar to that of the United States. While they don’t have a comprehensive law on circumcision—in fact, “most countries do not currently have laws dealing specifically with male circumcision,” says the WHO—these nations do adhere to certain guidelines and have implemented various regulations that address certain aspects of that practice. Below are some more details on how they oversee circumcision in their respective jurisdictions.

Australia: Though circumcision is legal in Australia, no formal law or regulation sets comprehensive and detailed standards. As long as a person gives informed consent, that procedure is legal, says the Royal Australasian College of Physicians (RACP), a nonprofit organization responsible for the training and assessment of doctors in Australia and New Zealand.

In the case of infants and young children who cannot give informed consent, the Government of Western Australia, for instance, says that “it is lawful for a doctor to circumcise an infant, so long as the circumcision is performed expertly and reflects current ‘best practice,’ it is believed to be in the child’s best interest, and parents who request circumcision are fully informed, and formally consent to the operation.” According to a 1992 court decision called *Secretary, Department of Health and Community Services v. JWB and SMB*, when a “child is incapable of giving valid consent to medical treatment, parents (as guardians) may, in a wide range of circumstances, consent to medical treatment of their child who is a minor.” (This case did not concern circumcision.)

On the other hand, a person who circumcises a child against the wishes of the parents or against the wishes of a child old enough to give consent could face civil and criminal assault charges, say Australian legal experts.

Between 10 to 30 percent of males in that nation are circumcised every year, down from 85 percent during the 1950s, according to various statistics. In September 2010, RACP said in a policy statement that a review of the evidence of that procedure’s risks and benefits did not “warrant routine infant circumcision.” In other words, “there is no medical reason for routine male circumcision,” say many other medical groups. In fact, the Department of Health of

the Government of Western Australia says that “most circumcisions are done for family, cultural, or religious reasons.”

As the rate of circumcisions has decreased in Australia, public opinion against the procedure has increased. A poll performed by *The Mercury* found that 83 percent of respondents are in favor of making circumcision illegal.

Because circumcision is usually not medically necessary, critics have long challenged the right of parents to give consent on behalf of their infants and young children to undergo that procedure. As in the case of opponents in the United States, those in Australia argue that because the risks of circumcision—in their opinion—outweigh its benefits, the procedure can never be in the best interests of a child. Therefore, parents don’t even have a right to give consent for a circumcision on behalf of their children.

In the early 1990s, the Queensland Law Reform Commission began a review of the rights of children in the state of Queensland (the second largest in Australia) to consent to certain invasive and irreversible medical procedures. After reviewing current rights and practices concerning a certain procedure, the commission then issued what it called a research paper containing background information and also suggestions for possible reforms.

In December 1993, the commission released a research paper that specifically addressed male circumcision. It concluded that “if the young person is unable, through lack of maturity or other disability, to give effective consent to a proposed procedure and if the nature of the proposed treatment is invasive, irreversible . . . then court approval is required before such treatment can proceed.” Such treatments include sterilization, the turning off of life support, and the transplant of organs. But the case of male circumcision is “less clear,” said the commission. It continued: “Whether the procedure is within the best interests of any particular child will depend upon the circumstances of the particular case. For example, adherence to the religious and cultural beliefs and practices of the child’s community could be seen as being within the child’s best interests.”

Among some possible reforms concerning male circumcision, the Queensland Law Reform Commission suggested that “it may be reasonable to require . . . medical practitioners to inform parents of all arguments for and against circumcision before, and possibly at least a number of days before, undertaking the procedure.”

In a similar fashion, the Tasmanian Law Reform Institute—a

professional body created to examine legal issues and to recommend reforms to the law—studied the framework for circumcision in the Australian state of Tasmania. In August 2012, it issued Final Report No. 17 (*Non-Therapeutic Male Circumcision*), which included a series of recommendations on that procedure. For example, it said that “uncircumcised adults and capable minors [who can give actual consent] should generally have the right to determine both their own circumcision status and the circumstances of the performance of their own circumcision.”

The Institute also said that the law should generally prohibit the circumcision of minors who are not yet able to give consent, but that it “ought to create an exception for the performance of some well-established religious or ethnicity motivated circumcision.” (That is to say, parents or guardians should be able to give consent on behalf of their infants and young children in these specific cases.)

United Kingdom: As in the case of Australia, the United Kingdom does not have a formal statute or set of rules that specifically allows and regulates circumcision, say legal experts. Instead, “male circumcision is lawful under English common law,” according to a 1995 consultation paper issued by the Law Commission, an independent body created by Parliament to review existing laws and propose reforms. In other words, circumcision became legal through decisions issued by the courts over a period of time.

For example, according to Lord Templeman in a 1993 decision (*R v Brown, 2 All ER 75, HL*): “Even when violence is intentionally afflicted and results in actual bodily harm . . . the accused is entitled to be acquitted if the injury was a foreseeable incident of a lawful activity in which the person injured was participating” such as surgery. He continued: “Other activities carried on with consent by or on behalf of the injured person [that] have been accepted as lawful” include ear-piercing, violent sports, and ritual circumcision, among others.

While people in the United Kingdom do request circumcisions for medical reasons, they also undergo that procedure for religious and other nontherapeutic reasons. Adults who provide informed consent for and then undergo nontherapeutic circumcisions do so without arousing any controversy. “It is currently accepted that non-therapeutic circumcision is lawful,” said the British Medical Association (BMA).



But British society—as in the case of those in many other nations—is debating whether parents may give permission on behalf of their infants and young children for nontherapeutic circumcisions. (Many argue that, given what they believe to be the high risks of circumcision, parents should wait until their children are mature enough to provide consent for that procedure.) But a judge ruled in 2000 that “as an exercise of joint parental responsibility, male ritual [i.e., religious] circumcision is lawful.”

Given the ongoing debate and legal uncertainty surrounding whether parents may consent to nontherapeutic circumcisions on behalf of their children, the Law Commission in 1995 suggested to

Several nations, such as Australia and the United Kingdom, oversee circumcision in a way similar to that of the United States. While they don't have a comprehensive law on circumcision, these nations do adhere to certain guidelines and various regulations that address certain aspects of that practice.

the British government that “it would be useful to put the lawfulness of ritual male circumcision beyond any doubt.” But since that time, the British Parliament had not passed any laws that definitively clarify this issue.

To provide more guidance, the BMA in 2004 issued written guidance for doctors (published in the *Journal of Medical Ethics*) that said that nontherapeutic male circumcision for infants and young children is lawful under three circumstances.

First, the patient must give consent. For a child who can express his own views, the BMA guidance says that his wishes should be “taken into account.” In fact, that organization goes on to say that it “cannot envisage a situation in which it is ethically acceptable to circumcise a competent, informed young person who consistently refuses the procedure.” For a child who is unable or not yet able to give consent, both parents must give permission on his behalf. If only one parent requests the procedure, then “the doctor must make every effort to contact the other parent in order to seek consent,” said the BMA. And if the parents disagree on whether their son should even be circumcised, the requesting parent should seek a “court order” authorizing the procedure.

Second, a doctor may carry out a nontherapeutic circumcision on a child if it is done so in his best interests. But who determines whether this is actually the case? The BMA guidance says that this responsibility “falls to his parents,” and that the organization is “generally very supportive of allowing parents to make choices on behalf of their children.” At the same time, the BMA added that “parental preference alone is not sufficient justification for performing a surgical procedure on a child,” and that doctors should also consider various other factors such as the child's own wishes and also his religious and cultural background, among others.

Third, those who carry out circumcisions must do so competently. They must, for example, take all appropriate steps to minimize risks, including “pain, bleeding, surgical mishap, and complications of anaesthesia,” says the BMA guidance. Doctors must also carry out the procedure in premises that are “suitable for [that] purpose.”

Nations with more comprehensive laws on circumcision: In contrast to Australia, the United Kingdom, and the United States,

other countries have passed laws that oversee circumcision with much greater detail. Some of them include the following nations below.

South Africa: While people in South Africa carry out circumcisions for medical and religious reasons, observers note that many groups do so mainly as part of an initiation rite into manhood. “Circumcision and ritual initiation [for these groups] is the only possible way of entering manhood and gaining the status, respect, rights, and responsibilities that are thought to attend manhood,” says the WHO. Professor Peter Mtuzze of Rhodes University in South Africa describes the moment of circumcision as “the greatest

day in every boy's life.”

As part of this rite, which can last for weeks, older teenagers attend institutions broadly known as “initiation schools” where instructors teach them cultural values, proper ways of adult conduct, and leadership skills. Along with this training, the teenagers undergo circumcisions carried out by traditional surgeons.

But many of these initiation schools have had long-standing problems with carrying out circumcisions, say analysts. They may, for instance, carry out the procedure in unhygienic conditions using the same scalpel on many teenagers. Other schools may not provide sufficient post-surgery care to handle bleeding or infections. In many cases, the traditional surgeon carrying out the circumcision may not have had enough training or have carried out the procedure incompetently. As a result, the federal government and the media say that, during one 10-year period, botched circumcisions have led to hundreds of penis amputations. Others note that “dozens of young men die annually because of the practices at these schools.” Critics also point out that many parents have forced their children to attend these schools without their children's consent.

To address these problems, the federal government in South Africa passed the Children's Act No. 38 of 2005 which sets broad standards on the protection and care of children throughout that nation. In the specific area of male circumcision, the act prohibits that procedure for those under the age of 16 except for medical or religious reasons. For male children older than 16, the act allows circumcisions only if they give consent and undergo counseling. It also says that “every male child has the right to refuse circumcision.”

While the 2005 act sets broad standards for circumcision across South Africa, several provinces have passed much more detailed legislation, which address specific aspects of that procedure. For example, the province of Eastern Cape in 2001 passed a law (which applies only to its jurisdiction) called the Application of Health Standards in Traditional Circumcision Act No. 6, setting minimum standards to prevent injury and the loss of life during a circumcision, according to the WHO. Under the 2001 act, anyone under the age of 21 must receive consent from his parents to get circumcised. In addition, before undergoing the procedure, a child must have

a medical examination to see if he is fit to do so. Furthermore, a medical officer must give authorizations to traditional surgeons who want to carry out circumcisions, and must also oversee the manner in which the procedures will be performed, said the WHO. After the procedure is carried out, a traditional nurse must stay with the initiates for eight days. Violators of the act can face a heavy fine and a long prison sentence.

Another province called Limpopo in 1996 passed the Northern Province Circumcision Schools Act No. 6 and, in 2003, the Initiation Schools Regulations, both of which set circumcision standards in initiation schools. Under these laws, a person who wants to operate an initiation school must receive a permit from the provincial government. Those who want to carry out a circumcision must receive a certificate of fitness from a registered medical practitioner. Also, traditional nurses must have a certificate of training to care for initiates after a circumcision. Furthermore, these laws prohibit people from abducting and then taking children to initiation schools.

Even with the passage of the federal and provincial circumcision laws, hospitals every year still treat hundreds of people who had undergone illegal circumcisions. According to the WHO, “Eastern Cape officials have made many arrests, convicted illegal circumcision school practitioners, and have closed several illegal schools in each year of the law’s operation.”

Sweden: According to reporting from *Der Spiegel*, Sweden is the only nation in Europe that “expressly regulates circumcision.” In 2001, the government passed the Circumcision of Boys Act (on a 249-10 vote with 20 abstentions and 70 absences, said the *Swedish Daily News*), which created national standards for that procedure. It had done so not because more and more Swedes were requesting that procedure—in fact, “circumcision is not a traditional practice” in that nation, said the WHO—but because of an influx of Muslim immigrants who circumcise their children for religious reasons.

Under an analysis by the WHO, the 2001 law allows parents to request a nonmedical circumcision on behalf of their infant or young child only after they receive information on how the procedure will be carried out, its possible health risks, and post-surgery care. Both parents must also consent to the circumcision. (Still, “two out of three doctors surveyed in Sweden said they refuse to circumcise boys because they consider it assault without the child’s consent,” reported United Press International.) For a child capable of understanding the procedure, the law says that the person who will carry it out must give information to him about the circumcision. If a child then refuses the procedure, the circumciser may not perform it.

For a child under the age of two months, either a registered medical practitioner or a person holding a special license may carry out a circumcision. For those over the age of two, only a medical practitioner may perform it. Regardless of the age of the child, a registered nurse or a medical practitioner must use anesthesia during surgery, which itself must take place in a hygienic environment. Those who violate these regulations—which are overseen by the National Board of Health and Welfare—could face fines and imprisonment for up to six months.

Has the law been effective in making circumcisions safer in Sweden? Government reviews of the law in 2005 and 2007 found

“more than two-thirds of the 3,000 Muslim boys that were estimated to be circumcised yearly were circumcised outside the boundaries of the Swedish law” by visiting doctors who were not licensed to perform circumcision within Sweden, said Professor Johanna Schiratzki of Stockholm University.

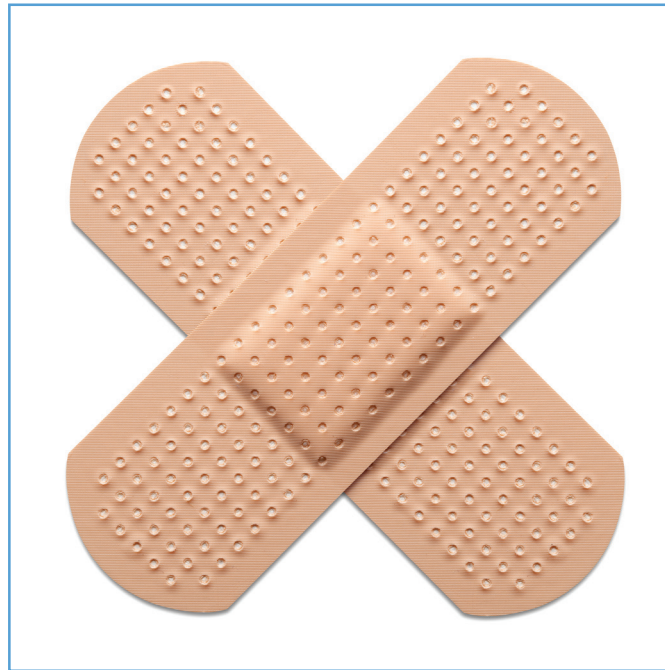
In December 2010, Stockholm-based English daily *The Local* reported the sentencing of a 50-year-old Egyptian citizen to two months in prison for illegally circumcising nine boys. The man “previously had a license to perform circumcisions, but the health board [had] revoked it because of doubts about his abilities.” His sentencing, said the article, “marked the first time that Sweden’s law on circumcising

boys had been tested in court since coming into force.”

In January 2014, the ethics council of the Sweden Medical Society (a private professional group) unanimously passed a resolution recommending that when doctors in Sweden—85 percent of whom are members of the society—carry out circumcisions, they must do so only on boys who are at least 12 years old and only if these boys give consent, reported the *Huffington Post*. (The resolution is not considered law.) In response, a government official defended the current laws, saying that the circumcision procedure itself is “not very intensive,” and that “parents have the right to raise their children according to their faith and tradition.”

Israel: According to a 2007 report (*Male Circumcision: Global Trends and Determinants of Prevalence, Safety, and Acceptability*) by the WHO, “male circumcision continues to be almost universally practiced among Jewish people,” adding that “almost all newborn Jewish males in Israel . . . are circumcised.” The procedure, says the WHO, is usually carried out—eight days after a male’s birth—by religious traditional circumcisers (called *mohels* in Hebrew) who have been trained and supervised by government ministries.

The Ministry of Health oversees regulations that Israel passed specifically to oversee circumcision. Though an English translation of these regulations is not readily available on the Internet or in published materials, the 2007 WHO report says that the law



views the circumcisions of males under the age of six months as a “religious ritual act,” which can be carried out by mohels or medical professionals. On the other hand, circumcisions for those over the age of six “should only be carried out by qualified and licensed surgeons and in an approved surgical theatre.”

Although circumcision is not legally mandatory, anti-circumcision groups such as the Israeli Association Against Genital Mutilation said that society generally views the procedure as “an obligation that cannot be omitted or questioned,” and that “parents who protect their babies from circumcision are subjected to strong condemnation and often also to ostracism from their families.” They further claim that mohels who carry out the circumcision “do not seek the consent of the child’s parents or guardians” and also that current laws do not require them “to provide documentation that informed consent for the operation was legally obtained.”

In November 2013, a rabbinical court in Israel began to fine a woman about U.S. \$140 a day after she had refused to allow her son to get circumcised, reported the *Guardian*. It noted that this was the first time that such a court had done so. According to various media reports, the rabbinical court was overseeing the divorce proceedings of the woman (whose identity has not been revealed) and the infant’s father, and it later ordered her to follow the wishes of the father to circumcise the son. The rabbis on the court have speculated that the woman was refusing the circumcision as a way to gain leverage over her husband during the divorce proceedings, reported *Haaretz*, an English news daily. But she publicly stated her belief that circumcision was a form of child abuse, adding “I don’t believe in religious coercion.” In December 2013, the Supreme Court of Israel issued a temporary order to stop the rabbinical court’s decree.

Circumcision and international law

Previous sections have shown that the manner and extent to which individual nations currently address circumcision vary widely. Does international law address whether and how nations should address that procedure? Presently, no international treaty or declaration explicitly set standards on how nations should oversee and regulate circumcision. But circumcision opponents believe that certain provisions in existing treaties do apply to the practice of circumcision, and that they indirectly prohibit that procedure on those who cannot give consent. Supporters say otherwise. Some of these treaties and their provisions are described below.

Universal Declaration of Human Rights: Adopted by the U.N. General Assembly in 1948, this political statement calls on nations to recognize and respect a wide variety of human rights for “all peoples,” including the right to life and liberty, and freedom from slavery, discrimination, arbitrary arrest, and detention, among many others.

The Universal Declaration does not explicitly address circumcision. (Its text does not even mention that term.) But opponents of that procedure, including a group called Doctors Opposing Circumcision, say that the declaration—in its opinion—seems to call on nations to prohibit circumcision. Article 5, for instance, states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Opponents believe that carrying out circumcision

on, say, an infant unable to give consent to that procedure would be cruel and inhuman. But supporters of circumcision say that carrying out that procedure in sanitary conditions is not cruel and carries little health risks.

Opponents also say that carrying out a circumcision for religious beliefs would violate Article 18, which says that “everyone has the right to freedom of thought, conscience and religion.” Circumcising a person for religious reasons (without his consent) would violate his right to choose his own religion, they say. But circumcision supporters point out that Article 18 also says that a person’s right to freedom of religion includes the freedom to “manifest his religion or belief in teaching, practice, worship and observance.” Carrying out circumcision on their infants would be one (and vital) way to manifest their religious beliefs, they argue.

Despite these arguments and others, legal analysts point out that, as a general matter, declarations issued by the United Nations (such as the Universal Declaration) are mostly aspirational statements on how nations should address certain issues which are not specifically covered by a formal international treaty or agreement, and that they don’t have the force of law. In fact, many legal experts do not view the Universal Declaration as an international treaty. But in the decades following the approval of the Universal Declaration, the U.N. adopted legally-binding treaties that require nations to recognize and protect specific rights.

International Covenant on Civil and Political Rights: This 1966 treaty (known by its acronym ICCPR) specifically calls on its more than 140 signatory nations to pass domestic measures—both legal and nonlegal—that recognize and protect fundamental civil and political rights, including the right to life, freedom of association, and the right to a fair trial, among many others. (Unlike the Universal Declaration, the ICCPR is an enforceable international treaty.)

As in the case of the Universal Declaration, the ICCPR neither addresses circumcision nor mentions that term in its text. But circumcision opponents say that the ICCPR implicitly calls on nations to prohibit that procedure on those who are unable to give consent. Article 7, for example, says that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

Doctors Opposing Circumcision says that—under its interpretation—a nation that allows its population to carry out circumcision (on infants and young children) could be violating Article 7 because “one must bear in mind that non-therapeutic circumcision is a radical, irreversible operation that excises healthy, functional tissue from the body of the child without medical justification and without the consent of the child, and which permanently destroys various physiological functions.” Another anti-circumcision group, Intact America, says that “removing the foreskin is no more justified than removing a finger or any other healthy body part.”

Circumcision opponents also say that the ICCPR implicitly calls on nations to prohibit people from carrying out that procedure for religious reasons on those unable to give consent. As in the case of the Universal Declaration, opponents point out that the ICCPR says, under Article 18(1), that “everyone shall have the right to freedom of thought, conscience and religion.” By circumcising infants and young children for religious reasons without their consent, opponents say that parents are taking

away their children's rights to choose a religion on their own. In fact, Article 18(2) states that "no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

In response, circumcision supporters point out that Article 18(1) of the ICCPR also says that a person's right to freedom of religion includes the freedom to "manifest his religion or belief in worship, observance, practice and teaching." Circumcising their children is one way to manifest, practice, and teach their religious beliefs, they

While no international treaty explicitly sets standards on how nations should oversee and regulate circumcision, opponents believe that existing treaties indirectly prohibit that procedure on those who cannot give consent. But supporters say otherwise.

say. But anti-circumcision groups, in turn, point to Article 18(3), which says that "freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect . . . health." Because circumcision is a medically unnecessary procedure which, in their opinion, carries great health risks, they say that Article 18(3) implicitly prohibits that procedure. Circumcision supporters respond that the procedure is carried out usually without any complications. So Article 18(3) would not apply to circumcision.

Along with these various arguments, supporters of circumcisions carried out for religious reasons further point out that under Article 18(4) of the ICCPR, "the States Parties to the present Covenant undertake to have respect for the liberty of parents . . . to ensure the religious and moral education of their children in conformity with their own convictions." They say that circumcision is an integral part of the religious education of their children, and that Article 18(4) seems to support this particular view.

Declaration of the Rights of the Child: In 1959, the U.N. General Assembly adopted this political statement, which calls on all nations to recognize and protect certain rights for children, including the right to a name and nationality, free and compulsory education, and benefits to social security.

While the 1959 declaration (and its 10 principles) do not explicitly mention circumcision anywhere in its text, Principle 9 does state that "the child shall be protected against all forms of neglect, cruelty and exploitation." This principle, say circumcision opponents, implicitly prohibits that procedure, which they say is cruel. Supporters, on the other hand, believe otherwise.

As in the case of the 1948 Universal Declaration, the rights and protections set out by the 1959 declaration are mostly aspirational statements on how nations should address a certain issue that is not specifically covered by a formal international treaty or agreement. But several decades later, the world community adopted an actual treaty that calls on nations to give more specific rights to children.

Convention on the Rights of the Child: Using the 1959 declaration as a foundation, the U.N. General Assembly in 1989 adopted this treaty—known by its acronym CRC—which calls on its 140 signatory nations to pass domestic measures that will recognize and protect specific rights of children (defined as "every human being below the age of eighteen years") such as the right to life, health, education, privacy, and development.

As in the case of the previously mentioned declarations and treaty, the CRC does not explicitly address or mention circumcision. But opponents claim that several of its provisions implicitly prohibit that procedure on those who are unable to give consent.

For example, Article 19(1) says that "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment . . . while in

the care of parent(s), legal guardian(s) or any other person who has the care of the child." Circumcision opponents such as Australia-based Circumcision Information, says that, in its view, "violence or injury occurring in a doctor's surgery is not excluded" from the requirements of Article 19(1).

In addition, circumcision opponents believe that Article 37(a)—which says that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment"—calls on signatory nations to prohibit circumcision on those who are not old enough to give consent. In the opinion of Circumcision Information, "what could be more cruel or humiliating for a nine- or a six-year-old boy than to have the most interesting part of his penis cut off?"

Furthermore, Article 24(3) says that "States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children." While this article does not explicitly say that circumcision is a traditional practice that can hurt a child's health, Circumcision Information believes that "the reference is unmistakably to practices like circumcision." In response, circumcision supporters argue that the procedure is neither violent nor cruel, and that carrying it out is usually not prejudicial to children's health. Therefore, these articles don't apply to the practice of circumcision.

To those who say that they are circumcising their infants and young children (without their consent) as a way to express their religious beliefs, circumcision opponents point out that Article 14(1) requires nations to "respect the right of the child to freedom of thought, conscience and religion." Says Circumcision International: "This means that [a child is] entitled to choose his or her own religion, and that parents do not have the right to impose their own religion, or the rites and customs of that religion [such as circumcision], on their children."

But circumcision supporters respond that under Article 14(2), "States Parties shall respect the rights and duties of the parents . . . to provide direction to the child in the exercise of his or her [religious] right in a manner consistent with the evolving capacities of the child." Under one interpretation, because infants and young children do not yet have the capacity to understand (let alone appreciate) the religious importance of circumcision, Article 14(2)—in their view—gives parents the right to provide religious direction by circumcising children without their consent.

The European Convention for the Protection of Human Rights and Fundamental Freedoms: Also known as the European Convention on Human Rights, this regional treaty, adopted in 1950, calls on its 47 signatory nations—all located in Europe—to recognize and protect fundamental human rights and freedoms (such as the right to liberty, a fair trial, and life, and also freedom from torture and slavery) within their respective jurisdictions. This agreement also created the European Court of Human Rights to resolve cases involving alleged violations of these rights and freedoms.

As in the case of the other previously discussed treaties, the European Convention does not explicitly address circumcision. But opponents of that procedure argue that it contains provisions that (in their view) prohibit circumcision implicitly. For example, Article 3 says that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

For those who argue that their religious beliefs compel them to circumcise their children without their consent, opponents acknowledge that the European Convention seems to give them that right. According to Article 9(1), “everyone has the right . . . to manifest his religion or belief.” But they note that Article 9(2)—which says that the “freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, [and] health”—seems to limit this right. Given what they believe to be the high health risks of circumcision, opponents believe that Article 9(2) implicitly calls on nations to limit that procedure as a way to protect children’s health. But supporters could argue that because the risks of performing circumcisions in Europe are low, Article 9(2) would not apply to that practice.

In contrast to other treaties, the European Convention does not have a provision requiring signatories of that agreement to respect the rights and duties of parents in guiding the religious direction of their children.

Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Known as the Convention on Human Rights and Biomedicine, this 1997 regional treaty calls on its 35 signatory nations—all in Europe—to set minimum legal standards (by passing laws in their respective jurisdictions) to safeguard and protect human rights specifically in the area of biomedicine. They must, for example, prohibit discrimination based on genetic information, establish minimum safety standards when carrying out research on people, and regulate organ transplant and removal, among other obligations.

The convention does not specifically address circumcision. But analysts say that certain provisions seem to apply to that procedure in the case of infants and children, and that both supporters and opponents can cite them to argue their respective positions. Article 6(2), for instance, says that when a minor “does not have the capacity to consent to an intervention, the intervention may only be carried out with the authorisation of his or her representative.” (The convention does not define the term “intervention.”) Supporters can argue that this provision allows a parent to give consent on behalf of, say, an infant for a nonessential circumcision.

But the very same article also states that “the opinion of the minor shall be taken into consideration as an increasingly determining factor in proportion to his or her age and degree of maturity.” Opponents can use this provision to argue that older children and teenagers who are able to make an informed decision on whether to undergo a circumcision should be given a say in that matter.

2013 Council of Europe Resolution: In October 2013, the Council of Europe—a human rights organization whose 47 member states (all located in Europe) monitor human rights practices across the European continent and make recommendations on how to improve those rights—passed Resolution 1952 (Children’s right to physical integrity), which calls on its member states to examine certain practices that it believes violates the “physical integrity of children.” They include female genital mutilation, surgery for children whose gender is not readily identifiable, coercing children to piercing and tattoos, and “circumcision of young boys for religious reasons.”

Technically, a body within the Council of Europe called the Parliamentary Assembly—a forum whose members come from the parliaments of the Council’s member governments—passed the resolution by a vote of 78-13 with 15 abstentions, reported the *Times of Israel*.


While Resolution 1952 does not call on member states to prohibit male circumcision, it does call on them to “clearly define the medical, sanitary, and other conditions to be ensured” when people carry out that particular procedure. It also said that member states must “initiate a public debate, including intercultural and interreligious dialogue, aimed at reaching a large consensus on the rights of children to protection against violations of their physical integrity.”

The provisions of the resolution are not legally binding, but their adoption reflects what the Council says is political opinion across Europe on the substance of the provisions themselves.

Fearing that “individual countries would feel empowered to enact legislation outlawing circumcision,” Israel and Turkey—where most males have undergone ritual circumcision—called on the Council of Europe to withdraw the resolution or amend it by removing all references to male circumcision. One critic, Rabbi Marc Schneier, president of the Foundation for Ethnic Understanding, told the *Jerusalem Post* that circumcision is “not an issue which affects only Jews or only Muslims, but truly hurts the traditions of a large percentage of the peoples of faith both here in Europe and around the world.”

Others believe that the resolution violates freedom of religion, noting that the Parliamentary Assembly had voted to remove any references to the “religious rights of parents and families” before taking a final vote on the resolution.

The Secretary-General of the Council, Thorbjørn Jagland, also criticized the resolution. He told the *Jerusalem Post* that “starting to limit the rights of minorities is a very dangerous avenue to pursue,” and added that “whenever we have limited their rights, it has always led to catastrophe.”

In April 2014, the governing body of the Council issued a letter to the Parliamentary Assembly, urging its members not to take any further actions concerning male circumcision, reported the *Jewish Telegraphic Agency*. The letter also noted that several existing international treaties protect the rights of children. 

Is there a right to healthy and nutritious food?



Experts say that hundreds of millions of people around the world suffer from hunger and malnutrition. They lack not only access to foods that provide a wide variety of vitamins and minerals for healthy development, but also sufficient access to any food itself. To help relieve (and, hopefully, eliminate) hunger, nations began to create a broad legal framework on a right to adequate food for all people, among many other measures.

As nations continue to address hunger and malnutrition, demographic experts note that even more people are becoming overweight or obese. They believe that, among other factors, the increasing consumption of unhealthy foods—such as those with high contents of fat, sodium, and sugar—have played a significant role in this development.

Many governments are undertaking different approaches to counter what the United Nations has called the “double threat” of both malnourishment and obesity, including public health campaigns that encourage people to eat healthy and nutritious foods. They have also been passing various laws to curb the overconsumption of unhealthy foods. In support of these laws, observers generally say that the right to adequate food calls on

nations to help people access not only food itself, but specifically foods that are healthy and nutritious.

Which treaties, declarations, and guidelines recognize and protect the right to adequate food? Does this right also call on nations and societies to ensure people’s access to healthy and nutritious foods in particular? And what kinds of legal measures are governments carrying out to regulate more actively the production of unhealthy foods and discourage people from eating them?

A hungry and overweight world

Around 870 million people suffer from hunger and chronic malnutrition, according to a 2012 report from the Food and Agriculture Organization (FAO), a United Nations agency whose goals are to reduce hunger and poverty by making agriculture more productive and sustainable. The vast majority of them—around 98 percent—live in Southeast Asia and sub-Saharan Africa, it said.

The costs of hunger and malnutrition are high. Said the U.N. World Food Programme: “Hunger kills more people every year than AIDS, malaria, and tuberculosis combined.” Also, by not eating a

sufficient amount of nutritious foods, hundreds of millions of people currently suffer from various micronutrient deficiencies, according to the United Nations. For example, Vitamin A deficiency afflicts over 100 million children around the world, and can limit physical growth and lead to blindness. Iron deficiency, which can impair cognitive development, afflicts between four and five *billion* people. And around 30 percent of households in the developing world suffer from iodine deficiencies, which can lead to learning disabilities.

While close to one billion people suffer from hunger and malnutrition, demographic experts say that even more people are overweight or obese. Using a numerical indicator called the body mass index (BMI), the World Health Organization (WHO), the U.N. agency that coordinates global health matters, says an individual is overweight if his BMI is over 25 and is obese if it exceeds 30. As an example, a man is overweight if he is 5'9" (the average height for men in the United States) and weighs between 169 pounds and 202 pounds. Any weight above 203 pounds is considered obese. (Experts say that overweight people include those who are obese.)

According to the WHO, around 1.5 *billion* adults (over the age of 20) are overweight. Of these individuals, around 500 million are obese. By 2015, it calculates that 2.3 billion people will be overweight, and that 700 million of them will be obese. Given

from a widespread lack of food, China has seen its obesity rates triple since 1992, reported *Forbes* magazine.

- **India:** The overweight and obesity rates are increasing in the growing middle class even though 30 percent of infants in India are underweight, according to researchers Ambady Ramachandran and Chamukuttan Snehathala in a 2010 article in the *Journal of Obesity*.
- **The Philippines:** Approximately 20 percent of the adult population is overweight, while 13 percent remains underweight, said the *Journal of Obesity*.
- **Uganda:** Government statistics in 2007 revealed that while a third of women in the city of Kampala were overweight or obese, 50 percent of children in southwestern Uganda were malnourished, reported the *Boston Globe* in 2009.

Why are overweight and obesity rates increasing around the world, especially in developing nations? Analysts give a wide range of reasons. The Harvard School of Public Health said, for instance, that “as poor countries move up the income scale, and people shift from subsisting on traditional diets to overeating on Western diets, obesity becomes a disease of the poor.” (These diets include inexpensive processed foods that are usually high in saturated fats, sugar, and oil, said a 2011 report prepared by an independent U.N. expert.) Some add that the expansion of convenience stores,

Around 870 million people suffer from hunger and chronic malnutrition, according to the Food and Agriculture Organization. But demographic experts say that even more people are becoming overweight or obese.

these statistics, London-based think tank International Obesity Taskforce described the rising obesity rates as a “global epidemic.” To underscore this point, the American Medical Association in June 2013 began to classify obesity as a disease.

Being overweight or obese can increase the risk of developing noncommunicable diseases (i.e., those diseases that can't be transmitted from one person to another) such as breast and colon cancer, cardiovascular diseases, diabetes, and high blood pressure, among others. Obesity is currently the fifth leading risk of death in the world, says the WHO.

In industrialized nations, increasing obesity rates (and the health problems associated with them) has been a decades-long problem. In the United States, over 35 percent of adults are obese, giving that nation the highest obesity rate in the world, said the Centers for Disease Control and Prevention. Mexico ranked second with 30 percent, and New Zealand third with 27 percent, said Reuters. Increasing overweight rates are also a problem, according to WHO statistics. In the nation of Nauru, nearly 95 percent of the population is overweight. In the United States, close to 75 percent of all people are overweight.

While rising obesity and overweight rates have been long associated with affluent nations, they have also been increasing in developing countries, even in those with high rates of poverty and where significant segments of the population lack access to food. (The WHO says that “65 percent of the world's population lives in countries where overweight and obesity kills more people than underweight.”) They include the following examples.

- **China:** Once home to an undernourished population suffering

fast food restaurants, large chain restaurants, and street cart vendors in developing countries with growing middle classes helps to spread unhealthy Western diets.

Others say that as communities become more urbanized, people adopt a more sedentary lifestyle. They begin to rely on vehicular transportation, take white-collar jobs, and enjoy entertainment such as playing video games—all of which usually don't involve strenuous physical activity that can help burn calories.

Many believe that international agricultural businesses (dubbed “agribusinesses”) have developed food systems that “often work against, rather than facilitate, making healthier choices.” They favor growing those crops that can be converted into inexpensive oils and high-fructose syrup, claims an independent U.N. report, and then adds them to cheap, mass-produced foods, which are sent to poorer nations. At the same time, agribusinesses in poorer nations export healthier and more expensive foods—such as tropical fruits and vegetables—to wealthier nations. Ultimately, healthier foods have become more expensive than unhealthy ones, argue critics.

Still others say that poorer populations in developing nations (and even industrialized ones) cannot make informed decisions about their eating habits (and those for their children, elderly family members, and the disabled who rely on others to feed them) because they lack the educational resources concerning balanced nutrition. “Poor families may be less educated, on average, about the risks of unhealthy diets, and they lack the resources to improve their diets,” said the WHO. This lack of awareness of healthier food options also makes people more susceptible to marketing campaigns that glamorize sugary products and junk food, say observers.

Using international law to address the right to adequate food

Nearly half a century ago, various nations began to undertake their own domestic initiatives to address the prevalence of hunger and malnutrition. Some, for example, began to reform land ownership laws. Others increased the use of technology in agriculture. Along with these measures, they fashioned, over a period of many decades, a broad legal framework (consisting of a treaty, declarations, and guidelines) that recognizes and protects a right to adequate food for all people. Specific examples include the following instruments.

Universal Declaration of Human Rights (1948): According to legal analysts, the Universal Declaration of Human Rights (Declaration) was the first major international instrument to recognize the right to adequate food. Adopted by the U.N. General Assembly, the Declaration calls on nations to recognize and respect a wide range of human rights and freedoms for “all peoples,” such as the right to life and liberty, equal protection of the laws, and freedom from arbitrary arrest, discrimination, and slavery. The United States was one of many nations that voted to adopt the Declaration.

The Declaration does not proclaim an explicit right to adequate food per se. Instead, the right to adequate food is a contributing factor in a broader right. Specifically, Article 25 states, in part, that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care . . .” Observers say that a person will not be able to enjoy his right to a standard of living adequate for his health and well-being if his government did not also recognize a right to food (along with, for instance, the right to clothing and housing).

While Article 25 recognizes the right to adequate food, it doesn’t define or provide any further explanation of this right. Also, Article 25 does not give any specific guidance on how nations must observe the right to food or how quickly they must implement that right so that people can enjoy it. And, as a general matter, declarations issued by the United Nations are mostly aspirational statements on how nations should address a certain issue that is not specifically covered by a formal international treaty or agreement. (Legal experts do not view the Declaration as an international treaty.) They also don’t have the force of law, and nations are not legally bound to follow their provisions.

International Covenant on Economic, Social, and Cultural Rights (1966): In the decades following the adoption of the Universal Declaration, U.N. member states began to pass legally-binding treaties (with detailed provisions) requiring nations to recognize and protect specific rights mentioned in the Universal Declaration, including the right to adequate food.

The U.N. General Assembly adopted the International Covenant on Economic, Social, and Cultural Rights (ICESCR), an actual treaty that calls on all state parties to pass domestic measures recognizing and protecting various economic, social, and cultural rights such as the right to work, the right to safe and healthy working conditions, and the right to education, among others. The United States had signed the ICESCR in 1977, but it did not yet ratify that agreement. (While the United States is not legally bound to follow the provisions of the ICESCR, many note that it has long protected many rights in that agreement.)

As in the case of the Universal Declaration, the right to adequate food is a contributing factor within a broader right

explicitly mentioned in the ICESCR. Specifically, Article 11(1) of the ICESCR says: “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including *adequate food* . . .” So while Article 11(1) does not mention a stand-alone right to adequate food, experts say that people will not be able to enjoy their right to an adequate standard of living unless governments recognize other subordinate rights such as the right to adequate food. (“Human rights are interdependent, indivisible and interrelated,” said the United Nations Office of the High Commissioner for Human Rights.)

Unlike Article 25 of the Universal Declaration, ICESCR calls on nations—in Article 11(1)—to “take appropriate steps to ensure the realization” of the various rights in the covenant. So what specific steps must nations take, and how quickly should they do so to achieve, say, the right to adequate food? Under a separate provision (Article 2 of the ICESCR), nations must undertake steps “with a view to achieving progressively [i.e., gradually over a period of time] the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” (It doesn’t give more guidance beyond this statement.)

While the ICESCR in Article 2 explicitly requires nations to do more in recognizing and protecting the right to adequate food, observers point out that the covenant does not (as in the case of the Universal Declaration) give a more detailed explanation of the right to adequate food. What exactly is adequate food, for instance? Do governments need to consider certain factors (such as a person’s age, gender, and religious beliefs) when it tries to determine whether food is adequate? Does the government have to provide a person with a specific number of calories each day? Does the right to adequate food require a government to give free food? Analysts point out that the ICESCR does not answer these and many other questions.

Along with these shortcomings, Article 2 of the ICESCR does not give more detailed guidance to nations on the extent to which their measures (legislative or otherwise) must protect this right. Do they simply have to pass laws that require farmers to produce greater quantities of food, for example? Are there other measures that a nation can implement (or, conversely, are their existing laws that a nation should repeal) to recognize and protect the right to adequate food? Again, Article 2 of the ICESCR does not answer these and other important questions.

World Food Summit (1996): In the decades since the adoption of various legal and nonlegal measures to address hunger and malnutrition, the FAO noted that “food supplies [had] increased substantially.” In fact, “the world produces enough food to feed its entire population,” it said.

Despite such progress, malnutrition and food scarcity continued to exist in many parts of the world, especially in developing nations. Why? The FAO said that a variety of other factors—such as conflict, natural and man-made disasters, and unstable food prices—prevented “basic food needs from being fulfilled.” In addition, it noted that “poverty, social exclusion, and discrimination often undermine people’s access to food.”

Many also cite inadequate infrastructure to distribute food widely. Without adequate bridges, pathways, and vehicles (which can help people access arable land and distribute food efficiently), nations will struggle to alleviate hunger, according to the Global

Poverty Project, an advocacy organization. Others argue that existing government policies misallocate resources (such as farm credits, fertilizer, and public lands) by favoring powerful interests over the poor.

To address these various concerns, the FAO hosted the World Food Summit in November 1996. High-level government officials from close to 200 nations adopted a single document called the Rome Declaration on World Food Security and World Food Summit Plan of Action (Rome Declaration). The FAO described the Rome Declaration as the “first coherent plan to make the right to food a reality.”

Delegates pledged to achieve what they called “food security” for all people, which will exist when “all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life,” said the Rome Declaration.

To achieve food security, the Rome Declaration says that nations, under its Plan of Action, have a “responsibility” to carry out what it calls various “commitments” (in other words, voluntary recommendations). For example Commitment One calls on nations to create a “political, social, and economic environment designed to create the best conditions for the eradication of poverty . . .” Commitment Five calls on nations “to prevent and be prepared for natural disasters and man-made emergencies and to meet transitory and emergency food requirements.” To implement these commitments, nations should implement “national laws and [formulate] strategies, policies, programmes, and development priorities.”

Even though the Rome Declaration calls on nations to implement these various commitments, the FAO points out that the “concept of food security itself is not a legal concept per se.” As a result, the Rome Document neither imposed any legally-binding obligations on its signatory nations nor did it create new legally-binding rights for people. Also, the Rome Declaration primarily addresses “food security” and not the “right to adequate food.” (It doesn’t, for instance, give a more detailed explanation of the right to food or provide further guidance on the extent to which a nation’s measures must protect this right.)

To address this shortcoming, Commitment Seven of the Rome Declaration calls on the United Nations to “better define the rights related to food in Article 11 of the [International Covenant on Economic, Social, and Cultural Rights] and to propose ways to implement and realize these rights . . .”

General Comment 12 (1999): In response to Commitment Seven of the 1996 Rome Declaration, the U.N. Committee on Economic, Social, and Cultural Rights in May 1999 adopted General Comment 12 (U.N. doc. E/C.12/1999/5), which gives the first official interpretation (and also a detailed explanation) of the right to adequate food under Article 11 of the ICESCR.

Observers point out that the ICESCR (along with most other treaties) has broad and vague provisions whose terms are open to interpretation. So how do nations determine the meaning of a particular word, phrase, or section of the ICESCR? They note that the U.N. Committee on Economic, Social, and Cultural Rights—the body of independent experts at the United Nations overseeing the implementation of the ICESCR—periodically issues a “general comment,” which is an official interpretation of a particular right. While not strictly considered international law, which is legally

binding on nations, a general comment, analysts say, constitutes “the interpretation of the U.N. body institutionally responsible for monitoring the application of the treaty,” and enjoys “a particular authority.” Regarding the right to adequate food, General Comment 12 clarified many important issues.

When will a nation have satisfied the right to adequate food? General Comment 12 says that a nation will have satisfied this right when it ensures that food is available, accessible, and adequate to “every man, woman and child, alone or in community with others.” This right, according to the committee, shouldn’t be interpreted “in a narrow or restrictive sense which equates it [only] with a minimum package of calories, proteins, and other specific nutrients.”

Food is *available* when people can feed themselves directly from natural resources—such as growing food on land itself or by raising animals—or when they can get it through “well functioning distribution, processing, and market systems,” says General Comment 12.

Food is *accessible* when people are earning enough money to buy food, when the financial cost of food itself is affordable so that “the attainment and satisfaction of other basic needs are not threatened or compromised,” and when food is physically accessible to everyone, including “physically vulnerable people” such as infants, children, and the elderly.

Food is *adequate* when it is safe to eat and “free from adverse substances.” Also, it should be culturally acceptable to different people. That is to say, the available food doesn’t violate any “religious or cultural taboo.”

What obligations does a nation have under the right to adequate food? General Comment 12 says that nations have several obligations under the right to adequate food—or any other human right for that matter. (“The State cannot . . . be passive in its acknowledgement of [human] rights,” according to the FAO.) For example, it has an obligation to *respect* people’s existing access to food and must not take “any measures that result in preventing such access.”

In addition, a nation has an obligation to *protect* people’s access to adequate food by taking measures to stop “enterprises or individuals” from depriving other people of such access.

Furthermore, a nation has an obligation to *fulfill* the right to adequate food by taking proactive measures that will allow people to access and use resources in maintaining their livelihoods, which will, in turn, allow them access to food. Does this mean that nations have to give free food to people? The text of General Comment 12 does not implicitly or explicitly say that governments must distribute free food to able-bodied individuals. In fact, many human rights experts say that “the right to food is not a right to be fed.” Instead, “individuals are expected to meet their own needs, through their own efforts and using their own resources,” says the U.N. Office of the High Commissioner for Human Rights. Even General Comment 12 says that those who are able to do so must feed themselves either by gathering food directly from natural resources or by earning a living to buy food. Says the FAO: “States must respect and protect the rights of individuals to feed *themselves*.”

At the same time, governments do have an important role to play in helping people enjoy the right to food. General Comment 12 says that if people are unable to enjoy this right for reasons beyond their

control (such as the occurrence of a natural or other disaster), then a nation must provide that right directly. For instance, the FAO says that “direct food assistance is mainly called for in emergencies, such as natural disasters or war.”

While General Comment 12 lays out these various obligations to respect, protect, and fulfill the right to food, it does not provide specific and detailed guidance on how a nation must carry them out.

How quickly must a nation recognize, implement, and protect the right to adequate food? According to analysts, the U.N. Committee on Economic, Social, and Cultural Rights recognizes that “States may have resources constraints, and that it may take time to fully implement” their obligations under the right to adequate food. Still, General Comment 12 says that they must “take steps to achieve progressively the full realization” of this right. (It doesn’t say what steps must be carried out specifically, but describes such steps as “more of a long-term character.”) Does all of this mean that nations may ignore their obligations under the right to food until they have enough resources to carry them out? No. In fact, General Comment 12 says that nations must still “move as expeditiously as possible” in trying to achieve the right to adequate food.

What would constitute a violation of the right to adequate food? General Comment 12 says that preventing people from accessing food by using discriminatory factors, including their “race, sex, language, age, religion, political or other opinion, national or social origin,” among many others, will constitute a violation of the right to adequate food.

Other actions that may violate this right include repealing or suspending laws necessary to enjoy the right to food; adopting laws or policies that conflict with the legal obligations under this right; and failing to regulate the activities of individuals or groups who may be violating other people’s right to food.

How exactly should a nation implement the right to adequate food within their respective jurisdictions? According to General Comment 12, nations should implement the right to food by adopting a “framework law,” which would legally bind a nation to carry out its provisions. As its name implies, such a law sets a broad “framework” consisting of “overall principles, objectives and guidelines” for implementing the right to food, say legal observers. (According to the Office of the High Commissioner for Human Rights, a framework law is useful for “fleshing out any constitutional provisions, clarifying rights and obligations, as well as elaborating on institutional roles.” Also, a framework law is not necessarily a single law. A nation may, for example, pass several laws in many different areas of governance to implement a right to adequate food.) In turn, specific government agencies and officials would establish specific regulations to carry out the details of implementing that right.

While it recommends that nations adopt a framework law, General Comment 12 does not give more specific details. Instead, it provides very broad guidelines that nations should follow when they implement the right to adequate food. (“The most appropriate ways and means of implementing the right to adequate food will inevitably vary significantly from one State party to another,” says General Comment 12, adding that “every State will have a margin of discretion in choosing its own approaches.”)

How have nations been implementing the right to adequate food? Nations around the world have been recognizing (either

explicitly or implicitly) the right to adequate food in their constitutions and in separate legislation. In many cases, they had recognized and implemented that right even before the adoption of General Comment 12.

Explicit right to adequate food: Currently, 17 nations explicitly recognize the right to food as a stand-alone right (for its entire population or for certain groups only) in their respective constitutions, according to the FAO in its 2011 publication *Constitutional and Legal Protection of the Right to Food around the World*. According to one U.N. expert: “A constitutional right to food is the strongest possible basis the right to food can have, since all laws must conform to the constitutional provisions.” Once a nation includes the right to food in its constitution, the FAO points out that a judicial system will be able to review the legality of laws and policies that potentially conflict with that right.

One example is Brazil, which in February 2010 amended its Constitution of the Federative Republic of Brazil so that it would explicitly recognize the right to food for everyone under its jurisdiction. Specifically, Article 6 says: “Education, health, food . . . are social rights, as set forth by this Constitution.” (The previous version did not include food as a right.)

In 1999, Mexico amended Article 4 of its constitution so that only children (and no one else) would have “the right to satisfy their needs for food.” In 2011, the government again amended the constitution to expand the right to food to everyone else under its jurisdiction.

Subordinate right to adequate food: The 2011 FAO publication notes that, in 31 nations, the right to food is subordinate within a broader human right mentioned in a constitution. (That is to



say, it is not an explicit stand-alone right.) These broader human rights include “the right to adequate or decent standard of living, to well-being, to a means necessary to live a dignified life, [and] to development,” among others, says the 2011 FAO report.

For example, Malawi implemented in May 1995 its Constitution of the Republic of Malawi, which includes the right to food. Article 13(b) states that the government must “actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation . . . to achieve adequate nutrition for all in order to promote good health and self-sufficiency.”

According to Article 48 of the 2004 Constitution of Ukraine, “everyone shall have the right to a standard of living sufficient for themselves and their families including adequate nutrition, clothing, and housing.”

Directive principles on the right to food: While many nations explicitly or implicitly include the right to food in their constitutions, others (13, according to the FAO) have constitutional provisions known as “directive principles,” which are “various aims and aspirations to be fulfilled by the State in [the] distant future,” including, for example, giving people the means to access and acquire food. Do directive principles regarding food constitute an actual right to food? According to the 2011 FAO publication, “these constitutional provisions guide government action . . . but are not considered to provide for individual or justiciable rights.” Analyst Maulin Joshi adds that a directive policy serves as “a sign post” that can “guide the State in its entire works.”

For instance, Article 15(a) of the Constitution of the People’s Republic of Bangladesh says that the government has a “fundamental responsibility” to secure for its citizens “the provision of the basic necessities of life, including food, clothing, shelter, education . . .”

Framework laws on implementing the right to food: When a nation incorporates a right to adequate food into its constitution, that right won’t implement itself automatically. So General Comment 12 (as mentioned in a previous section) encourages nations to implement what are called framework laws to implement a right to adequate food. (“Such laws are often known as food security law rather than right to food laws, but the effect is similar,” said the FAO.)

According to the FAO, five nations (all in Central and South America) have passed and implemented framework laws concerning the right to food. Ten other nations in Latin America (along with India and Malawi) are in the process of debating or passing framework laws.

Nations without a constitutional provision to the right to adequate food: Even with more and more countries incorporating a right to food into their constitutions, over 150 nations—ranging from industrialized countries such as the United States to poor nations, including Madagascar—do not mention that right (explicitly or implicitly) in their constitutions, according to the FAO Legal Office. Given this statistic, “there is still a worldwide lack of experience in designing and using national legislation to implement [right to food] provisions,” said the FAO Legal Office. But, to be fair, many of these nations do have social safety nets (however imperfect) to feed hungry people and to help those who don’t have access to food. Still, critics believe that having a right to adequate food in a constitution will pressure governments to do more in protecting that right even during economic downturns and

in cases of disasters.

FAO Right to Food Guidelines (2004): While General Comment 12 better defines the right to adequate food and better informs nations of their obligations, it provides few suggestions on how to implement and attain this right. Many critics also note that nations have not done enough to attain the right to adequate food (within their respective jurisdictions) since the passage of General Comment 12 in 1999.

In response, the FAO adopted a document in November 2004 called *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security* (Right to Food Guidelines), which it says provides voluntary “practical guidance” to nations on how to progressively implement the right to adequate food. According to the FAO, these guidelines “represent the first attempt by governments . . . to recommend actions to be undertaken” to attain the right to adequate food. Other observers add that these guidelines are “by far, the most direct and detailed” in implementing this right. (But the FAO points out that they “do not establish legally binding obligations for States or international organizations.”)

The Right to Food Guidelines encourage nations to apply 19 guidelines—which take into account a wide variety of factors ranging from food safety to the use of natural resources to international considerations—to their various strategies and policies when implementing the right to adequate food. For instance, Guideline 1 says that nations should “promote democracy, the rule of law, sustainable development and good governance, and promote and protect human rights and fundamental freedoms . . .” Under Guideline 4, governments should “improve the functioning of their markets.” It also encourages the “development of corporate social responsibility” by protecting consumers against “fraudulent market practices, misinformation, and unsafe food.” Guideline 16 says that “food should never be used as a means of political and economic pressure.”

U.N. Special Rapporteur: To help monitor and promote the right to food around the world, the United Nations created an office called the Special Rapporteur on the right to food. Among other duties, the Special Rapporteur (or investigator) carries out field visits to nations to examine how they are carrying out the right to food, issues voluntary recommendations to them on how they should address certain issues pertaining to the right to food, and submits nonbinding annual reports to the U.N. that examine specific aspects of the right to food, such as the obligation of nations to protect the right to food during armed conflicts. (The Special Rapporteur works independently of any government or organization.)

The outgoing Special Rapporteur, Olivier De Schutter, a human rights scholar and professor at the Catholic University of Louvain in Belgium, completed his duties in 2014. The United Nations will announce his successor in 2015.

With the adoption and use of these various legal measures (in the form of declarations, interpretations, and guidelines) and nonlegal measures (such as the use of agricultural technology), has the world community—in recent decades—made strides in reducing the number of hungry and undernourished people? In a report called the *State of Food Insecurity in the World 2012*, the FAO said that between 1990-92 and 2010-12, the number of hungry people had declined by 132 million people. But it also added that “since 2007, global progress in reducing hunger has slowed and leveled off.”

Does the right to food require access specifically to healthy and nutritious foods?

Previous sections have shown that the recognition of a right to adequate food requires nations to provide their populations with access to and the resources to obtain food, among other obligations. But to the surprise of many, this right also requires them to provide access specifically to healthy and nutritious food, say experts. The U.N. Special Rapporteur said, for instance, that the right to food is an “inclusive right to an adequate diet providing all the nutritional elements an individual requires to live a healthy and active life, and the means to access them.” Therefore, states have a duty to “establish food systems that can ensure each individual’s access not only to sufficient caloric intake, but also to sufficiently diverse diets, providing the full range of micronutrients required,” he said.

Over a period of several decades, the world community fashioned a broad legal framework calling on nations to recognize and protect a right to adequate food for all people. To the surprise of many, it also says that nations should help people with access not only to food, but to healthy and nutritious foods, argue experts.

Does the existing legal framework on the right to adequate food actually say that nations should help the billions of undernourished and overweight people around the world who don’t have access to food or access to healthy and nutritious foods? Analysts point to many provisions in several international instruments that they say support such a claim.

International Covenant on Economic, Social, and Cultural Rights (ICESCR): While this 1966 treaty does not explicitly mention a right to healthy and nutritious food—specifically, Article 11(1) says: “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food—an analyst can argue that adequate food implies healthy and nutritious foods.

As the reasoning goes, if people do not have access or the means to obtain such foods, they may develop micronutrient deficiencies, which can lead to anemia and learning disabilities, for example. In fact, *billions* of people suffer from such deficiencies which, in turn, prevent them from enjoying an adequate standard of living.

General Comment 12: Using an example with more explicit provisions, many observers note that General Comment 12 (the first detailed explanation of the ICESCR’s right to adequate food) says—in Paragraph 9—that food should satisfy people’s “dietary needs,” meaning that “the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation.”

To ensure that food satisfies people’s dietary needs, a nation may have to implement measures to “maintain, adopt, or strengthen dietary diversity,” concludes Paragraph 9, though it doesn’t give more details on these measures.

FAO Right to Food Guidelines: In comparison to General Comment 12, the FAO Right to Food Guidelines say that they provide more “practical guidance” to nations on how to implement the right to adequate food. In particular, Guideline 10.3 encourages

nations to “increase the production and consumption of healthy and nutritious foods, especially those that are rich in micronutrients.” They also say that nations should “consider adopting regulations for fortifying foods to prevent and cure micronutrient deficiencies, in particular of iodine, iron, and Vitamin A.” Added an FAO report: “The absence of adequate norms regulating nutritional content of food in a country can be considered . . . as a gap.”

Although the provisions of General Comment 12 and the Right to Food Guidelines are not legally binding, they represent a consensus of how to interpret, implement, and protect the right to food, say scholars. And the consensus seems to say that nations should ensure that people have access to and the means to obtain not just food, but healthy and nutritious food.

While observers generally believe that the existing legal framework

on the right to adequate food calls on nations to provide people with the access and resources to obtain healthy food, they note that it doesn’t go as far as setting minimum nutritional standards concerning, for example, minimum caloric consumption for certain groups such as children and the elderly. But most governments (working with scientists and health groups) have already done so on their own even before the existence of General Comment 12 and the Right to Food Guidelines. Others note that bodies such as the WHO have published their own nutrition guidelines.

Does the right to food require nations to regulate more actively the production and consumption of unhealthy foods?

Along with helping people access and obtain healthy and nutritious foods, many analysts are arguing that the right to adequate food generally requires nations to undertake measures to regulate more actively the production and overconsumption of unhealthy foods such as those high in fat, sodium, and sugar. Does the existing legal framework on the right to adequate food really require nations to do so? Analysts cite many provisions from several existing international agreements, guidelines, recommendations, and resolutions.

International Covenant on Economic, Social, and Cultural Rights (ICESCR): Under Article 11(1) of this 1966 treaty, which again says that a person has a right “to an adequate standard of living for himself and his family, including adequate food,” an observer can argue, for instance, that a food market that heavily advertises and primarily sells unhealthy foods could violate people’s right to adequate food. How? Scientific evidence shows that eating too much unhealthy foods can lead to obesity and other serious health problems. And when people are afflicted with these health problems, they cannot enjoy an adequate standard of living, as the argument goes.

General Comment 12: Paragraph 19 in General Comment 12 (which was adopted in 1999 and is the first interpretation of the ICESCR’s right to adequate food) says that violations to the right to adequate food may occur if, among other examples, a nation fails

to “regulate activities of individuals or groups so as to prevent them from violating the right to food of others.”

What kinds of activities carried out by groups or individuals could violate other people’s right to adequate food? The FAO says, for instance, that if companies don’t provide clear and reliable nutrition labels on their food packaging, then “consumers cannot procure an adequate supply of safe and nutritious food.” It adds that people will be less likely to buy and eat nutritious foods “without protection from advertising and marketing campaigns that misleadingly represent foods as being nutritious and healthy.” (According to the U.N. Special Rapporteur on the right to food, “most advertisements promote unhealthy foods, high in total energy, sugars and fats, and low in nutrients.”)

What can a government do to address these situations? Paragraph 15 says that nations have an obligation to protect people’s access to adequate food by taking measures to stop “enterprises or individuals” from depriving other people of such access, point out analysts.

Along with helping people access healthy and nutritious foods, many analysts argue that the right to adequate food requires nations to regulate more actively the production and overconsumption of unhealthy foods such as those high in fat, sodium, and sugar.

So what kinds of actions can a nation take against enterprises or groups that, for instance, don’t use labels with clear nutrition information or that advertise unhealthy foods to audiences such as children? While General Comment 12 doesn’t say what nations can do exactly, Paragraph 20 states that “all members of society—individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector—have responsibilities in the realization of the right to adequate food.”

While it doesn’t explain these responsibilities in any detail, Paragraph 20 specifically calls on the “private business sector” to

“pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food.” But it does not give more information on such a code.

FAO Right to Food Guidelines: In contrast to General Comment 12, the FAO Right to Food Guidelines (adopted in 2004) recommend that nations voluntarily take specific measures to promote healthy eating. (The Right to Food Guidelines provide “practical guidance” to nations on how to implement the right to adequate food, say experts.) For example, Guideline 10.1 says that “if necessary, States should take measures to maintain, adapt or strengthen dietary diversity and healthy eating habits and food preparation, as well as feeding patterns.”

While Guideline 10.1 doesn’t provide more guidance beyond this statement, the following guideline (10.2) encourages nations to “take steps, in particular through education, information and labeling regulations, to prevent overconsumption and unbalanced diets that may lead to malnutrition, obesity and degenerative

diseases.” In fact, the FAO concluded in a 2009 report that “because food labeling, advertising, and marketing may affect the enjoyment of the right to food, they must be carefully regulated by the state.”

WHO Global Strategy on Diet, Physical Activity, and Health (WHO Global Strategy): The 192 member nations of the WHO in 2004 adopted a broad range of voluntary recommendations on promoting healthy diets and physical activity as a way to reduce the risk of developing noncommunicable diseases, such as cardiovascular disease, cancers, respiratory diseases, and diabetes. (Again, experts say that having an unhealthy diet is one of the leading causes of these diseases.)

For individuals, Paragraph 22 says that they should shift “fat consumption away from saturated fats to unsaturated fats”; eliminate the consumption of trans-fatty acids; eat more fruits, vegetables, and whole grains; lower “the intake of free sugars”; and limit the consumption of salt.

For governments, the WHO Global Strategy recommends (in Paragraph 41) that they “promote the development, production, and marketing of food products that contribute to a healthy diet” by using what it calls “market incentives” and “fiscal measures” (such as tax policy) as a way to “influence availability of, access to, and consumption of various foods.” Paragraph 40(3) says that nations should work with consumer and private groups to discourage advertisements that promote “unhealthy dietary practices,” especially those ads that “exploit children’s inexperience or credulity.” To help people choose healthier foods, nations should require “accurate, standardized, and comprehensible information on the content of food items.”

For private companies, the WHO Global Strategy says (in Paragraph 61) that they should limit the amount of saturated fats, trans-fatty acids, sugars, and salt in their products; “develop and provide affordable, healthy, and nutritious choices to consumers”; carry out the marketing of foods with unhealthy ingredients in a



responsible fashion; and provide nutrition labels that are clear and understandable.

Guiding Principles for Reducing the Commercial Promotion of Foods and Beverages to Children (the Sydney Principles): While agreeing that unhealthy foods should not be marketed to children, the nations of the world did not agree on how they should reduce such marketing. But in 2008, a body known as the International Obesity Taskforce adopted seven broad (and voluntary) principles—known as the “Sydney Principles,” named after the city where it had developed them—that nations should follow when they undertake efforts to “substantially reduce commercial promotions [of unhealthy foods and beverages] that target children.”

Principle 2, for example, says that because “children are particularly vulnerable to commercial exploitation,” nations should pass regulations “sufficiently powerful to provide them with a high level of protection.” Principle 3 says that “only statutory regulations have sufficient authority to reduce the volume of marketing to children,” and that “industry self-regulation is not designed to achieve this goal.” (According to the FAO, “not all industry respondents agreed” with Principle 3.) Under Principle 5, “regulations need to ensure that schools and other child care and education settings are free from commercial promotions that specifically target children.”

WHO Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children: While the Sydney Principles established a set of broad principles that nations should follow when undertaking efforts to reduce the marketing of unhealthy foods to children, they did not say what nations must do exactly. But in 2010, the WHO adopted 12 specific recommendations—all of which are voluntary—“to guide efforts by [WHO] Member States in designing new and/or strengthening existing policies on food marketing communications to children.”

For example, Recommendation 5 says that companies should not market unhealthy foods (i.e., those high in saturated fats, trans-fatty acids, free sugars, or salt) in places where children gather such as “nurseries, schools, school grounds and pre-school centres, playgrounds, family and child clinics, and paediatric services,” among other locations. Recommendation 7 says that nations should consider the “most effective approach” in reducing the marketing of unhealthy foods to children. These approaches can include statutory regulation or industry-led self-regulation.

Political Declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases: In this resolution (A/RES/66/2) adopted in September 2011, the U.N. General Assembly calls on nations to reduce those various factors (ranging from tobacco use to physical inactivity) that can lead to noncommunicable diseases (such as cardiovascular diseases, diabetes, and high blood pressure) by voluntarily implementing “relevant international agreements and strategies, and education, legislative, regulatory, and fiscal measures.”

In the specific area of unhealthy diets (one factor that can lead to noncommunicable diseases), the resolution does not break any new ground. For example, Paragraph 43 says that governments should discourage the “production and marketing of foods that contribute to unhealthy diets,” and also “encourage policies that support the production and manufacture of, and facilitate access to, foods that contribute to [a] healthy diet.” But it doesn’t give any specific guidance.

Paragraph 44 calls on the private sector not only to follow the 2010 WHO recommendations on reducing the marketing of unhealthy foods to children, but also to produce and promote “food products consistent with a healthy diet.” It should also provide healthier versions of existing foods that are “affordable and accessible,” and whose packaging “follow relevant nutrition and labeling standards.” Paragraph 44 also says that the food industry should reduce “the use of salt . . . in order to lower sodium consumption.”

Report of the U.N. Special Rapporteur on the right to food: In a December 2011 report submitted to the U.N. General Assembly, the U.N. Special Rapporteur on the right to food makes several recommendations on how nations and the private sector should voluntarily address the overconsumption of unhealthy foods. For example, he recommends that nations “impose taxes on soft drinks (sodas), and on [foods high in saturated fats, trans-fatty acids, sodium and sugar] in order to subsidize access to fruits and vegetables and educational campaigns on healthy diets.” In addition, the Special Rapporteur says that nations should specifically adopt laws and regulations because, in his assessment, they are “the most effective way” to reduce the marketing of unhealthy foods.

Furthermore, he says that the private sector should comply with the 2010 WHO food marketing recommendations to children “even where local enforcement is weak or non-existent.” The U.N. Special Rapporteur also calls on the private sector to “shift away from the supply of [unhealthy foods] and toward healthier foods, and phase out the use of trans-fatty acids in food processing.”

Legal measures to regulate the production and consumption of unhealthy foods

As the previous sections illustrate, the world community has established a legal framework on the right to adequate food (by passing agreements, guidelines, recommendations, and resolutions), which, among many purposes, broadly calls on nations to help people increase their access specifically to nutritious and healthy foods while curbing the growing production and consumption of unhealthy foods—all through a variety of approaches.

In recent decades, governments have implemented several of these approaches. In many cases, they had done so even before the adoption of the various instruments that make up the legal framework on the right to adequate food. The following sections describe some of these efforts.

Restricting trans fat—“the worst kind of fat”

According to various analysts, food manufacturers add an ingredient called trans fat (most of which are made artificially using vegetable oil) to cookies, chocolate bars, frozen foods, ice cream, and pastries as a way to lengthen their shelf life, among other purposes. Consuming trans fat, say experts, can lead to an increased risk of cardiovascular disease and other health problems. Critics such as the New York City Department of Health and Mental Hygiene say that “trans fat is the worst kind of fat.” Added the American Heart Association: “There is likely no safe level of trans fat.” The *Los Angeles Times* reported that “adding fewer than 4.5 grams of [trans fat] to a 2,000-calorie daily diet can increase the risk of coronary heart disease by 23%.”

While no international treaty has set binding guidelines on the use of trans fat, several resolutions (described in previous sections) recommend that businesses and consumers eliminate the use of trans fat. Also, during the past decade, many nations and also certain

cities in these nations have passed their own measures limiting the use of trans fat in foods. They include the following examples.

Asia: While three countries and territories in Asia—Hong Kong, South Korea, and Taiwan—have passed laws that require food manufacturers to list the amount of trans fat on their nutrition labels, they haven't set any limits on the amount of trans fat in their food products, say observers. In Japan, the Consumer Affairs Agency noted that it had released guidelines on how the food industry should disclose information on the amount of trans fat in their products. While these guidelines are voluntary, that agency announced that it would consider developing a more formal labeling system for trans fat.

European Union (EU): The EU—an economic and political union of 28 independent and sovereign states bound together by a series of complex international treaties—has not passed any European-wide laws calling on its members to restrict the use of trans fat in foods. Instead, most EU nations have called on food manufacturers to voluntarily reduce the use of trans fat in their products, according to a study published in the *British Medical Journal*. While noting that the amount of trans fat in foods has decreased in Western Europe, the study said that levels still remained high in Eastern Europe. Currently, only four EU nations have passed domestic laws to reduce the use of trans fat in foods.

For example, in 2003, Denmark became the first nation in the world to restrict the use of trans fat, according to the FAO. Under Executive Order No. 160 (which applies only to consumers in the entire nation), oils and fats sold only to the public or which are added to processed foods may not contain more than 2 grams of trans fat per 100 grams of oils and fats. Violators may have to pay a fine. If their violations are “intentional or grossly negligent,” authorities can imprison them for up to two years.

In 2008, Switzerland became the second nation in Europe to restrict the use of trans fat when it passed a national regulation that (like the one passed in Denmark) limits the amount of trans fat contained in foods to 2 grams for every 100 grams of oils and fats.

South America: In 2010, Argentina amended its *Food Code* to reduce the use and consumption of trans fat. Resolution 137/10 says that the amount of trans fat in vegetable oils and margarines sold directly to consumers cannot exceed 2 percent of total fat. Also, it may not exceed 5 percent of total fat in all other foods. (Food manufacturers must also label the amount of trans fat in their foods.)

In 2003, Brazil passed a resolution (No. 360) that requires all food products to list the amount of trans fat on nutrition labels. In 2007, it passed a law mandating that the amount of trans fat in foods may not exceed 2 percent of total fat. Other nations that require the listing of trans fat on nutrition labels include Chile, Paraguay, and Uruguay.

United States: The United States does not have a federal law that sets a national standard on the amount of trans fat that restaurants and companies may include in their foods. Instead, the U.S. Food and Drug Administration in 2003 amended its regulations so that food manufacturers must now include the amount of trans fat on the nutrition labels of their products.

On the other hand, individual states, cities, and counties have taken their own initiatives to restrict the use of this ingredient in foods. For instance, in December 2006, the New York City Department of Health and Mental Hygiene announced that it had

amended its Health Code to phase out the use of artificial trans fat in “all food service establishments required to hold a New York City Health Department permit, including restaurants, caterers, mobile food-vending units, and mobile food commissaries.” These facilities may not store, use, or serve any food containing 0.5 grams or more artificial trans fat per serving. But the law doesn't apply to “packaged foods served in the manufacturer's original, sealed packaging.”

Violators may have to pay a fine of between \$200 and \$2,000. Along with New York City, five New York State counties—with a total population of over four million people—have passed laws that restrict the use of artificial trans fat in restaurants and other food facilities, according to the Center for Science in the Public Interest, a Washington, D.C.-based nonprofit food watchdog organization.

In 2008, California became the first state in the United States to restrict the use of trans fat in foods. The Health and Safety Code prohibits all food facilities from storing, distributing, serving, or using any food that contains 0.5 grams or more of artificial trans fat per serving. Food facilities include “private schools, grocery stores, bakeries, and other retail food facilities,” and also to mobile and temporary food facilities, according to the California Department of Public Health. But the law does not apply to food “sold or served in a manufacturer's original, sealed package.” Violators may have to pay a fine of between \$25 and \$1,000.

Imposing taxes on unhealthy foods

To discourage people from purchasing and eating unhealthy foods, governments have started levying what are now generally called “fat taxes,” which make them more expensive. “The introduction of food taxes . . . to promote a healthy diet constitutes a cost-effective and low-cost population-wide intervention that can have a significant impact,” claimed the U.N. Special Rapporteur on the right to food. While critics say that making unhealthy foods more expensive will penalize poor people who eat more of those foods and spend a greater proportion of their incomes on them, the U.N. Special Rapporteur said that the taxes can be used to subsidize healthier foods or fund health initiatives. Some nations that have imposed food taxes include the following examples.

Denmark: In 2011, the media reported that Denmark (whose population is 47 percent overweight and 13 percent obese) became the first nation to impose a tax on foods whose content of saturated fat—found mostly in products such as butter, cream, and meat, said one observer—was greater than 2.3 percent of total fat. The tax applied to all saturated fats, whether in a “McDonald's hamburger or a quart of milk from grassfed cows,” said *Time* magazine.

According to one calculation, the price of a half-pound of butter increased by the equivalent of 45 U.S. cents, a pound of cheese by 50 cents, and a half-pound block of lard by 70 cents. The tax would have raised annual revenues of \$220 million and, claimed the government, reduced the consumption of saturated fats by 10 percent, reported the *Jakarta Post*. (ABC News noted that Denmark had, in 2010, increased taxes on “ice cream, chocolate and sweets by 25 percent,” and also increased taxes on soft drinks. It has also taxed candy for nearly 90 years, added German weekly magazine *Der Spiegel*.) But after one year, the government repealed the tax, citing loud complaints from businesses and the food industry, which said they had faced higher operating costs and lower sales as consumers

went to neighboring countries to buy those foods, which were more expensive in Denmark.

France: In 2011, France passed a law that imposed a tax on canned and bottled soda. (The tax does not apply to diet sodas.) That country's National Institute for Health and Medical Research noted that 20 million people in France are overweight, and that seven million of them are obese. Analysts expect the tax to raise \$150 million a year. The government will use the revenues not to lower obesity, but to lower the nation's deficit, according to ABC News.

Hungary: In 2011, Hungary passed a law that imposed a tax called "the most comprehensive on unhealthy foods in the world to date," said *Der Spiegel*. Rather than singling out a single ingredient such as saturated fats (as in the case of Denmark), the law imposed a tax on packaged foods with high amounts of caffeine, fat, salt, and sugar. Some products include soft drinks, energy drinks, salty snacks, and even "high salt content condiments, soup mixes, gravy mixes and bases," according to one industry analyst. Close to two-thirds of Hungary's inhabitants are overweight or obese, say analysts, and their life expectancy is one of the lowest in Europe. The tax raised nearly \$80 million in 2012, reported the *New York Times*, some of which will be used to pay for the state's health care costs.

United Kingdom: In 2011, the government said that it was considering a range of options to address rising rates of overweight and obesity (including fat taxes), but did not provide any details. The *Daily Mail*, a news daily, described Britain as the "fattest nation in Europe," noting that 25 percent of adults were obese, and that around one-third of children were overweight or obese by the time they finished primary school. A government strategy paper leaked in 2004 indicated that the government was considering a fat tax on "some dairy products, fast food, and sweets."

In January 2013, a coalition of 61 organizations, including the Royal Society for Public Health, called on the government to impose a fat tax on canned and bottled soda, and then use the estimated £1 billion in annual revenues to improve children's health by providing "free school meals or free fruit and vegetable snacks."

United States: While the federal government currently does not levy a national "fat tax" on any specific foods or on certain ingredients, it had done so decades ago, though not for health reasons. For example, in 1917, the federal government imposed taxes on soft drinks as a way to raise money to fight World War I, and not as a way to address obesity or protect public health, according to research by legal analyst Wendy Sheu. Over the following decade, the federal government imposed taxes on both candy and carbonated beverages (describing them as luxury items) as a way to raise revenues, and not to promote public health. Congress repealed these taxes in 1934.

Many state governments and individual cities have passed laws (since the early 20th century) that imposed excise and sales taxes on non-nutritious foods such as candy, carbonated beverages, and snack foods, among other items. But, as in the case of the federal government, these states had done so largely as a way to raise general revenues, noted the Center for Science in the Public Interest, and not as a way to address public health concerns. For example, California in 1933 imposed a 7.25 percent sales tax on soft drinks. In 1961, Texas passed a 6.25 percent sales tax on soft drinks, diluted juices, and candy. Kentucky in 1972 passed a 6 percent sales tax on

candy, gum, and soft drinks. Currently, 30 states have levied a "sales tax on purchases of sweetened drinks, averaging around 5 percent," according to the *Wall Street Journal*.

In a reversal of this trend, many states—from New Mexico to South Dakota to Georgia—have attempted (since the 1990s) to impose further taxes on unhealthy foods as a way to discourage their consumption while using any collected revenues to promote health programs, say various observers. But opponents have blocked several of these efforts or helped to repeal them outright. For example, in 2008, after Maine imposed a \$4-per-gallon tax on soda syrup used in restaurants and also a 42 cents per gallon tax on bottled soda as a way to fund a state-sponsored health insurance program, a ballot referendum overturned these taxes by a 65-35 percent margin a few months later. In April 2010, Washington state passed a tax of 2 cents for every 12 ounces of soda, reported the *Washington Post*. It had planned to use the revenues to fund hospice care and other health initiatives, but a ballot initiative overturned the tax in the same year.

An online survey conducted by Harris Interactive in April 2013 revealed that nearly 60 percent of respondents opposed taxes on candy and sweetened drinks. "The idea of taxing calorie-rich candies and sodas may be popular with some health advocates . . . but it is very unpopular with the public," said the polling company to *U.S. News and World Report*. Opponents argue that blaming certain unhealthy foods for rising obesity rates is unfair.

Despite setbacks in other states and public opinion against taxes on unhealthy foods, the California state legislature in 2013 began to consider a "penny-per-ounce tax on all sugary beverages sold in the state, including sodas, sweet teas, and energy and sports drinks," reported the *Huffington Post*. It would then direct revenues to a Children's Health Promotion Fund to fund anti-obesity programs.

Regulating food advertisements

While food companies advertise a wide variety of foods, they use a large percentage of their advertising budgets to promote foods with high contents of fat, salt, and sugar, say public health experts.

To prevent the overconsumption of these kinds of unhealthy foods, many governments have passed domestic laws to regulate advertising and marketing for them, especially those aimed at children and adolescents. Many of these laws are now part of existing broadcast, consumer protection, and media laws, according



to the WHO. Along with using legislation, nations allow private companies to establish their own self-regulatory systems to guide their food advertising and marketing activities. (In a WHO survey of 73 nations, 22 of them used this combination of laws and guidelines.) A publication from the WHO called *Marketing Food to Children: The Global Regulatory Environment* includes many examples.

- In 2010, the EU passed the Audiovisual Media Services Directive (2010/13/EU) which sets European-wide rules on audiovisual services and commercial communications. (All 28 EU member nations must implement these rules by passing their own domestic laws.) The directive says that audiovisual communications must not be discriminatory, or use subliminal techniques, or promote tobacco products, among many other requirements. In the specific area of food advertising, Article 9 says that its member states must encourage media service providers to develop voluntary codes of conduct to regulate “inappropriate audiovisual commercial communications” in children’s programming for foods and beverages containing nutrients and substances such as “fat, trans-fatty acids, salt/sodium, and sugars.” But it doesn’t give any more details on such a code of conduct.
- Many nations also have laws that say that food advertisements must not give the impression that snack foods such as candies and soft drinks can replace a regular meal. For example, Denmark in 1997 passed Executive Order No. 489, which says that “advertisements for chocolate, sweets, soft drinks, snacks and other similar products may not indicate that the product may replace regular meals.” Under a 1997 guideline in Finland, advertisements for items such as candy, chocolate, and soft drinks must not “give the impression that they replace regular food.” In 1998, Colombia adopted a guideline that said that “the advertisements of products not comprising part of the basic diet, such as appetizers, desserts, sweets, chewing gum . . . must not suggest that these products can be substituted for the basic diet.”
- Other laws and guidelines call on food advertisements to encourage balanced diets. For instance, a 1990 regulation in Malaysia says that “all advertisements on food and drinks must show the necessity of a balanced diet.” Under Ireland’s advertising standards passed in 2001, “advertisements representing meal time should clearly and adequately depict the role of the product within the framework of a balanced diet.” A 2003 rule in Romania says that advertisements that show a comparison between different foods “shall not discourage or suggest renouncement of essential foods, especially fresh vegetables and fruits.”
- Many nations have passed laws and guidelines that prohibit advertisements from giving misleading or wrong information about a food’s nutritional content. Australia’s Children’s Television Standards of the Australian Broadcasting Act, for example, says that “an advertisement for a food product may not contain any misleading or incorrect information about the nutritional value of that product.” In a similar fashion, the United Kingdom’s advertising codes say that “advertising must not give a misleading impression of the nutritional or health benefits of the product as a whole.”
- Some governments have set minimum nutritional standards for advertised foods. For instance, the United States in 2011 proposed national voluntary principles for the nutritional content of those foods that the private sector most heavily advertises specifically

to children between the ages of 2 and 17. (These foods include breakfast cereals, snack foods, carbonated beverages, and frozen desserts, reported the Federal Trade Commission.) Under Principle A, these foods must contain at least one food group from a specified list, including fruit, vegetable, whole grain, fat-free or low-fat milk, and extra lean meat. Under Principle B, certain ingredients in these foods must not exceed a specific level. For instance, they should not contain more than 1 percent of saturated fat, 13 grams of added sugars, and 210 mg of sodium per serving. The government is currently reviewing public comments on these principles and hopes to implement them in 2016. If companies want to advertise foods (specifically to children between the ages of two and 17) that don’t meet these voluntary guidelines, they would have to “reformulate” their products to meet them.

- In an effort to combat the overconsumption of foods high in fat, salt, or sugar, the United Kingdom in 2007 became the first nation in the world to implement rules restricting the televised advertising of foods high in these nutrients. Under that nation’s TV Advertising Standards Code, advertisements for such foods “must not be shown in or around programmes specifically made for children” and also “in and around programmes of particular appeal to children under 16.” To determine whether a food is high in fat, salt, or sugar, a body called the Food Standards Agency uses a “nutrient profile,” which calculates a score based on the food’s nutritional content. The 2007 rules also say that advertisements for unhealthy foods targeted at preschool or primary school children may not use “licensed characters and celebrities popular with children,” among many other restrictions.
- Some private organizations have established global self-regulatory codes (all of which are voluntary) for a wide range of business practices. The International Chamber of Commerce (ICC), for instance, has created ethical standards for marketing activities, among many other codes. Its 1997 International Code of Advertising Practice broadly says that “all advertising should be legal, decent, honest, and truthful.” While it doesn’t specifically address the marketing of food, Article 14 of the code does say that “advertisements should not exploit the inexperience or credulity of children and young people.” Experts say that several nations use various ICC codes as a foundation to create their own advertising and marketing standards.
- Along with using global self-regulatory standards, business groups in individual nations have created their own self-regulatory standards to guide their activities, including the



advertising and marketing of foods. For example, while consumer protection laws in the United States prohibit false and deceitful advertising, no federal law or government agency has set separate legal standards specifically for the advertising of foods. Instead, companies voluntarily follow various industry-created food advertising standards. For example, an industry group called the Children’s Advertising Review Unit fashioned the Self-regulatory Guidelines for Children’s Advertising, though its provisions on food advertising are vague. They say, for instance, that “advertising of food products should encourage responsible use of the product with a view toward healthy development of the child.” In 2006, the Better Business Bureau launched its voluntary Children’s Food and Beverage Advertising Initiative whereby 17 companies—including the Coca-Cola Company, General Mills, the Hershey Company, and Kraft Foods Group, Inc.—have promised to establish minimum nutritional standards for food advertisements, limit the use of characters and celebrities in food advertising, and not to advertise their foods in elementary schools, among other commitments.

Regulating in-school food marketing


During the 1990s, the WHO said that schools across the world began to increase the in-school marketing of certain products (including unhealthy foods) as a way to increase education revenues. (Companies would pay fees to schools to advertise and sell their products on school grounds.) To address this development, many nations and individual cities began to pass laws, regulations, and guidelines that broadly limit or prohibit direct and indirect in-school marketing, including the marketing of unhealthy foods. A survey carried out by the WHO includes the following examples.

- In Brazil, the cities of Florianópolis, Rio de Janeiro, and São Paulo prohibit “the sale and distribution of soft drinks and confectionary” in schools.
- In Brunei, “canteens in private and public schools are prohibited from selling soft drinks, confectionery, snacks, ice cream, and instant noodles.”
- Malaysia prohibits the selling of “junk foods” in school cafeterias.
- Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates restrict the “sale of carbonated soft drinks in all schools.”
- Since 2005, France has not allowed food or beverage vending machines in schools. The following year, the United Kingdom banned the sale of unhealthy foods from school vending machines, replacing them with healthier food.
- In the United States, school districts and independent schools participating in the National School Lunch Program—which provides them with federal cash subsidies and food from the U.S. Department of Agriculture (USDA)—must serve cafeteria lunches that meet minimum federal nutrition standards. The most recent standards require schools to increase the “availability of fruits, vegetables, and whole grains in the school menu,” says the USDA. In June 2013, that agency released national minimum nutrition standards for all foods sold outside a school’s cafeteria (but still located on school grounds), such as those purchased from vending machines, school stores, and snack bars. Under these standards, a food’s total calories from fat must be 35 percent or less per item. It must also have no trans fat. Furthermore, a food may not have more than 230 mg of sodium per item, and its weight of sugar must not exceed 35 percent of the food’s total weight. For beverages, schools may serve only plain water, low-

fat milk, nonfat milk, full strength fruit juices, and vegetable juices. The standards—which came into force in August 2013—also limit beverage sizes for elementary, middle, and high school students.

Nutrition labeling and caloric postings

In 1985, the Codex Committee on Food Labeling—a group that is part of the FAO and the WHO—adopted its Guidelines on Food Labeling. These guidelines say that nutrition labeling should be voluntary “unless a nutrition claim is made.” Once a company makes a nutrition claim for a certain product (for example, a company may tout a product’s high content of protein), the guidelines say that the product’s nutrition label should also declare four other nutrients: energy, protein, carbohydrates, and fat. A 2004 WHO survey of 74 countries revealed major differences in nutrition labeling requirements across various nations. They include the following examples.

- It said that in “the greatest proportion of these countries (27 in total), nutrition labeling is voluntary unless the food bears a nutrition claim.” They include 17 countries in Europe (including France, Germany, Italy, Switzerland, and the United Kingdom), Ecuador, Indonesia, Japan, Mexico, Singapore, South Africa, and Thailand.
- Only 10 nations required mandatory nutrition labeling on prepackaged food products. They included Argentina, Australia, Brazil, Canada, Israel, Malaysia, New Zealand, Paraguay, the United States, and Uruguay.
- Nations that require nutrition labeling also have different requirements on how many nutrients to list. While many nations require the listing of energy, protein, carbohydrates, and fat, others require up to 10 nutrients, said the WHO.
- Many nations (19 in all) did not have any regulations on nutrition labeling, including the Bahamas, Egypt, Kenya, and Pakistan. Along with nutrition labeling, some nations and cities are considering laws that will require restaurants and other food establishment to post the number of calories for items on their menus. Below are some examples.
- Canada is considering a law that will require “chain restaurants with five or more locations to post calorie counts for hamburgers, hot dogs, fries, wrap, milkshakes, and other items on menus,” reported the *Toronto Star*, a news daily.
- In 2008, New York City became the first American city to require calorie postings. The New York City Health Code requires covered food establishments—such as those with 15 or more outlets in the United States and those that serve food with “standardized preparation, portion sizes, and content”—to prominently post calorie information on all menu boards and menus, foods on display with tags, and any other visible pictorial display of food items. Violators may have to pay fines ranging from \$200 to \$2,000. Cities in California, Massachusetts, and Washington are also considering similar calorie posting regulations, reported *USA Today*.
- In April 2013, the U.S. Food and Drug Administration proposed national regulations that will require restaurants and other retail food establishments with 20 or more locations (and also vending machine operators with 20 or more machines) to display the calorie information of their foods on menus and menu boards. The regulation will not apply to businesses whose primary purpose is not to sell food, including airlines, bowling alleys, and movie theaters. 

How do nations and international law address fracking?

For at least a decade, energy companies have been heavily using a drilling technique called hydraulic fracturing (now popularly known as “fracking”) to extract natural gas trapped inside shale rock formations found deep in the ground across the United States. When fracking helped the United States become the largest producer of natural gas in the world in recent years, other countries with shale rock deposits began debating whether they should use that drilling technique to extract natural gas. But the use of fracking has become highly controversial. While supporters say that fracking will help nations boost their own energy supplies and bring down energy costs for decades to come, many others argue that fracking will contaminate water supplies, worsen air pollution, and even cause earthquakes.

How exactly does fracking work? Does it harm the environment and threaten human health? Which federal and state laws in the United States regulate the fracking process, and are they effective in doing so? How do other nations oversee fracking? And can international law play a role in the use of this controversial drilling technique, which seems to bring both promise and peril?

Fracking: Access to more natural gas

Oil and gas companies have built millions of natural gas wells across the world since the 1800s by drilling vertically through dirt, sand, and rock to extract easily-accessible natural gas deposits close to the surface, according to the American Public Gas Association, a nonprofit trade organization for publicly-owned natural gas distribution companies.

Along with natural gas pockets near the surface, analysts say that large amounts of natural gas are trapped within enormous shale rock formations in the ground, but that reaching and extracting them are much more difficult and expensive. Some formations are two miles underground, which is the height of seven Empire State Buildings, according to *National Geographic* magazine. The shale formations may stretch hundreds of miles in length and range in thickness from between 20 and 250 feet. The Marcellus Shale Formation in the United States, for instance, stretches across most of Pennsylvania, and also large parts of New York, according to the Pennsylvania Department of Conservation and Natural Resources. Others include the Bakken Shale Formation in North Dakota and Wyoming, the Barnett

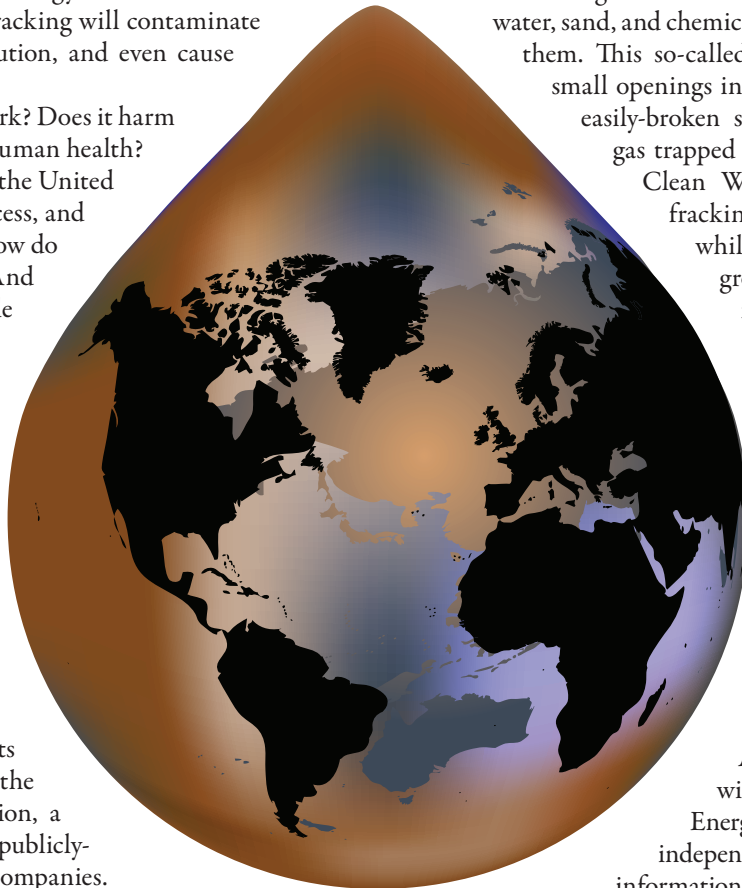
Shale Formation in Texas, and the Fayetteville Shale Formation in Arkansas, according to the Natural Gas Supply Association, a trade group. These formations and others spread across more than 20 states.

As the supply of easily-accessible natural gas deposits began to decrease, oil and gas companies developed fracking in the late 1940s to extract natural gas trapped inside shale rock formations. Using this technique, they drill wells descending thousands of feet into the ground before turning horizontally (and directly) into the shale rock formations. Workers then insert steel pipes and cement casings into these wells, and then pump a mixture of water, sand, and chemicals—at a very high pressure—into them. This so-called fracking fluid escapes through small openings in the pipes and then fractures the easily-broken shale rock, releasing the natural gas trapped inside, said environmental group Clean Water Action. (The sand in the fracking fluid keeps these fissures open while the chemicals “inhibit bacterial growth, minimize friction, and increase viscosity,” says *National Geographic* magazine.) Workers then collect not only the natural gas, but also the fracking fluid, which returns to the surface.

The United States, which fractures around 13,000 wells every year, may have around 24 trillion cubic meters of recoverable natural gas from shale rock (which has the energy of over 147 billion barrels of oil), said the U.S. Energy Information Administration (EIA), the agency within the U.S. Department of Energy that analyzes and distributes independent and impartial energy information. (A cubic meter is approximately the size of a large oven range.)

In an interview in *Bloomberg Businessweek*, an official from the U.S. Department of State said that fracking accounted for 35 percent of U.S. natural-gas production in 2012, compared to only one percent in 2006. In contrast to the conventional methods of natural gas extraction, nine out of 10 natural gas wells in the United States today use fracking, according to reporting from ProPublica, a nonprofit investigative news service. And researchers at the University of Colorado School of Public Health estimate that shale gas operations have grown almost 50 percent annually since 2006, and may quadruple between 2009 and 2035.

Currently, 29 states—stretching from Alaska to New York—have fracking operations, said the Natural Resources Defense



Council (NRDC), an environmental advocacy group. Some analysts believe that the Marcellus Shale Formation may be home to the second largest shale gas reserves in the world. So far, reported the *New York Times*, oil and gas companies have built more than 4,000 gas wells on top of the Marcellus shale in Pennsylvania, a number that could increase to more than 100,000 in a few decades. In 2011, Colorado began drilling 3,000 new wells that will use fracking, said *The Columbus Dispatch*. The media also reported that fracking operations in Wyoming have drilled hundreds of wells in the last few years, making it “one of the top gas-producing areas in the United States.”

All of this fracking activity catapulted the United States over Russia to become the world’s largest producer of natural gas in 2012, says *Bloomberg Businessweek*.

What are the effects of fracking?

Opponents of fracking believe that the rapidly growing and long-term use of fracking in the United States and around the world without more extensive oversight and regulation will harm the environment and human health. But others say that opponents have exaggerated these concerns. What are some of the effects of fracking?

Water contamination: Observers say that workers inject (and then recover) two to five million gallons of fracking fluid over the course of a natural gas well’s lifetime—which could be many, many

Fracking opponents believe that the rapidly growing and long-term use of that technique in the United States and around the world without more extensive oversight and regulation will harm the environment and human health.

years. An analysis by *National Geographic* of the fracking fluid used in a well in North Dakota said that it contained over 80 percent water, close to 20 percent sand and man-made ceramics, and 0.5 percent chemicals.

Which chemicals do fracking fluids contain? “Formaldehyde, acetic acids, citric acids, and boric acids,” among hundreds of others, some of which are toxic and carcinogenic, says Clean Water Action. (Others say that several companies add diesel fuel to their fracking fluids.) The Marcellus Shale Coalition, a group that supports the natural gas industry, describes these chemicals as “things that you probably shouldn’t drink,” but adds that they are “just as easily found beneath your kitchen sink.” In the case of the North Dakota well, *National Geographic* noted that for the fracking fluid, the company had used two million gallons of water, four million pounds of sand, and over 350 barrels of chemicals.

Once oil and gas companies use and recover their fracking fluids, they use a variety of methods to dispose of them. Many critics, such as the NRDC and other groups, believe that shortcomings in these methods allow the fracking fluid to seep into groundwater supplies, lakes, rivers, and streams, which could then harm human health and safety.

For instance, many companies haul the recovered fracking fluid to municipal and privately-owned sewage treatment plants, which try to remove the chemicals from the fluid. Critics say that many of these facilities don’t have the capability to do so effectively, and that

the treated fluids (which still contain chemicals) go straight into drinking supplies. Companies also dig open waste pools—which are large pits lined with a covering—and then dump the fracking fluid into them until they resemble small ponds and lakes. But some of the fluid will seep into the soil and contaminate groundwater supplies, argue observers.

Many will inject the recovered fracking fluid into disposal wells located deep underground. “In many regions of the U.S., underground injection is the most common method of disposing of fluids . . . from shale gas extraction operations,” said the U.S. Environmental Protection Agency (EPA). The NRDC says that this method “can be one of the safest options because it minimizes the risk of pollutants being released into the environment.” Still, many worry that companies may not completely adhere to safeguards such as avoiding the use of disposal wells in earthquake zones where tremors could disperse the fracking fluid.

In a May 2012 report, the NRDC said “all of these options present some risk of harm to health or the environment,” and that federal and state regulations “must be significantly strengthened to reduce the risks of fracking.”

In the last several years, many communities located near natural gas wells that use fracking have complained of contaminated drinking water and also of health problems such as dizziness, headaches, and skin rashes, among an assortment of other ailments.

In some cases, people have claimed that natural gas (released by fracking, they believe) had seeped directly into their water supplies. Several Internet videos show them using matches to set fire to water coming out of their faucets.

In response to critics who say that the use of fracking had directly contaminated water supplies, groups such as Harrisburg, Pa.-based Commonwealth Foundation for Public Policy Alternatives, a free-market think tank, claim that “amazingly, there have been no confirmed cases of groundwater contamination in 1 million [fracking] applications,” meaning that fracking fluid has not yet escaped from the cement and steel pipes deep underground. On the other hand, it does acknowledge that the disposal of fracking fluid (once it returns to the surface) has contaminated water supplies and land areas, but says that the gas industry does comply with regulations to remediate and restore the affected areas.

The Commonwealth Foundation also said that the migration of natural gas (not captured in the well pipes during the fracking process) into drinking supplies deep in the ground in, say, Pennsylvania, is a “legitimate concern.” But it added: “Many of Pennsylvania’s drinking wells were already contaminated before drilling.” Still, in cases of contamination caused by natural gas drilling, the foundation said that “gas companies have . . . installed safer, higher quality drinking wells.”

In October 2011, Pennsylvania State University released a state-funded study for which it had sampled 233 private water wells in

rural areas near natural gas sites on the Marcellus Shale Formation during an 18-month period. It did not find a “statistically significant” correlation between fracking and the presence of dissolved methane (the primary component in natural gas) in the water wells. “There was no evidence of influences from hydraulic fracturing at least on the wells that we looked at in the time frame that we looked at them,” said a Penn State spokesperson. The study also found low concentrations of methane gas, which already seemed to exist in 20 percent of water wells, and which were probably not caused by fracking. Still, the study said that “longer-term studies” using a greater number of water wells would provide more accurate conclusions.

But in December 2011, the EPA released a draft report that, analysts say, for the first time links contaminated groundwater supplies with the use of fracking. That is to say, the contamination occurred not when an oil and gas company had improperly disposed of fracking fluid once it had reached the surface, but while the fracking was taking place deep in the ground.

By way of background, residents of the town of Pavillion, Wyo., complained to the EPA in 2008 about the smell and taste of the water from their groundwater wells. In response, the EPA began what it called a “comprehensive groundwater investigation” of possible contamination by taking samples from 37 residential wells and two municipal wells, which investigators say lie on top of what is known as the Pavillion gas fields, where 169 natural gas wells owned and operated by Encana, an energy company, use fracking. The EPA also drilled its own water wells as part of the study.

The December 2011 draft report noted that the EPA’s investigation had found high concentrations of dangerous chemicals such as benzene and gasoline range inorganics, among

other substances, in its water samples. While considering alternative reasons as to why the water samples contained these chemicals, the draft report concluded that “the likely impact to ground water . . . can be explained by hydraulic fracturing.”

A spokesperson for Encana called the findings “speculation” in an interview with National Public Radio. As for the presence of carcinogenic chemicals such as benzene, he said: “We didn’t put those compounds there, nature did.”

Air pollution: Along with water contamination, critics say that fracking causes air pollution. According to the EPA, the oil and gas industry is a “significant source of VOCs [volatile organic compounds],” which can lead to the formation of ground-level smog. It also says that “some of the largest air emissions in the natural gas industry occur as natural gas wells that have been fractured are being prepared for production,” during which time many gases are released into the air, including VOCs, methane, and benzene.

These air pollutants can affect the health of people exposed to them. Experts say that several studies have already shown that people living near oil and gas wells have a higher risk of developing “eye irritation and headaches, asthma symptoms, acute childhood leukemia, acute myelogenous leukemia, and multiple myeloma.” Below are some recent examples.

- After fielding public complaints of health problems, the Texas Commission on Environmental Quality in January 2010 released emission test results from 94 natural gas sites in that state. Two of them near the city of Dish, Texas, had “extremely high levels of cancer-causing benzene,” and 19 others had “elevated levels,” said the Associated Press. (All of these sites and the city itself are located on the 5,000 square-mile Barnett Shale, which has close to 15,000 gas wells, according to the state government.) The commission reported that faulty valves



at the two worst sites had leaked benzene, and that the company operating the wells soon fixed them. “If they find something, they fix it,” said a lawyer for the Texas Pipeline Association to the media.

- In March 2012, the Colorado School of Public Health released a three-year study revealing the presence of carcinogenic chemical emissions (composed of benzene, xylene, toluene, and ethylbenzene) at Colorado natural gas sites that use fracking. The presence of these emissions, noted the report, posed “higher cancer risks for residents living nearer to wells as compared to residents residing further from wells.” (Colorado requires its more than 3,000 active natural gas wells to be at least 150 feet away from rural residential areas and 350 feet away in developed ones, say analysts.) The study concluded that “these data show that it is important to include air pollution in the national dialogue on [fracking, which], to date, has largely focused on water exposures to hydraulic fracturing chemicals.”
- In 2011, smog levels in the Upper Green River Basin in Wyoming—one of the largest gas-producing regions in the nation—“rose above the highest levels recorded in the biggest U.S. cities,” reported the Associated Press, noting that they had exceeded both federal environmental standards by two-thirds and also the worst smog levels in Los Angeles in 2010. Experts say that emissions from fracking operations had combined with many other chemicals to create the air pollution in this area and others.

Earthquakes: Analysts say that fracking-related activities such as the drilling of deep wastewater wells to store fracking fluid are causing man-made earthquakes.

A 1990 study carried out by the U.S. Geological Survey and the EPA said that the high-pressure injection of fracking fluid into deep disposal wells may have “triggered earthquakes in Colorado, Texas, New York, New Mexico, Nebraska, and Ohio, and possibly in Oklahoma, Louisiana, and Mississippi,” reported Bloomberg.

How does this practice lead to earthquakes? If a company injects enough fracking fluid into a wastewater well located near a fault, doing so could raise the underground water pressure and make the fault slip, which then leads to an earthquake, said the U.S. Geological Survey. But “while the disposal process has the potential to trigger earthquakes, not every wastewater disposal well produces earthquakes,” said that agency. “In fact, very few of the more than 30,000 wells designed for this purpose appear to cause earthquakes.”

Still, the U.S. Geological Survey noted that “the number of earthquakes has increased dramatically over the past few years within the central and eastern United States.” From 1970 to 2000, this region had 21 earthquakes a year. But the rate increased to 50, 87, and 134 from 2009 to 2011, respectively, it said. Have there been any recent cases of earthquakes caused by fracking-related activities?

- In March 2011, the Arkansas Oil and Gas Commission had shut down four disposal wells, reported the *New York Times*, after the occurrence of several moderate earthquakes that reached 4.7 on the Richter scale.
- The Colorado Oil and Gas Commission began to review applications more carefully for new or expanded disposal wells after a 5.3 earthquake in a gas field in August 2011, according to Bloomberg.
- In December 2011, the Ohio Department of Natural Resources

imposed a moratorium on the use of five disposal wells near the city of Youngstown after a series of 11 light earthquakes (reaching a 4.0 on the Richter scale) shook the area, which is “not known for seismic activity,” said Reuters. While government officials did not say that the injection of fracking fluid into these wells had directly caused the earthquakes, a state report noted what it called “a number of coincidental circumstances.” For instance, it said that all of the earthquakes had occurred within a mile of the waste disposal wells, and that the number of earthquakes had shot up only after the state had allowed an energy company to increase the pressure used to inject fracking fluid into them.

- In the past three years, thousands of minor earthquakes—most of them too small to be felt—have struck Oklahoma, which has tens of thousands of oil and gas wells that use fracking, according to the *New York Times*. It reported that while Oklahoma does have natural seismic activity averaging around 50 small tremors every year, that state had more earthquakes in 2013 (surpassing 2,600) than in any other year. Many believe that the pumping of fracking wastewater into the more than 4,000 disposal wells in that state is causing the earthquakes, though no one has proved a direct link. Still, a state government commission had asked one operator to reduce the amount of wastewater it injects into a disposal well.

While fracking-related activities such as injecting wastewater into disposal wells could trigger an earthquake, experts believe that the fracking process itself (whereby high-pressure fluids break up shale) will not lead to seismic activity. The U.S. Geological Survey said that its studies show that “only very rarely” does the fracking process itself directly cause earthquakes, and that carrying out fracking will only create “thousands of extremely small ‘microearthquakes,’” which are “rarely felt and are too small to cause structural damage.”

Fracking laws in the United States at the federal level

Currently, no single federal law comprehensively sets minimum national standards for (or oversees) the entire fracking process, say legal analysts. Instead, several existing federal laws regulate or have regulated specific aspects of fracking. They include the following statutes.

Safe Drinking Water Act (SDWA): The EPA says that this law sets minimum national standards in protecting the quality of drinking water. As part of the SDWA, the EPA created the “Underground Injection Control Program” (UIC)—which regulates the construction, operation, and closure of underground wells used by companies to store or dispose of waste fluids such as those used in fracking—as a way to protect underground drinking water. But in the Energy Policy Act of 2005, Congress amended the SDWA so that companies that store fracking fluids in underground wells would no longer have to comply with the UIC program unless such fluids contain diesel fuel. In 2009, several member of Congress tried unsuccessfully to overturn the 2005 law.

To understand better the effects of fracking on drinking water supplies, the EPA is carrying out a national study in which it will review existing data, laboratory testing, and case studies on fracking. It will release a draft report for review and public comment in 2014.

Clean Water Act (CWA): This law regulates the “discharges of pollutants into the waters of the United States,” including the nation’s streams, rivers, lakes, wetlands, and coastal waters. It does

so by setting national standards on the extent to which different industries must remove pollutants from their wastewaters before releasing them back into the environment. While these standards prohibit the gas and oil industry from discharging its fracking fluids straight into bodies of water (without any treatment whatsoever) once it finishes using them, the EPA notes that “no comprehensive set of national standards exists at this time” on the extent to which companies must first remove pollutants in the fracking fluid before doing so.

Under the CWA’s Stormwater Pollution Prevention Plan, “nearly all” construction site operators in the United States must have a plan to prevent the runoff of toxic chemicals and other substances from their sites and into the nation’s waters during rainstorms, says that EPA. But in 1987, Congress amended the CWA to exempt oil and gas exploration sites from the stormwater plan unless any runoff comes into contact with waste products on the construction sites.”

Observers also point out that Congress had amended the CWA so that its provisions would not apply to fracking fluids. How? The definition of “pollutants” in the CWA now specifically excludes “water, gas, or other material which is injected into a well to facilitate production of oil or gas.” Still, in 2011, the EPA announced that it would begin to develop standards for wastewater discharges specifically from fracking operations.

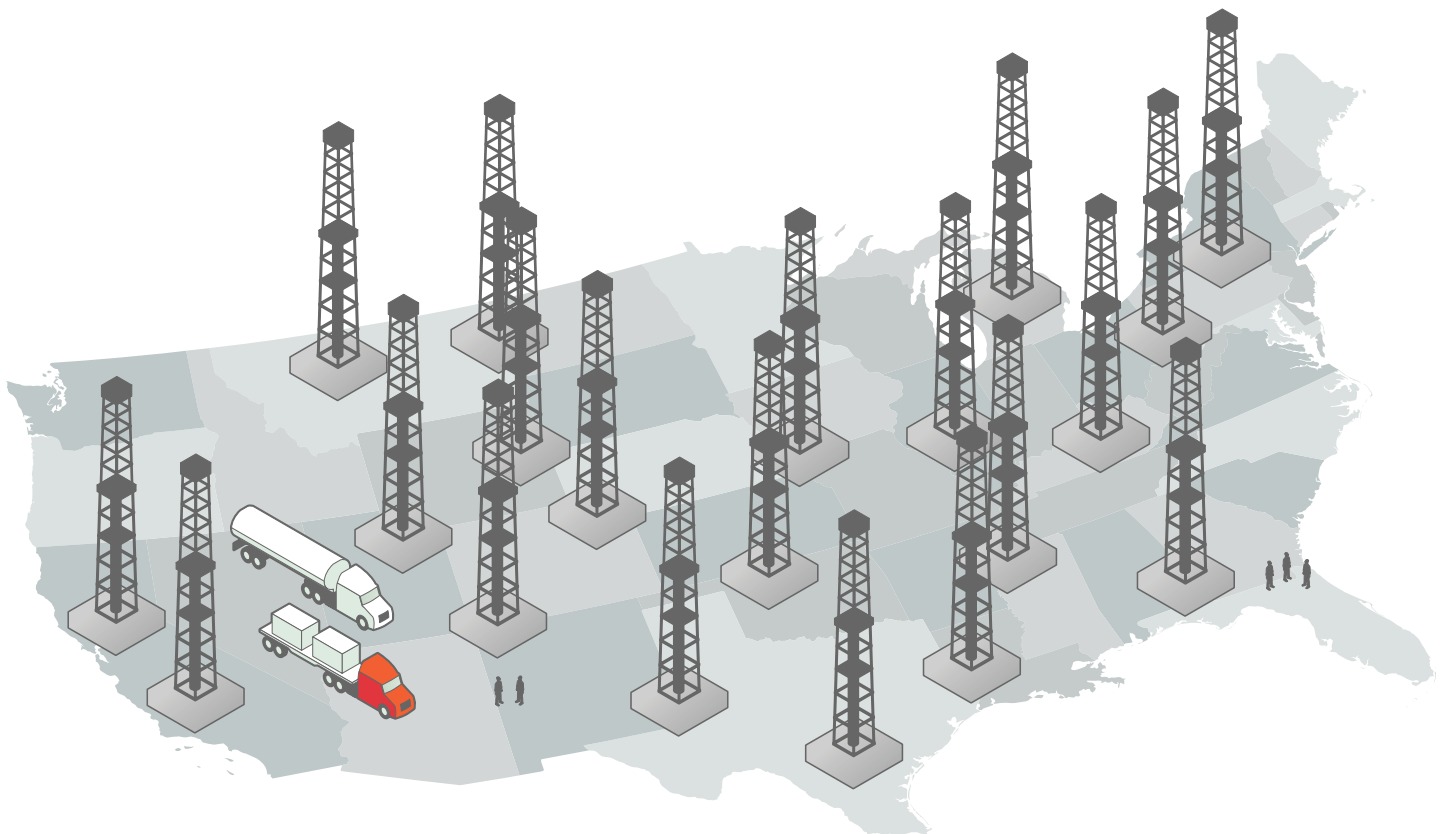
Clean Air Act (CAA): This statute gives legal authority to the EPA to set and enforce national standards for mobile sources of air pollution (i.e., vehicles), and also air pollution from stationary sources, including factories and power plants. Air pollutants from stationary sources also include those coming from oil and natural gas production sites. The CAA also requires the EPA to set standards

for new sources of air pollution which could hurt public health.

In April 2012, the EPA set the “first federal air standards for natural gas wells that are hydraulically fractured.” Under these standards, the oil and gas industry must put in place, by 2015, special technology to capture natural and other gases which escape from fractured gas wells. The EPA estimates that the use of this technology (which some states such as Colorado and Wyoming had already required) will, on an annual basis, reduce emissions of volatile organic compounds by 190,000 to 290,000 tons, air toxics by 12,000 to 20,000 tons, and methane by 1.0 to 1.7 million short tons.

Emergency Planning and Community Right-to-Know Act (EPCRA): After an accident at an American-operated chemical plant in Bhopal, India, in 1984 released a cloud of toxic gas that killed and injured thousands of people, the U.S. government passed the EPCRA. Under this law, the federal, state, and local governments must have an emergency plan in place to evacuate communities in the event of a release of hazardous chemicals into the environment. These governments, working with various industries, must also provide information to communities about the release of these chemicals.

The EPCRA further created the Toxics Release Inventory (TRI), a mandatory program whereby certain industries must report annually whether they are manufacturing, processing, or using certain hazardous chemicals (above certain levels) listed in the inventory. Currently, the TRI lists over 650 chemicals, says the EPA. But critics note that while the oil and gas industry uses many chemicals listed on the TRI, federal law does not specifically require that industry to comply with TRI reporting requirements on private lands. In addition, the U.S. Department of the Interior



noted that “there is no specific requirement for operators to disclose these chemicals [listed on the TRI] on federal and Indian lands.” As a result, critics such as the National Resources Defense Council

widely. For example, some states require companies to remove fracking fluid from storage sites frequently while others do not.

Also, while the federal government has proposed a single chemical

Currently, no single federal law comprehensively sets minimum national standards for (or oversees) the entire fracking process, say legal analysts. Instead, several existing federal laws regulate or have regulated specific aspects of fracking.

(NRDC) say that “companies are not required by any federal law to identify the chemicals they are injecting into the ground as part of fracking.”

In 2009, several members of Congress introduced a bill called the Fracturing Responsibility and Awareness of Chemicals Act (the FRAC Act, for short), which would require companies to disclose “the chemical constituents (but not the proprietary chemical formulas) used in their fracturing fluids” to state authorities and the public. Congress did not pass the FRAC Act, and political analysts say it is unlikely to do so in later sessions.

But in June 2012, the Interior Department proposed new rules that would require companies to disclose publicly the chemicals used in fracking operations specifically on public and Indian lands—noting that 90 percent of the 92,000 oil and natural gas wells drilled on these lands use fracking—but only *after* they complete their fracking operations. The new rules would also protect trade secrets for the composition of fracking fluid. The Interior Department had also issued updated draft rules in May 2013 that incorporated public comments. While various critics such as the NRDC say that the proposed rule is a step forward concerning chemical disclosures, they say that people need to know the chemical composition of fracking fluids *before* fracking operations begin so that they can trace the source of any contamination.

Fracking laws in the United States at the state level

While lawmakers and policymakers are debating whether and to what extent the federal government should regulate various aspects of fracking, “much of the regulatory heavy lifting is left to the states,” said law professor David Spence of the McCombs School of Business and the School of Law at the University of Texas. Indeed, observers say that individual states largely regulate fracking (such as drilling process itself) and related activities, including the disposal of fracking fluid, within their respective jurisdictions.

But many have criticized various state efforts in regulating and protecting the public from what they say are the risks posed by fracking.

Some, including Professor Jody Freeman of Harvard Law School, have described state fracking regulations as a “patchwork of rules and jurisdictions riddled with gaps and inconsistencies.” She points out that while the EPA can enforce federal rules on air and water pollution in fracking sites, that agency cannot regulate the drilling process itself.

Professor Spence says that while “every shale gas state imposes some limitations on the methods and storing and disposing of chemicals and liquid wastes” from fracking, these standards vary

disclosure requirement on fracking operations taking place on federal lands, current disclosure requirements vary widely on state and private lands, where most fracking takes place. In July 2012, the NRDC issued a report showing that of the 29 states with fracking operations, more than half (15) did not have any public disclosure rules at all, including California, Illinois, Kansas, Missouri, New York, Virginia, and Washington.

Of the remaining 14 states requiring the public disclosure of chemicals in fracking fluids, seven—including Colorado, Ohio, Pennsylvania, Texas, and Wyoming—say that the oil and gas industry must identify all chemicals. Others require the identification of only certain chemicals. Eight of the 14 states allow companies to withhold information that they claim are trade secrets, though some of them allow health care providers to see such information when they need to treat someone for possible exposure to certain chemicals. But many of these states don’t have a process in place to evaluate whether a company is actually protecting a trade secret or is simply hiding important information, said the NRDC report.

While the “current system of multiple state and federal regulators produces a confusing patchwork of rules,” this “regulatory complexity is the norm in the U.S.,” says Professor Spence. “Few, if any, industries are overseen by a single federal agency.” He also believes that individual states are getting better at regulating the risks involved in fracking operations. As a result, “neither industry nor the states are clamoring for a single federal permitting regime for the fracking industry,” he believes.

Given the uncertainties surrounding the effects of fracking on the environment, several states have prohibited that drilling technique (and related activities) or have imposed restrictions and moratoria on current fracking operations. But fracking supporters have repealed some of these measures. Below are recent examples.

- Starting in 2008, the Department of Environmental Conservation (DEC) in New York had stopped issuing new fracking permits until it had a chance to study further that drilling technique, noted observers. Over 50 counties had banned fracking operations, according to the FracTracker Alliance, a nonprofit group. Nearly 80 had imposed moratoria, and close to 70 were considering a ban or moratoria. In December 2010, then Governor David Paterson issued a statewide ban on high-volume fracking, but still allowed low-volume fracking, which uses less water. (Around 90 percent of New York’s natural gas wells used low-volume fracking, according to Environmental Advocates of New York, a watchdog group.) In December 2014, New York announced that it would ban fracking, citing what it called “significant public health risks.”

- In May 2012, Vermont became the first state to ban fracking. “This bill will ensure that we do not inject chemicals into groundwater in a desperate pursuit for energy,” said that state’s governor, Peter Shumlin, as he signed the bill. The law also prohibits people from importing and storing fracking wastewater.
- While New Jersey doesn’t have any fracking operations, that state’s governor, Chris Christie, in August 2011 vetoed a bill that would have permanently banned fracking. Instead, he

Fracking in other nations

The United States is not the only nation in the world with shale gas deposits. According to estimates from the U.S. Energy Information Administration, China may have up to 36 trillion cubic meters of technically recoverable shale gas reserves, making it the largest in the world. (The term “technically recoverable gas” means that the “technology exists to make extraction possible,” says the Natural Gas Supply Association.) The United States has the

While lawmakers and policymakers debate whether and to what extent the federal government should oversee various aspects of fracking, that process and its related activities are largely regulated by individual states within their respective jurisdictions, say observers.

issued a one-year moratorium so that the state’s Department of Environmental Protection would be able to study the issue further. The New Jersey legislature in June 2012 overwhelmingly passed a bill (called the Fracking Waste Ban Bill), which would have prohibited “the treatment, discharge, disposal, or storage” of fracking waste water. But the governor vetoed it.

- After the governor of North Carolina vetoed a bill that would allow fracking, the state legislature overrode it in July 2012.
- In a growing trend, many localities are restricting or banning fracking operations—even in states that widely allow fracking—by using a power called “home rule,” under which a local government may set certain ordinances, regulations, and zoning restrictions without permission from state or federal authorities. For example, in July 2012, a Pennsylvania appeals court (in *Robinson Township v. Commonwealth of Pennsylvania*) struck down part of a state law—known as Act 13—that barred local governments from setting more restrictions on the drilling of natural gas than those set by the state, reported the *New York Times*. The media also noted that dozens of towns in New York had enacted zoning restrictions to stop fracking, and that two state judges had upheld their authority to do so.

Industry guidelines for fracking in the United States

Along with federal, state, and local regulations, various organizations have adopted “best practices” for companies to follow when they use fracking. The American Petroleum Institute (API)—a national trade association representing the oil and gas industry in the United States—published voluntary guidelines for companies to follow when carrying out fracking activities.

For instance, a 2009 guideline on well construction recommends “actions to protect shallow groundwater aquifers while also enabling economically viable development of oil and natural gas resources.” A guidance released by API in 2010 identifies best practices on handling, treating, and disposing of wastewater and fluids used during fracking.

According to a 2011 guidance, API supports the disclosure of chemicals used in fracking, though it believes that “states are the proper authority to determine reporting requirements,” and that fracking is “effectively regulated by numerous federal, state, and local requirements.” It also says that companies should be able to protect the proprietary information of their fracking fluids.

second largest with 24 trillion cubic meters, Argentina third with 21.9 trillion cubic meters, South Africa fourth with 13.7 trillion cubic meters, and Australia fifth with 11.2 trillion cubic meters. Other nations with large amounts of technically recoverable shale gas reserves include Canada, Poland (the largest in Europe, says the U.S. Department of Energy), and France.

While all of these nations have substantial shale gas reserves, “the United States and Canada are the only major producers of commercially viable natural gas from shale formations in the world,” according to a June 2013 EIA report.

To recover the natural gas trapped within the shale rock, these nations are or had been carrying out fracking operations. But as news of the controversies surrounding this extraction method continues to spread across the world, several of them have restricted or prohibited the use of fracking in recent years. Nevertheless, economic and even geopolitical factors have pushed some governments to ease these restrictions or even reject outright any limits on fracking. Examples include the following nations.

France: In June 2011, citing its potentially adverse environmental effects, the then-ruling party and opposition lawmakers in France passed a law banning the use of fracking, making it the first nation in the world to do so. If a company uses fracking to explore and extract hydrocarbons, the government will revoke its energy exploration permit and could also impose fines and jail time, reported Bloomberg.

Still, analysts point out that the law does not prohibit companies from using other techniques to extract natural gas and oil from shale deposits in France, which has the second largest amount of recoverable shale gas in Europe, according to the U.S. Department of Energy.

In October 2013, France’s highest court, the Constitutional Council, dismissed a lawsuit filed by Texas-based Schuepbach Energy, which had argued that the law violated that nation’s constitution by unfairly singling out fracking, among other arguments. The Council ruled otherwise. Despite these apparent setbacks for fracking, French lawmakers are now questioning whether to continue the ban on fracking, says Minneapolis-based Public Radio International. Analysts also note that the law will create a national commission to study whether fracking can be carried out in an “environmentally safe manner.”

Still, nearly three-quarters of the French public oppose the exploration and production of unconventional sources of hydrocarbons, said the results of a poll released by the French daily *Le Monde* in September 2012.

Bulgaria: In January 2012, Bulgaria became the second nation in the world to ban the use of fracking. Its parliament had passed a law that prohibits fracking anywhere on its territory and coastal waters, reported *Bloomberg Businessweek*, and imposes a fine of up to \$65 million for violators. (According to estimates from its Ministry of Economy and Energy, Bulgaria has up to 300 billion cubic meters of shale gas.)

But in June 2012, Bulgaria eased its restrictions. The law currently allows companies to use fracking when test-drilling for natural gas, said *TheJournal.ie*, an online publication. But once they find the natural gas, the companies cannot use fracking to extract it.

The United Kingdom: The United Kingdom is not yet producing natural gas extracted from shale rock on a commercial basis. Instead, companies in that nation are still in the exploration stage of drilling and testing shale rock for natural gas. “Exploration for shale gas in the UK is still at a very early stage,” said the government, noting that “none of the wells drilled has been production tested.” Still, the UK’s Prime Minister claimed that “there’s about 1,300 trillion cubic feet of shale gas lying underneath Britain,” and that extracting one-tenth of it would provide the nation with more than a half century of gas supplies.

The UK does have regulations that oversee the drilling of both conventional and unconventional sources of natural gas. (Unconventional sources include shale rock.) Before a company drills a well, it must receive permission from a local planning authority and also from the national government’s Environmental Agency. That agency could require the well operator to carry out an environmental impact assessment to ensure that the drilling will not substantially affect the environment and drinking water supplies. It must also disclose the content of any fracking fluids used during the drilling process. Even after receiving permission to drill, the company must show the government that it has plans to address major accidents during its drilling operations.

In May 2011, the government imposed a nationwide moratorium on all exploratory drilling using fracking after two small earthquakes shook the area of Blackpool in northwestern England, where a company called Cuadrilla Resources was fracking exploratory wells, reported the *New York Times*. A company report concluded that its use of fracking had probably caused the tremors.

In December 2012, the government lifted the moratorium, concluding that the “seismic risks associated with fracking can be managed effectively with controls.” It also announced the creation of the Office of Unconventional Gas and Oil to oversee the extraction of these natural resources.

In a separate development, an independent report from the Royal Society and the Academy of Engineering (published in June 2012) concluded that the “risks associated with hydraulic fracturing . . . could be managed effectively in the UK.” It said, for example, that the UK can manage the health and environmental risks of fracking only by implementing and enforcing “strong regulation.” The report also concluded that fracking was unlikely to contaminate aquifers if it took place substantially below them. At the same time, it said that the government and companies must monitor shale gas operations before, during, and after extraction

and require them to undergo a mandatory environmental risk assessment.

Even with these developments, much of the public remains opposed to the use of fracking. According to results of a European Commission survey released in October 2013, around 60 percent of respondents in the United Kingdom opposed the development of unconventional fossil fuels.

Poland: According to the Polish Geological Institute, Poland has the largest reserves of shale gas in Europe with estimates between 346 billion and 768 billion cubic meters, which could provide that nation with supplies lasting between two and five decades. In contrast to nations such as Bulgaria and France, which have specifically restricted the use of fracking to extract natural gas from shale (see previous sections), Poland allows this technique.

Analysts note that Poland currently imports two-thirds of its natural gas supply, with much of it coming from Russia at prices that are four or five times higher than those in the United States, said the Polish Ministry of Foreign Affairs. As a way to reduce its dependence on Russian natural gas, Poland is trying to develop its own domestic supply from both conventional and unconventional sources.

Currently, Poland is not producing shale gas on a commercial basis, say experts. But the government has issued over 100 licenses to over 20 domestic and foreign energy companies that are now drilling and testing close to 50 exploratory wells to see if they will be commercially viable, reports *Russia Today*, a Russia-based English language news network.

To encourage the development of its shale gas industry, the government is currently amending those regulations—such as the Geological and Mining Law—which oversee the extraction



process, taxation, and distribution of hydrocarbons. “Poland at present lacks regulations which would apply to the development of unconventional resources such as shale gas,” said Natural Gas Europe, a news service that studies natural gas development in Europe.

Under several draft amendments, companies will bid for the right to explore and extract hydrocarbons through what is called a tender process, according to a 2012 report by accounting firm Ernst & Young. (Under the Geological and Mining Law, the Polish government owns natural resources, including shale gas reserves, found within areas of land that are deemed nonessential

and Marathon Oil Corporation in Houston—had pulled out of Poland in 2013 because they did not find commercial levels of shale gas. In 2012, ExxonMobil had stopped its shale gas operations in that nation. Others say that because the government had already delayed the introduction of its proposed hydrocarbon amendments several times and is still in the process of amending them, foreign energy companies are reluctant to invest their resources in Poland.

China: The U.S. Energy Information Administration says that China is the second largest economy in the world (after the United States) and the largest consumer of energy. That nation currently

As news of the controversies surrounding fracking continue to spread across the world, several nations have restricted or banned the use of that drilling technique. But economic and even geopolitical factors have pushed other governments to ease restrictions or even reject outright any limits on fracking.

to the land itself, according to attorney Wojciech Bagiński. As a way of illustration, while the government doesn’t own, say, mineral deposits close to the surface of private lands, which their owners could extract easily, Bagiński says that because shale gas deposits are located so deep in the ground, Polish law doesn’t consider them as the property of the person who owns the land directly above them.) In July 2013, the European Court of Justice ruled that Poland had violated a law—called the Hydrocarbon Directive—which calls on most European nations to grant hydrocarbon exploration and production rights using a tender process based on “objective, non-discriminatory criteria.”

Even after a company wins a bid in Poland, it must then carry out an environmental assessment and also obtain various construction and waste management permits. In March 2012, the Polish Geological Institute released a report claiming that the use of fracking at one test drill site did not harm the environment. “Soil, air, water—the studies show that all these elements of the environment are safe if exploration of shale gas is conducted in accordance with legal regulations,” said the report. But critics said to the Associated Press that alleged “cases of leakage and water contamination in the U.S. show that this is not a safe technology.” Still, the European Commission released a survey in October 2013 showing that that nearly 60 percent of Poland supports the development of unconventional fossil fuels such as shale gas (in contrast to the 60 percent of UK respondents, who are opposed to the development of such fuels).

Under other draft amendments, Poland will tax the gross profits from oil and gas exploration at a proposed 40 percent rate starting in the year 2020. In an interview with the Associated Press, an official said that the government will adopt the new regulations in 2013 and that they will take effect in 2015.

The government says that commercial shale gas production itself will begin in 2014 and that over 300 shale gas wells will be in operation by 2021, reported Bloomberg. But others are wary of these optimistic projections. They point out that two major energy companies—Canada-based Talisman Energy

imports more than half of its oil, and it consumes half of the world’s coal, which supplies 70 percent of its energy. Various estimates say that China has between 25 and 36 trillion cubic meters of technically recoverable shale gas reserves, the largest in the world today compared to the United States, which has the second largest at 24 trillion. While all sources of natural gas currently make up less than 4 percent of China’s total energy consumption, the EIA says that the Chinese government has already decided to increase the use of that fuel to meet its rising energy demands. For instance, in March 2012, the government published a five-year plan that calls on China to extract 6.5 billion cubic meters of shale natural gas by the year 2015, and 100 billion cubic meters by 2020.

But as in the case of nearly every other nation in the world, China is not yet producing shale gas on a commercial basis. Production is currently negligible, according to the *Wall Street Journal*. Analysts at law firm Sidley Austin describe China’s shale gas industry as “still in its infancy.” As of 2013, China has drilled 150 shale gas wells, far behind the 400,000 in the United States, said the *Independent*, a British news daily. Reuters added that China will need to drill 1,800 wells to reach its 2015 shale gas extraction target.

Experts say that China faces many hurdles in extracting shale gas. For example, they cite many technical challenges, pointing out that domestic Chinese energy companies don’t have sufficient experience in fracking operations or have access to fracking technologies to extract shale gas. In addition, “many of the Chinese shale formations have a high clay content . . . which makes them more pliable and less apt to fracture,” said an expert at Lawrence Livermore National Laboratory in an interview with *Scientific American* magazine. Furthermore, some of the most promising areas for fracking are located in “the nation’s most seismically active province,” reported Bloomberg. Moreover, others note that shale gas extraction using fracking requires enormous amounts of water, and that China may not be able to carry it out efficiently because many shale gas reserves are located in mountainous areas where water is scarce.

Despite these challenges, China is still moving forward with its plans for shale gas production. In May 2010, China carried out its first fracking exercise, reported the *Financial Times*. In partnership with oil company BP, a Chinese energy company called Sinopec began using American technology to frack a shale gas well.

In June 2011, the Ministry of Land and Natural Resources carried out China's first tender offer for shale gas exploration licenses when it invited six Chinese energy companies (all state-owned) to bid for the right to explore for shale gas in four blocks of territories in the southern part of that nation, reported Reuters. China did not allow Sino-foreign joint ventures or foreign companies to submit bids on their own. But the government did allow foreign companies to partner with the two winning Chinese firms, Sinopec and Henan Coal-Bed Methane Co., reported *Oil & Gas Journal*.

During a second round of bidding for shale gas licenses in September 2012, the government allowed Chinese-controlled foreign joint ventures to submit bids, but still did not allow foreign companies to do so on their own, said the *Financial Times*. Unlike the small response during the first tender, the second attracted over 70 domestic companies, with China awarding exploration licenses to 16 firms. But Reuters noted that "not one of the 16 firms . . . [had] ever drilled a gas well."

Over the past several years, China has also been laying the legal groundwork to promote the investment, development, and production of shale gas. For instance, in December 2011, it updated its *Catalogue for the Guidance of Foreign Investment Industries*, a document that describes whether and how a foreign company may invest in specific industries in China. The Catalogue places these industries in certain categories—such as "encouraged," "restricted," and "prohibited"—as a way to direct foreign investment, according to the Congressional-Executive Commission on China, a group created by the U.S. Congress to monitor human rights and the rule of law in China.

The government may, for example, prohibit foreign companies from investing in a certain sector (such as rare earth metals) while encouraging it in another (including vaccine production) under certain conditions such as partnering with a Chinese company. When the Catalogue places a particular industry in the category of "Encouraged Foreign Investment Industries," the government will provide foreign investors with certain tax benefits and other incentives. These investors will also face fewer administrative requirements, said law firm Vinson & Elkins.

For the first time, the Catalogue (in a revised version released in December 2011) addresses foreign investment specifically in the area of unconventional natural gas resources, including shale gas, by placing it in the "encouraged" category, though it says that such investment must be carried out as equity joint or contractual joint ventures with a Chinese partner. But Vinson & Elkins says that the Catalogue does not make clear whether foreign investors may hold majority ownership in a shale gas operation or whether they may bid directly for shale gas licenses.

Also in December 2011, the Ministry of Land and Natural Resources changed the legal classification of shale gas to "independent mining resources" from "a natural resource," reported Reuters. Doing so will allow smaller Chinese energy companies to develop that unconventional energy resource. Under the previous

designation, only companies with special approval from the government were able to explore and produce oil and natural gas in China, said Vinson & Elkins. It also noted that the change in the legal status of shale gas will allow foreign companies to partner with Chinese oil and gas companies that are not owned by the state.

In October 2013, the National Energy Administration in China issued broad guidelines, suggestions, and recommendations (known as the *Shale Gas Industrial Policy*, a nonbinding document issued only in Chinese), which it believes will help develop the shale gas industry in China. According to various analysts, they include the following points.

- Companies that want to explore and produce shale gas resources should be "financially sound, have well-established accounting procedures, and be legal entities capable of independently assuming civil liabilities," said Beijing-based law firm King & Wood Mallesons. They should also have qualified personnel to carry out the construction and management of shale gas resources.
- The development of shale gas should be open to all investors with prices for shale gas set by the market rather than the government. ("China's natural gas prices . . . are regulated and generally well below international market rates," said the U.S. Energy Information Administration.)
- The policy also says that central and local governments should give more direct financial support (in the form of subsidies) to shale gas exploration companies.
- The policy recommends "stronger enforcement of environmental regulations, a ban on direct emissions of waste gas, more efficient use of water and energy, and timely rehabilitation of land," said King & Wood Mallesons. The policy adds that shale gas "shouldn't be developed at the cost of the environment," and that the government should ban shale development in areas with nature reserves, scenic spots, and drinking water reserves, according to China's official news agency Xinhua.

While analysts welcome this policy, they question whether its broad recommendations will help develop China's shale gas industry. "Until the details behind the policies become known, the policies are unlikely to have a transformative effect on shale gas development in China," said Sidley Austin.

Fracking: International law and voluntary guidelines

Previous sections describe how individual nations are addressing fracking. While many are still developing their fracking laws, others have more established policies and rules in place, though their details differ (in many cases, substantially) at the local and national levels.

How does international law address the use of fracking? Is there a single global standard? Currently, no treaty establishes comprehensive standards on the entire fracking process for all nations to follow. In fact, no treaty even sets a single standard on every aspect of the exploration and extraction of oil and gas. (On the other hand, several existing multilateral treaties do regulate how nations must address oil pollution in oceans and how to establish civil liability for damages caused by such pollution.) Analysts generally say that every nation relies on its own domestic laws to oversee various aspects of hydrocarbon exploration and drilling, including fracking.

Also, when a nation usually signs contracts with oil and gas companies for them to explore and drill for hydrocarbons, bilateral investment treaties signed between the host nation and the nation where the companies are based generally oversee the execution of these contracts.

In place of a single global treaty, nations are considering whether to regulate fracking in cooperation with a select number of other countries. But no nations have moved forward on any plans except for those belonging to the European Union (EU), though they have done so slowly. Others note that a global organization has created voluntary principles for nations to follow when they carry out fracking.

European Union: The EU is an economic and political union of 28 nations (all in Europe) that coordinate their policies and have set minimum legal standards in certain areas (such as environmental protection, trade matters, and agriculture, among many others), which individual countries must implement in their respective jurisdictions. To regulate the exploration and production of hydrocarbons in Europe, the EU created a legal framework for that industrial sector by passing what are called directives. Each directive calls on all member states to pass their own domestic laws, which

connection between shale gas and shale oil extraction and human or animal health,” and that no reputable sources have shown any cases where “hydraulic fracturing has led to contamination of drinking water.” It also describes that drilling technique as an “extremely seasoned and tested technology.”

But as the controversies surrounding the use of fracking have grown in recent years, the EU is now in the process of deciding whether (and to what extent) it should regulate fracking throughout Europe even though it said earlier that existing directives “satisfactorily [govern] all aspects” of the extraction and production of unconventional fossil fuels. Analysts say that governments are under pressure from private-sector companies and various domestic lobbies to allow them to drill for shale gas as a way to reduce their energy dependence on other nations, reduce fuel prices, and create jobs. At the same time, governments are under pressure to protect human health and the environment from fracking activities whose long-term effects are not well-known. So what courses of action has the EU taken in recent years?

European Parliament resolution: In November 2012, the European Parliament—the EU’s legislative body—rejected a measure (by a 391-262 vote) that called on EU member nations to

No international treaty establishes comprehensive standards on the entire fracking process for all nations to follow. In fact, no treaty even sets a single standard on every aspect of the exploration and extraction of oil and gas. Instead, every nation relies largely on its own domestic laws to oversee various aspects of hydrocarbon exploration and drilling, including fracking.

establish minimum standards on certain practices in their respective energy sectors.

Currently, no single directive specifically regulates the extraction and production of unconventional fossil fuels (such as shale oil and gas) across Europe. Rather, the European Commission (the EU’s executive body) said in 2012 that eight existing directives—such as the Mining Waste Directive (2006/21/EC) and the Water Framework Directive (2000/60/EC)—“satisfactorily [govern] all aspects” of their extraction.

Also, no single directive regulates every aspect of the use of fracking such as disclosing the chemical composition of fracking fluids to the handling of waste fluids to the monitoring of seismic activities. Instead, each EU nation has taken a different approach to fracking. As discussed in previous sections, some are encouraging its use while others prohibit it. But even those EU nations that allow fracking are still in the process of establishing and implementing regulations to oversee that drilling technique. In interviews with several media outlets, many companies have said that these varying regulations and standards across Europe concerning fracking have created legal uncertainty for their shale gas operations, and that they would hold back their shale gas investments until regulations become clearer.

How do various EU institutions view fracking? For one, the European Commission said in September 2012 that “no official or other reputable sources have demonstrated any systematic

prohibit new fracking operations. At the same time, it did not say that Europe should allow fracking without any restrictions. Instead, the European Parliament also passed a nonbinding resolution (A7-0283/2012) that discusses the “environmental impacts of shale gas and shale oil extraction activities” and provides many recommendations concerning those activities.

The resolution states, for instance, that every EU member nation has the “exclusive prerogative to exploit their [shale] energy resources.” But it also warns (in an explanatory note) that “no human activity can be wholly risk-free,” pointing out that even the European Commission is carrying out a “series of studies” to determine “whether the current regulatory framework of EU legislation provides an adequate guarantee against the risks to the environment and human health resulting from shale gas activities.” The resolution also notes that “there is insufficient data on fracturing chemicals and environmental and health risks associated with hydraulic fracturing.”

To address these risks, the resolution says that all EU member states should create “a robust regulatory framework” that protects the environment through “proper planning, testing, use of new and best available technologies, . . . [and] monitoring and reporting,” among other measures. While it doesn’t discuss proposals with any level of detail, the resolution broadly says that the EU should carry out “scientific studies regarding the long-term impact on human health of fracking-related air pollution

and water contamination,” impose a blanket ban on fracking in “certain sensitive and particularly endangered areas,” and require shale gas operators to disclose the composition and concentration of their fracking fluids.

EIA Directive: In October 2013, the EU began to take more concrete steps towards addressing the possible environmental risks of fracking. Under an existing European-wide law called the Environmental Impact Assessment Directive (EIA Directive – 85/337/EEC), all EU member states must require private companies and even their own governments to carry out an environmental review of projects (such as the construction of a new factory, road, airport, or waste disposal facility, among others) before their actual construction, according to the European Commission. These reviews provide a “thorough and detailed survey of the aspects of the environment that are likely to be significantly affected by the relevant activity,” says Houston-based law firm Bracewell & Giuliani LLP.

Annex I of the EIA Directive lists all projects which require a mandatory environmental assessment, a process which can be expensive and could last several years, say some critics. In the specific area of commercial natural gas operations, Annex I (in Paragraph 14) requires a company to carry out an assessment if it extracts more than 500,000 cubic meters of gas per day. For operations which extract less than that amount, governments have the discretion of whether to require an assessment, say analysts.

Because of rising public concerns over the environmental effects of fracking, several members of the European Parliament began an effort to amend Annex I so that EU nations would have to assess all fracking operations. In October 2013, the European Parliament (in a 332-311 vote) amended Annex I so that it would require a mandatory environmental assessment for the fracking of oil and natural gas trapped in shale or similar rock formations “regardless of the amount extracted.” The rules won’t apply to shale gas operations which don’t use fracking. They also won’t set any new standards on drilling operations, drinking water protection, or the storage and treatment of waste fluids.

Once the governments of the EU member states reach an agreement on the final rules (which will only apply to shale gas operations specifically using fracking), the parliament will then take another vote, reported the *New York Times*. Analysts, such as those at law firm Bracewell & Giuliani, are not sure when the Parliament will vote on the final text of the amendment to the EIA Directive. They also point out that another body called the Council of the European Union must approve the amended directive before it comes into force, but that “there is currently no fixed timeframe for the Council to consider and vote on the amendment.”

A new framework for unconventional fuels: In November 2013, an unnamed EU official—in an interview with the *European Voice*, a weekly publication specializing in EU policies—said that the European Commission would create what he called an “enabling framework” for the regulation of unconventional fuels at a later date. (“Many issues regarding shale gas are unaddressed in existing EU law,” he said. “A consistent application of EU law is needed.”) But the exact form of that framework and the range of issues which it will address are not clear. Still, the official told the *European Voice* that “options included generalized guidance, amending existing laws, or enacting shale-gas-specific legislation.”

The Golden Rules: Along with efforts by the European Union in trying to standardize specific aspects of fracking, the International Energy Agency (IEA)—a 28-nation organization that provides its members with “research and analysis on ways to ensure reliable, affordable, and clean energy”—released a report in May 2012 listing voluntary principles and recommendations (dubbed the “Golden Rules”) that governments and private companies should follow when regulating, extracting, and building public support for unconventional natural gas.


For example, in the area of gas wells, the Golden Rules call on governments to establish “robust rules on well design, construction, cementing, and integrity testing.” They also say that a nation should set minimum depth requirements for fracking so that it takes place away from water sources. The rules further call on nations and the private sector to prevent and contain wastewater spills and to dispose of them properly.

In the area of drilling, the Golden Rules say that companies should drill gas wells in areas that will “minimize impacts” to the heritage, livelihood, and ecology of local communities. They should also assess the risk of earthquakes in a particular area before fracking.

When using water during the course of fracking, the Golden Rules say that companies should recycle and reuse water “to reduce the burden on local water resources,” and also minimize the use of chemicals in fracking fluids by finding “more environmentally benign alternatives.”

To build public support, the Golden Rules recommend that local communities and residents should have “sufficient opportunity” to comment on unconventional gas operations and the use of fracking. In addition, they say that companies should fully disclose the chemicals in fracking fluids. Furthermore, governments should oversee the development of unconventional gas with “robust regulatory regimes,” and that officials should “pursue continuous improvement of regulations and operating practices.” According to an IEA press release, “if the social and environmental impacts are not addressed properly, there is a very real possibility that public opposition to drilling for shale gas and other types of unconventional gas will halt the unconventional gas revolution in its tracks.”

While the Golden Rules list over 20 voluntary principles and recommendations, they don’t provide any details or specific standards for them. Also, they are not legally binding on any nation or company.

When governments and companies adhere to the Golden Rules, the IEA estimates that doing so will increase the financial cost of a shale gas well by 7 percent. At the same time, it says that the Golden Rules will help build public support for the exploration and use of unconventional natural gas which, in turn, will increase the share of natural gas to 35 percent of the world’s total energy use by 2035, second only to oil, according to IEA estimates. If, on the other hand, nations and companies don’t follow the Golden Rules and, instead, try to block regulations on unconventional natural gas (such as those that reveal the chemical composition of fracking fluid), doing so could be more costly because the public will oppose the drilling of that energy source. Said reporter Brad Plummer of the *Washington Post*: “Unrestrained fracking could lead to mass opposition that limits new gas development altogether.” 

Insulting religions: Allowed or prohibited under international law?



People of different faiths have long come together to cooperate and find common ground on important matters. At the same time, others have long used religion in ways that lead to conflict and strife. Even in contemporary times, adherents of different religions—and those who don't practice any religion—criticize, insult, and mock the faiths of other believers.

Several years ago, Muslims around the world held protests against a YouTube video and also several illustrations published by European media outlets that they said insulted Islam and its prophet Muhammad. They called on all nations to prohibit people from insulting religions. A terrorist attack on one of these outlets in January 2015 killed 12 people.

In response, many argued that criticizing and insulting a religion—no matter how distasteful—is part of public discourse protected by the right to freedom of expression. Still, others say that this right is not absolute and that nations should prohibit insults aimed specifically at religions.

How does international law regulate freedom of expression? Does it place limits on this particular right? How are people using international law to argue their respective positions in this debate on insulting religions?

Religion: A target for insults

Every year, news stories describe many instances when people of different religious faiths—and even those within the same faith but who are members of different denominations—strongly criticize and insult each other on matters of theology and over a wide variety of issues. Doing so has often led to hostility and also violence. To address such conflicts, many say that nations should pass laws that prohibit people from criticizing, insulting, and denigrating religions. (In fact, such laws have long existed in many countries, including some of the world's leading democracies.) These laws, say their supporters, will help to maintain civility in an era when people hold many different and conflicting beliefs.

Others acknowledge that criticizing and insulting religions usually inflame passions and often lead to violence. But they say that allowing such discussions to take place—no matter

how heated—is an important part of freedom of speech and expression. This particular right helps society weigh the strengths and weaknesses of various arguments, allows people to get more information and stay better informed, and prevents governments from stifling dissent on important matters of public policy, say free speech advocates. So passing laws that prohibit people from criticizing or mocking religions may stifle legitimate debate.

Media stories from recent years show that arguments over religion still lead to instances of violence. While most of them have gone unnoticed, certain ones in the past few years concerning Islam have attracted worldwide attention. They include the following stories.

Innocence of the Muslims (United States): Nakoula Basseley Nakoula—an Egyptian-born American citizen who is also a Coptic Christian—made an independent film called *Innocence of the Muslims*, which had its premiere in California in July 2012 “in a run-down theater on a seedy stretch of Hollywood Boulevard” to an audience of fewer than 10 people, according to reporting from the *Los Angeles Times*. It added that “the acting was amateurish, the dialogue clunky, and the costumes no better than those sold for Halloween.”

Nakoula, who used several aliases, including the name Sam Bacile, also made several trailers for his movie. One of the trailers was dubbed in Arabic, and parts of it were aired on *Al-Nas*, a popular Islamic television station in Egypt, in September 2012. BBC News said that the trailer depicts Islam as a religion of violence and hate, and its prophet Muhammad as a power hungry deviant who was a killer, looter, and extortionist.

Shortly after its airing in Egypt, violent protests against the film had spread across the Middle East, which hurt hundreds of people and killed many others. In an interview with National Public Radio, John Esposito—a professor at Georgetown University who specializes in religion, Islamic studies, and international affairs—explained that many Muslims saw this film as the “ultimate form of disrespect. It would be the ultimate blasphemy.” Muslims also protested in many European nations, the United States, and Canada, reported CNN.

During the worldwide protests, Ghulam Ahmad Bilour, then railways minister of Pakistan, offered a bounty for anyone who killed Nakoula, said Reuters. “I announce today that this blasphemer, this sinner who has spoken nonsense about the holy Prophet, anyone who murders him, I will reward him with \$100,000,” he said. The Pakistani government quickly denounced his remarks.

The actors of the film said that Nakoula had tricked them by claiming that he was making a historical adventure called “Desert Warrior.” In an interview with ABC News, Cindy Lee Garcia, an actress who appeared in the film, said that Nakoula had dubbed their lines with offensive remarks.

In September 2012, police arrested Nakoula, not because he had made a film that offended Muslims, but for probation violations stemming from a previous plea of no contest in 2010 to charges of bank fraud, the media reported. The *Los Angeles Times* said that some of these violations included lying to his probation officer and using aliases.” After Nakoula pleaded guilty to four probation violations, a court sentenced him to a year in prison.

Many believe that nations should pass laws that prohibit people from criticizing, insulting, and denigrating religions as a way to maintain civility. But others argue that allowing such discussions is an important part of freedom of speech and expression.

In Egypt, a court in September 2012 tried in absentia several individuals responsible for making the film, including Nakoula, the Associated Press reported. It found them guilty of “harming national unity, insulting and publicly attacking Islam, and spreading false information”—all of which are punishable by death. But all of the convicted individuals live outside of Egypt and are unlikely to be extradited to that nation.

While several Muslim nations called on the United States to ban the trailer, it did not do so. Free speech advocates point out that the United States protects controversial speech and expression. For example, its Constitution and laws allow people to burn the American flag as part of a protest and also to criticize and insult individuals, including the nation’s top leaders, according to several U.S. Supreme Court decisions. But this right is not absolute. People may not, for instance, defame others (i.e., make a false statement that harms someone’s reputation and exposes that person to public ridicule and contempt) or incite imminent violence.

Groups such as Human Rights First and the Muslim Public Affairs Counsel warned that attempts to combat religious bigotry by cracking down on freedom of speech and expression often lead to violence and more human rights violations against targeted individuals.

On the other hand, during a discussion on racist hate speech held by the U.N. Committee on the Elimination of Racial Discrimination, the Executive Director of Minority Rights Group International, Mark Lattimer, said that hate speech has been the precursor to the most serious crimes against humanity, including the genocides in Rwanda and during the Holocaust.

Jyllands-Posten (Denmark): Believing that media outlets were censoring themselves on topics concerning Islam because they feared the reactions of extremist Muslims, *Jyllands-Posten*—Denmark’s largest daily newspaper—had announced a plan to

promote freedom of speech and expression by asking several illustrators to draw their personal interpretations of Muhammad, claimed its cultural editor, Flemming Rose. “Modern, secular society is rejected by some Muslims,” he wrote in the newspaper. “They demand a special position, insisting on special consideration of their own religious feelings. It is incompatible with contemporary democracy and freedom of speech, where one must be ready to put up with insults, mockery, and ridicule.”

In September 2005, *Jyllands-Posten* printed 12 cartoons with Muhammad in various renditions. One illustration shows a solitary figure traveling in the desert. In another picture, an artist is simply drawing the Islamic prophet’s face on a piece of paper. But others were more provocative. Muhammad’s turban is actually a bomb with a burning fuse in one cartoon, and another shows the prophet turning away suicide bombers arriving in heaven by saying, “Stop, stop, we have run out of virgins!”

After *Jyllands-Posten* had published the cartoons, several groups in October 2005 filed a complaint with the police against that

newspaper. Even though Denmark protects freedom of speech in its constitution, the complaint said that by printing the cartoons, the daily had violated section 170 of the Denmark’s criminal code, which states that “any person, who, in public, ridicules or insults the dogmas of worship of any lawfully existing religious community in Denmark shall be liable to imprisonment for any term not exceeding four months.” It also said that *Jyllands-Posten* had violated section 266b, which “criminalizes the dissemination of statements or other information by which a group of people are threatened, insulted or degraded on account of e.g. their religion.”

In January 2006, the Regional Public Prosecutor in Viborg concluded that the newspaper did not violate either section of the criminal code. When assessing whether a violation had occurred, the public prosecutor said that he also had to uphold other rights, such as those protecting freedom of speech and expression. The prosecutor determined that the cartoons, while insulting, were a subject of public interest. Therefore, their publication did not violate the criminal code. Later that month, violent protests against the cartoons in several Muslim nations led to the deaths of hundreds of people and attacks on European and other Western embassies, reported the media.

Charlie Hebdo (France): In February 2006, Paris-based satirical magazine *Charlie Hebdo* (or *Charlie Weekly* in English)—a publication known for mocking right-wing politics, Catholicism, Islam, and Judaism, among other targets—published a front-cover cartoon to criticize extremist Muslims who use religion to justify violent acts. Under the headline “Muhammad overwhelmed by fundamentalists,” a weeping cartoon of Muhammad says, “It’s hard to be loved by idiots.” Along with this cartoon, the magazine had reprinted the two provocative illustrations from *Jyllands-Posten* as described in the previous section.

In response, several Muslim groups filed a lawsuit against *Charlie*

Hebdo. While France protects freedom of speech and expression, the groups pointed out that the law—specifically, the Law on the Freedom of the Press of 29 July 1881—sets certain limits on this right. By printing the three cartoons, the magazine had violated that law, which prohibits insults and defamation when they target “a person or group of people because of their origin or membership of an ethnic, national, religious or racial group, their gender, sexual orientation or physical disability,” said the lawsuit.

According to Lyombe Eko, a professor at the School of Journalism & Mass Communication at the University of Iowa, the High Court of Paris ruled that the publication of the three cartoons was neither insulting nor defamatory because *Charlie Hebdo* had directed the illustrations at “Islamic fundamentalists and extremists, and not at all Muslims on account of their religion.” The court added that while the pictures were shocking, they were still part of a “public debate of general interest born of the excesses of Muslims who commit criminal acts in the name of this religion [i.e., Islam] and claim that it could govern the political sphere.” This decision was later affirmed by the Paris Court of Appeals, which said that because the cartoons were “clearly directed at a fraction of Muslims and not the whole Muslim community,” they did not “amount to direct and personal public insults directed at a group of persons on account of their religion.”

Many years later, in September 2012, soon after the start of protests in Muslim nations over the trailers for *Innocence of the Muslim* (see previous section), the magazine once again published cartoons that Muslims say insulted Muhammad. One cartoon—titled “Muhammad: A Star is Born”—shows the naked buttocks and testicles of the Islamic prophet. A second cartoon—with the caption “Riots in Arab countries after photos of Mrs. Muhammad are published”—shows a topless depiction of the prophet’s wife.

In an interview with various media outlets, Gérard Biard, the editor of the magazine, said that the purpose of printing the cartoons was to denounce the violence sparked by the YouTube video. But in a radio interview, the French foreign minister said: “In the present context, given this absurd [YouTube] video that has been aired, strong emotions have been awakened in many Muslim countries. Is it really sensible or intelligent to pour oil on the fire?” Shortly after the publication of the cartoons, the French government temporarily closed its embassies, consulates, and cultural centers in 20 nations, reported the *New York Times*.

In January 2015, two armed men, whom analysts say were French-born Muslim extremists, stormed the offices of *Charlie Hebdo* and

killed 12 people, including a top editor (who was on Al Qaeda’s “Wanted: Dead Or Alive” list), several cartoonists, and two police officers. In a video footage of their getaway, they yelled: “We have avenged the Prophet Muhammad! We have killed *Charlie Hebdo*!”

Insulting religions and international law

Many nations have their own domestic laws that protect the right to freedom of expression. Still, they also limit that right in certain cases. But how does international law oversee and regulate freedom of expression? How would it address situations such as those described in the previous sections? Does international law also impose certain limits on this right? Below are some treaties and their provisions concerning freedom of expression.

Universal Declaration of Human Rights: Approved by the United Nations in 1948, the Declaration calls on nations to recognize and respect a wide variety of human rights for “all peoples” such as the right to life and liberty, equal protection of the laws, and freedom from slavery, discrimination, arbitrary arrest, and detention, among many others.

Regarding freedom of expression, Article 19 of the Declaration says, in part, that “everyone has the right to freedom of opinion and expression . . .” However, it does not give more details on how nations must implement and protect this particular right (or any other rights in its text for that matter) or whether they must place any limits on it.

Legal experts also say that the Declaration is not an international treaty. They point out that, as a general matter, declarations issued by the United Nations (such as the Universal Declaration) are mostly aspirational statements on how nations should address certain issues that are not specifically covered by a formal international treaty or agreement, and that they don’t have the force of law. But in the following decades, the U.N. adopted several legally-binding treaties that require nations to recognize and protect specific rights found in the Declaration.

International Covenant on Civil and Political Rights: This 1966 treaty (known by its acronym ICCPR) specifically calls on its more than 140 signatory nations to pass domestic measures that recognize and protect fundamental civil and political rights, including the right to life, freedom of association, and the right to a fair trial. (Unlike the Universal Declaration, the ICCPR is an enforceable international treaty.) The U.N. Human Rights Committee—a group comprised of independent experts—monitors the implementation of the ICCPR by its signatory nations, and also issues authoritative interpretations (called “general comments”) of specific treaty provisions.

Just like Article 19 of the Declaration, Article 19 of the ICCPR addresses freedom of expression. Specifically, Article 19(2) says that “everyone shall have the right to freedom of expression . . .”

But freedom of expression is not absolute under the ICCPR. Article 19(3) says that this right “carries with it special duties and responsibilities,” and that a government may place restrictions on freedom of expression for only two reasons—to protect the rights or reputations of others and to protect national security, public order, public health, and morals. But before a government actually does so, the proposed restriction must meet a two-part test:

- First, an existing domestic law (and not a custom or a political declaration) must authorize a government to impose the restriction.
- Second, the restriction must be necessary. In other words, a government must show that the only way to protect, say, a person’s



reputation or public order is to restrict freedom of expression, and that no other means exist. This implies that if a government is able to protect a person's reputation or public order using other ways that don't restrict the right to freedom of expression, it must use those ways first.

While Article 19(3) of the ICCPR says that a government may restrict freedom of expression (for only two specific reasons) by using a two-part test, Article 20(2) actually calls on nations to prohibit one specific form of expression. It says: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law." That is to say, a government must prohibit expression that advocates national, racial, or religious hatred if it encourages or urges people to express hostility toward or discriminate or inflict violence against others. (Legal experts say that Article 20(2) is referring to "hate speech" even though it does not specifically use that term in its text.) The ICCPR doesn't define the word "hatred" or give any other details for Article 20(2).

Does international law protect or prohibit religious insults?

Does the ICCPR give people a right to insult religions by making videos such as *Innocence of the Muslims* and printing illustrations such as those in *Charlie Hebdo* magazine and the *Jyllands-Posten*? Or does it prohibit them from doing so?

The ICCPR prohibits religious insults: Citing several reasons, many believe that the ICCPR does call on nations to prohibit people from insulting religions.

First, they argue that Article 19(3) allows governments to restrict freedom of expression as a way to protect the rights or reputations of others, which, in their view, include entire religious faiths. "There should be limits for the freedom of expression, especially if such freedom blasphemes the beliefs of nations and defames their figures," said President Abd Rabbo Mansour Hadi of Yemen at the U.N. General Assembly in September 2012.

Analysts note that many Muslim nations already have laws that prohibit people from defaming and disrespecting Islam. The Pakistan Penal Code, for instance, contains provisions in Section XV that prohibit people from defiling places of worship, using derogatory remarks against the prophet Muhammad, and creating outrage through the use of insults, among other restrictions.

The Organization of Islamic Cooperation (OIC)—an intergovernmental organization of 57 states whose mission is to protect the interests of Muslims—points out that many non-Islamic nations protect religions (such as Judaism) and the rights of different classes of people, such as women and minority groups. It cited, for example, laws "in Europe and other countries that impose curbs on anti-Semitic speech, Holocaust denial, or racial slurs." In the same way, the world community should—under Article 19(3)—also protect the rights and reputation of Islam from what it considers to be Islamophobic expression, argues the OIC.

The foreign minister of Malaysia, Anifah Aman, also emphasized this point in a speech to the U.N. General Assembly in September 2012. "When we discriminate against gender, it is called sexism. When African-Americans are criticized and vilified, it is called racism. When the same is done to the Jews, people call it anti-Semitism. But why is it when Muslims are stigmatized and defamed, it is defended as 'freedom of expression'?" he asked.

In remarks to the U.N. Human Right Council, the ambassador to Pakistan noted that because many European nations already

have restrictions on anti-Semitic speech and Holocaust denial, "Islamophobia [also] has to be treated in law and practice equal to the treatment given to anti-Semitism," and that "not to do so would be a clear example of double standards."

William Saletan, the national correspondent for *Slate* magazine, wrote: "Islamic governments . . . are demanding to know why insulting the Prophet Muhammad is free speech but vilifying Jews and denying the Holocaust isn't. And we don't have a good answer."

Others point out that since 1999, groups such as OIC have unsuccessfully called on the United Nations to pass resolutions that would require nations to prohibit people from specifically defaming religions.

Second, many note that under Article 19(3), a nation may restrict freedom of expression as a way to protect public order and public health. Referring to the violent protests that came after the release of the YouTube video and publication of the pictures in *Charlie Hebdo* magazine, then president Asif Ali Zardari of Pakistan said that "the international community . . . should criminalize such acts that destroy the peace of the world and endanger world security by misusing freedom of expression." According to Dr. Nabil Elaraby, Secretary General of a 22-member regional organization called the Arab League: "If the international community has criminalized bodily harm, it must just as well criminalize psychological and spiritual harm."

Third, those who believe that the ICCPR calls on nations to prohibit people from insulting religions say that the YouTube video and the French cartoons are, in their own opinions, a form of hate speech, which encourages people to carry out violence. Article 20(2) of the ICCPR, they point out, calls on nations to prohibit such speech if it incites people to carry out violence, hostility, or discrimination.

Pakistan claimed that the video clip was a "blatant attempt to provoke religious hatred, discrimination and intolerance that has led to unfortunate loss of life and damage to property." In a speech to the U.N. General Assembly, then Egyptian president Mohamed Morsi said: "Egypt respects freedom of expression. One that is not used to incite hatred against anyone, one that is not directed towards one specific religion or culture."

The Secretary General of the OIC, Ekmeleddin Ihsanouglu, said during an interview with the *Huffington Post* that "freedom of speech is one thing, but usage of your freedom should not be to offend others or advocate hate speech or provoke people to violence."

Some individuals outside of the Middle East also agreed that the YouTube video is a form of hate speech. "This film is purely and simply an incitement to religious hatred," wrote Andrew Brown, a reporter for the *Guardian*, a British daily, in a personal column. "It stokes hatred in both of its intended audiences—Christians and Jews in the US, and Muslims in the wider world."

The ICCPR does not prohibit religious insults: Many acknowledge that the YouTube video along with the Danish and French cartoons had provoked anger across the Islamic world and did nothing to promote interfaith dialogue or understanding. But they respond that the ICCPR does not, in their opinions, call on nations to prohibit people from insulting or defaming religions. What reasons do they give?

First, organizations such as Article 19 (a London-based group named after the free speech provision in the Universal

Declaration of Human Rights) argue that when Article 19(3) of the ICCPR allows nations to restrict freedom of expression as a way to protect the rights or reputations of others, such protections apply only to individuals and not to entire belief systems such as Islam. Specifically, it said that Article 19(3) “does not extend to the protection of religion or religious beliefs as such, but only to individuals and groups who would be targeted for their race, ethnicity, or religion.”

Analysts note that many Muslim nations had pushed the United Nations to pass resolutions that would require countries to prohibit defamation of religions, but that their efforts failed to gather broad global support. Instead, the United Nations passed a resolution in March 2011 that “[addresses] religious intolerance through promoting the related rights to freedom of expression, freedom of religion or belief, and non-discrimination.”

Second, many observers believe that prohibiting people from criticizing or disrespecting a religion—as in the cases of the YouTube clip and the Muhammad cartoons—would violate the principle of freedom of expression unless doing so encouraged people to express hostility towards or discriminate or inflict violence against others. “The cartoons criticize a religious idea . . . they may be considered

any proposed prohibition would still have to comply with the two-part test set out in Article 19(3) of the ICCPR.

Others believe that General Comment No. 34 would not only forbid a blanket prohibition on criticizing or disrespecting a religion, but that it would also probably ban laws that criminalize such expressions. Specifically, Paragraph 49 says: “Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the [ICCPR] imposes on States parties in relation to the respect for freedom of opinion and expression.”

Would Paragraph 49 apply to, say, Holocaust denial? In *Haaretz*, an English news daily in Israel, Natan Lerner, a professor at the Interdisciplinary Center in Herzliya, wrote: “Though the statement does not refer by name to the denial of the Holocaust, it seems quite obvious . . . that it is aimed at laws that exist in a large number of European states (and in Israel as well) prohibiting just that.”

Third, concerning the issue of hate speech, some say that—in their own assessments—the YouTube video and the Danish and French cartoons, while provocative, are not forms of religious hatred that specifically call on people to carry out violence against Muslims. For example, free speech group Article 19 said it did not

“When we discriminate against gender, it is called sexism. When African-Americans are criticized and vilified, it is called racism. When the same is done to the Jews, people call it anti-Semitism. But why is it when Muslims are stigmatized and defamed, it is defended as ‘freedom of expression’?”

– Anifah Aman, Foreign Minister of Malaysia

blasphemous, but banning speech based on criticism of ideas is incompatible with freedom of expression, even if they are firmly held religious ones,” said free speech group Article 19.


To back up this claim, they note that in September 2011, the U.N. Human Rights Committee—which again oversees the implementation of the ICCPR and issues interpretations of specific provisions called general comments—had issued General Comment No. 34, which gives nations much more detailed guidance on Article 19. The Open Society Justice Initiative described the comment as “an authoritative interpretation of the freedoms of opinion and expression guaranteed by Article 19.”

In the area of religion and freedom of expression, General Comment No. 34 determined (in Paragraph 48) that “prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible” with the ICCPR unless such displays constitute hate speech which incite people to carry out discrimination, hostility, or violence. The general comment adds that “it would be impermissible [not only] for any such laws [i.e., prohibitions] to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers,” but also impermissible “for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.”

Even if a nation decided to prohibit blasphemy and other forms of disrespect against a religion, General Comment No. 34 says that

believe that the publication of the French cartoons was an act of incitement because, in its opinion, *Charlie Hebdo* magazine’s intention was not to urge people to act violently against Muslims. “They surely aim to provoke a response and a heated debate,” said Article 19. “But that is not the same as calling on people to conduct violent acts. The person responsible for incitement in that case is the person who decides that they are going to react by urging violence. That person is acting illegally.”

During his speech at the annual gathering at the United Nations in 2012, U.S. president Barack Obama described the YouTube trailer as “crude and disgusting,” saying it was “an insult not only to Muslims, but to America as well.” But he also condemned the violent protests against the video, calling on all leaders to “speak out forcefully against violence and extremism,” while adding that “to be credible, those who condemn that slander must also condemn the hate we see in the images of Jesus Christ that are desecrated, or churches are destroyed, or the Holocaust that is denied.”

Responding to those who called on the United States to simply ban the film, President Obama said: “We [did] not do so because we support hateful speech, but because our founders understood that without such protections, the capacity of each individual to express their own views and practice their own faith may be threatened.” He added that “the strongest weapon against hateful speech is not repression; it is more speech—the voices of tolerance that rally against bigotry and blasphemy.” 

Quotas for women on corporate boards?

Concerned about the lack of women in the upper echelons of business, the member nations of the European Union (EU) are considering a draft law that will require corporate boardrooms across the continent to fill 40 percent of their seats with women by the end of the decade. Supporters say that this law will open more opportunities for women and correct gender imbalances on European corporate boards. Opponents, on the other hand, believe that imposing a quota will hurt the interests of women and may actually derail efforts by individual nations to include them in the management of top companies.

What are some of the major provisions of the proposed EU law? Will governments themselves fill the seats of corporate boards? Will the law apply to both public and private companies? Does the EU actually need a law to attain gender balance in corporate boardrooms? Why are opponents trying to stop the law? And what are the chances of its passage and implementation?

A glass ceiling in European boardrooms?

Women in Europe currently account for 56 percent of university graduates and 45 percent of the employed work force, but only 13.7 percent of board seats in the largest listed companies on that continent, according to a report—*Women in economic decision-making in the EU*—issued by the EU in 2012. Among individual European nations, the percentage of women sitting on corporate boards varies drastically, ranging from 42 percent in Norway to less than 10 percent in Ireland, 5 percent in Cyprus, and less than 3 percent in Malta. Despite an ever progressing and diverse workforce, “[g]ender imbalance on corporate boards remains an important challenge for all EU member States,” said the 2012 EU report.

Research carried out by the European Parliament found that a significant obstacle to increasing the number of women is “the current lack of transparency of the selection procedures and qualification criteria for board positions among most Member States.” Specifically, it said that the secrecy surrounding hiring practices “prevents potential candidates for board positions from applying to boards where their qualifications would be most required and from challenging gender-biased appointment decisions.”

Requirements under the proposed law

To increase the number of women on corporate boards, the EU in November 2012 proposed a law called the Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures (2012/0299).

To carry out the broad goals of any directive, the EU calls on its member nations to draft, pass, and then enforce their own domestic laws and regulations using their own legal systems and procedures. (The EU bureaucracy itself does not change or enforce the domestic laws of individual countries.) Under Directive 2012/0299, each EU nation must pass its own laws, which require companies listed on a stock exchange to increase the percentage of the “under-represented sex” (in the case of Europe, women) who serve as nonexecutive members on their corporate boards to around 40 percent.

The directive applies specifically to nonexecutive positions because those who fill them are responsible for selecting the executives who manage a company’s day-to-day activities. And having women in such positions could attract more women to fill



them in the future, say analysts. The directive also applies only to publicly listed (and not privately owned) companies “due to their economic importance and high visibility,” and also because they “set standards for the private sector at large,” said the EU proposal.

The preamble of the proposed directive (in Paragraph 24) says that the percentage of women who serve as nonexecutives members should be “the number closest to 40 percent.” (It doesn’t have to be exactly 40 percent.) The directive also gives numerical guidance

fill openings with its own candidates, for instance? The preamble says (in Paragraph 22) that EU member governments themselves will not impose or exclude certain directors. Instead, “the decision on the appropriate board members . . . remains with the companies and shareholders” who must, under Article 4(1), adopt “pre-established, clear, neutrally formulated and unambiguous [hiring] criteria” for those positions. That way, prospective applicants for board openings will know whether they have the necessary qualifications to apply in the first place.

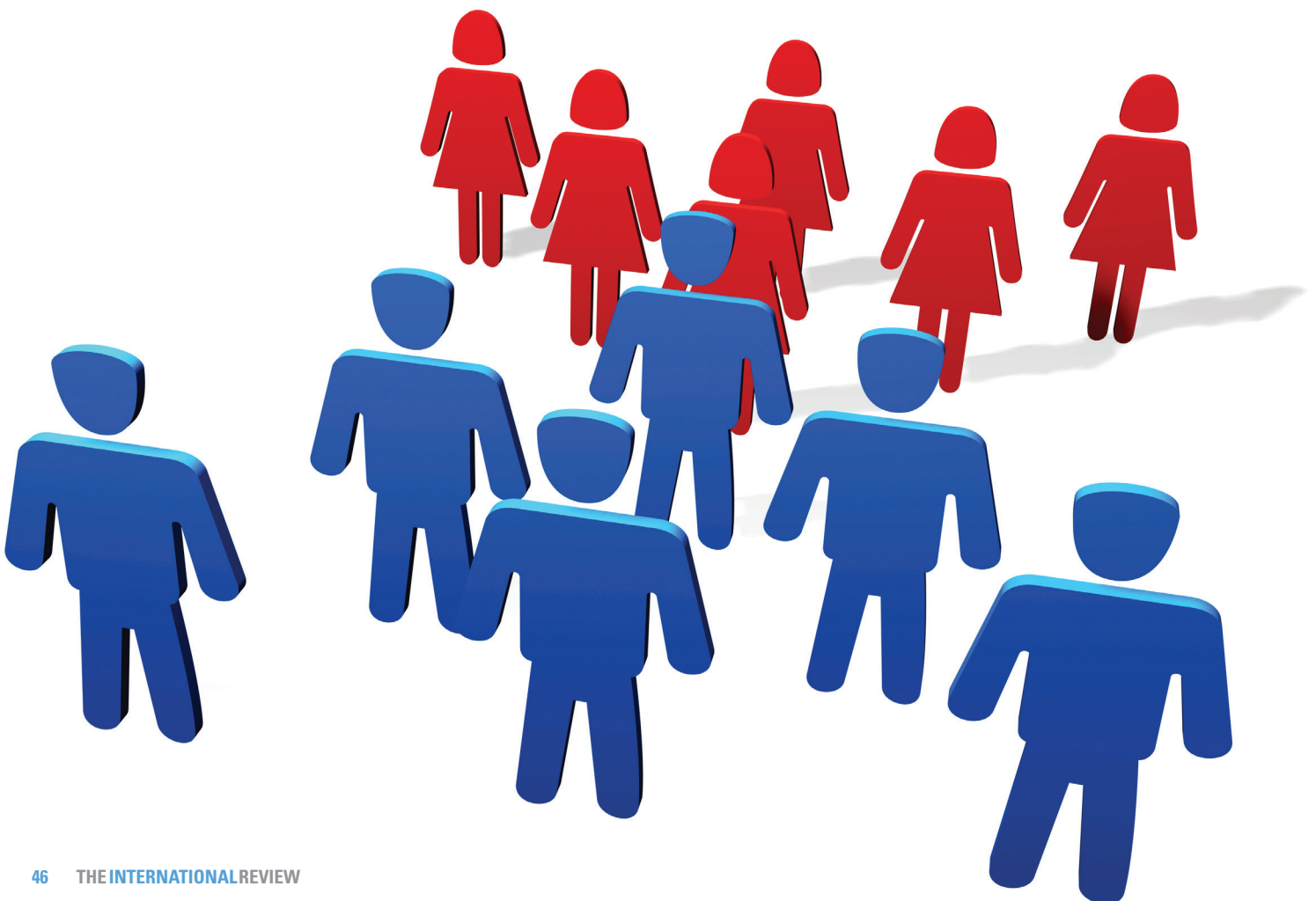
Under a proposed European-wide law, all EU nations must pass their own regulations, which require companies listed on a stock exchange to increase the percentage of the “under-represented sex” who serve as nonexecutive members on their corporate boards to around 40 percent.

on how to fill nonexecutive positions. For instance, if a corporate board has three or four nonexecutive members, at least one should be a woman. A board with five or six nonexecutive directors should have at least two women.

How exactly will the directive—which will apply to around 5,000 companies, says Bloomberg—help to increase the number of women serving as nonexecutive directors on a corporate board? Will the EU bureaucracy or each EU member government actually

What are some of these hiring criteria? According to Paragraph 26 of the directive’s preamble, they could include managerial and supervisory experience, knowledge in specific areas, including finance and human resources, and leadership and communication skills.

What must a company do if two candidates of the opposite sex are equally qualified for an open nonexecutive seat? Under Article 3, a company must give priority “to the candidate of the



under-represented sex if that candidate is equally qualified as a candidate of the other sex in terms of suitability, competence, and professional performance.” If a company does not choose a certain candidate to fill a board position, it must—at the request of the unsuccessful candidate—explain why he or she didn’t get the position.

Under certain exceptions, publicly listed companies don’t have to comply with Directive 2012/0299. For example, Article 3 says that the directive won’t apply to small- and medium-

Women in Europe currently account for 56 percent of university graduates and 45 percent of the employed work force, but only 13.7 percent of board seats in the largest listed companies on that continent. The percentage of women sitting on corporate boards varies drastically, ranging from 42 percent in Norway to less than 10 percent in Ireland, 5 percent in Cyprus, and less than 3 percent in Malta.

sized businesses that employ fewer than 250 people and have annual revenues below €50 million. In addition, under Article 4, companies where women make up less than 10 percent of the workforce or where women already hold at least one-third of all director positions don’t have to comply with the directive. Furthermore, companies are exempt if they can show that their own initiatives to attain gender balance will increase the percentage of women in nonexecutive board positions to around 40 percent.

What if companies don’t follow the directive’s provisions or fail to increase the number of women in nonexecutive positions to around 40 percent? To prevent such scenarios, EU member governments must pass their own rules, which will allow them to impose “effective, proportionate, and dissuasive” sanctions on these companies. For example, Article 6 says that they can impose administrative fines. They can also allow a judicial body to nullify the appointment of nonexecutive directors “made contrary” to the directive.

When exactly do publicly listed companies have to comply with all of these provisions? The directive sets a deadline of January 1, 2020. But it sets an earlier one (January 1, 2018) for listed companies in which the government is a major shareholder or appoints a majority of administrative and supervisory members. Even before reaching these deadlines, each EU member state must publish a report by January 1, 2017, and every two years afterwards, on the measures implemented by its publicly listed companies in attaining the goals of the directive.

The directive itself has an expiration date of December 31, 2028, by which time officials hope that many more publicly listed companies will have women making up around 40 percent of non-executives positions on their corporate boards.

In order to pass, “the draft rules need the backing of most of the EU’s 27 member states,” reported Bloomberg, all of whom can amend them before voting on a final draft. Currently, the EU and its member nations are still reviewing the proposed law.

Legal experts say that the EU has the legal authority to call on its member nations to implement quotas as a way to correct gender imbalances on corporate boards in Europe. Article 157(4)

of the Treaty on the Functioning of the European Union says that “with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”

The proposed directive comes on the heels of a 2011 EU-

led initiative—known as the Women on the Board Pledge for Europe—which called on European companies to make voluntary pledges to increase the percentage of women on their corporate boards to 30 percent by 2015, and then to 40 percent by 2020. But only 24 companies across Europe had signed the pledge, a pace that, according to the 2012 EU report, “would take more than 40 years to arrive at gender balanced boards.”

Others note that the EU, over several decades, had been pushing the private sector to do more in recruiting women. For example, in 1984, the EU called on its member governments to ensure that their companies take “positive action” to increase “the participation of women in decision-making bodies.” It had also issued a similar recommendation in 1996.

Proponents of the 2012 directive say that because self-regulatory efforts seem to have failed, legislation is now “required in order to accelerate gender equality in many of the most senior areas of business life,” said then EU Commissioner for Justice, Fundamental Rights, and Citizenship, Viviane Reding, in an interview with the *New York Times*. (The 2011 initiative said that the EU should introduce legislation if companies did not take adequate steps to increase the percentage of women on their boards.) “Personally I don’t like quotas,” said Reding, “but I like what quotas do. Quotas open the way to equality and they break through the glass ceiling.” What’s more, she added, countries which already have quotas for women on corporate boards “bring the results.”

Current efforts in Europe to increase gender diversity in boardrooms

Efforts to increase gender diversity in corporate boardrooms are not a new phenomenon. Over the past decade, many European countries had passed their own measures to increase the percentage of women on corporate boards, say observers. They include laws and regulations setting mandatory quotas, voluntary pledges for more gender diversity, and revisions in corporate governance codes which require companies to comply with gender diversity efforts or explain (in annual reports) why they haven’t done so. The following table describes these efforts in several EU nations.

EU nation (date of passage of gender quota law or recommendation)	Details concerning gender quota laws or gender diversity recommendations on corporate boards
Norway (2003)	<ul style="list-style-type: none"> • Norway became the first nation in Europe to require voluntary, followed by mandatory, quotas for both genders on company boards when, in 2003, it amended its Public Limited Liability Companies Act of 13 June 1997. • The amendment gives exact numerical guidance on the composition of company boards. Company boards with two or three members, for instance, must have at least one member of each gender. For boards with four or five members, at least two members of each gender must serve on the board. Those with six to eight members must have a minimum of three members from each gender. If a board has more than nine members, then each gender must make up at least 40 percent of its members. The remaining 20 percent can be filled with a mix of either gender. • The amendment applies to all public limited companies, those owned by cities and the state, and cooperative companies. (It does not apply to private limited liability companies.) • A court can dissolve companies that don't comply with the quota system, though analysts note that this has not happened yet. • Because of the law, "the proportion of women directors rose from 9 percent at the time of implementation to the current average of just over 40 percent," according to the <i>New York Law Journal</i>.
Spain (2007)	<ul style="list-style-type: none"> • Spain does not have mandatory gender quotas for corporate boards. • But Organic Law 3/2007 of effective equality between women and men recommends that large public limited companies (i.e., those with 250 or more employees) set a minimum 40 percent quota for each gender in both executive and nonexecutive positions on a corporate board by 2015. • These quotas are voluntary, and noncomplying companies won't face any sanctions. But the government announced that it would take a company's noncompliance into account when it awards public contracts.
United Kingdom (2011/2012)	<ul style="list-style-type: none"> • The United Kingdom (UK) does not have any quotas for women on corporate boards. • While a 2011 report (<i>Women on Boards</i>) commissioned by the government—and headed by Lord Davies of Abersoch—acknowledged the importance of having more women serve on corporate boards of publicly listed companies, it noted the very slow pace at which they were joining them. "At the current rate of change," said the report, "it will take more than 70 years to achieve gender-balanced boardrooms in the UK's largest 100 companies." • Rather than impose mandatory quotas, the report recommended that the 100 largest companies (by market capitalization) in the <i>Financial Times</i> Stock Exchange index voluntarily fill a minimum of 25 percent of their corporate boards with women by 2015 while the top 350 companies set their own targets by that date. • In 2012, the Financial Reporting Council—an independent regulator that sets audit standards—released a revised UK Corporate Governance Code calling on companies to set measurable policies and targets to achieve gender diversity in corporate boards, and also disclose the progress of doing so in their annual reports.
France (2011)	<ul style="list-style-type: none"> • France adopted its Act 2011-103, 27 January 2011 (on the balanced representation of Women and Men Boards of Directors and monitoring and equality work), which requires, by 2017, a minimum 40 percent quota for each gender for nonexecutive board positions. • For corporate boards with eight or fewer members, "the difference between the number of directors of each gender should not be higher than two," according to a 2011 report—<i>Women in the Boardroom: A Global Perspective</i>—by the Deloitte Global Center for Corporate Governance. • Publicly listed companies must comply with the mandatory quotas. Private companies that have at least 500 employees and have earned revenues or have assets exceeding €50 million during the past three years must also comply with the law. The law also applies to universities. • If companies don't reach the target quotas, the law prohibits the payment of fees to their board members, a penalty that analysts refer to as "suspension of benefits."
Netherlands (2011)	<ul style="list-style-type: none"> • The Netherlands adopted the Act of June 6, 2011 to amend Book 2 of the Civil Code in connection with the adjustment of rules on management and supervision in public and private companies, which calls for a minimum 30 percent voluntary quota for each sex on management (i.e., executive) and supervisory boards. • These voluntary quotas apply to publicly listed and also to private companies if they meet two of the three following criteria: (1) total assets exceed €17.5 million, (2) total revenues are greater than €35 million, and (3) the number of employees is more than 250. • Companies that don't reach the targets will not face any penalties, but must explain (in an annual report) why they didn't reach the targets and also describe what measures they will take to reach them in the future. • The law expires on January 1, 2016.

EU nation (date of passage of gender quota law or recommendation)	Details concerning gender quota laws or gender diversity recommendations on corporate boards
Belgium (2011)	<ul style="list-style-type: none"> • Belgium implemented mandatory gender quotas when it passed the Act of 28 July 2011, which modified the Law of 21 March 1991 on the reform of certain public economic enterprises and also that nation's Company Code. • The law requires a minimum one-third quota for each gender on the corporate boards of publicly listed, state-owned, and small- and medium-sized enterprises. Rather than applying specifically to only executive or only nonexecutive board positions, the quota applies to the corporate board as a whole. • If a company has not yet reached the target quota, it must fill any vacant position with a person of the under-represented sex. The law will void any appointments which violate this rule. • If a company fails to comply with the mandatory quotas, it may not provide any benefits—"financial or otherwise"—to any of the existing board members until it reaches the quota targets. • The government also established a database of qualified male and female director candidates, which companies can use to fill open board positions.
Italy (2011)	<ul style="list-style-type: none"> • Under Law 12 July 2011, n. 120 (Amendments to the consolidated text of the provisions on financial mediation, pursuant to Legislative Decree February 24, 1998, n. 58, concerning the equal access to organs administration and control of companies listed on regulated markets), at least 33 percent of each gender must be represented in both executive and nonexecutive positions on a corporate board by 2015. • The law applies to publicly listed companies and state-owned companies. • A government body called the National Securities and Exchange Commission (known by its Italian acronym "Consob") will apply progressively stronger sanctions on companies that don't comply with the quota targets. After issuing a first warning, Consob will give a company four months to comply with the law, after which it could impose a fine ranging from €100,000 to €1 million. After issuing another warning, Consob can later replace the company's board.
Germany (2015)	<ul style="list-style-type: none"> • The government had used a self-regulatory system whereby the German Corporate Governance Code (updated in 2010) recommended that publicly listed companies set their own voluntary quota targets for women on supervisory boards (which are similar to nonexecutive boards). • But in March 2015, Germany's parliament passed a law (currently available only in German) that will require them to fill 30 percent of their supervisory board seats with women beginning in 2016, according to news broadcaster Deutsche Welle. • Reporting from the <i>Wall Street Journal</i> added that companies that don't comply with the new law must leave their supervisory board seats vacant. On the other hand, smaller companies must report by 2017 how they are trying to increase the number of women in "leadership positions," said Deutsche Welle. But they will not face penalties for failing to meet the 30 percent quota.

Sources: European Commission, Directorate-General for Justice, *Women in economic decision-making in the EU: Progress report, 2012*; European Commission, National Fact Sheets, *Gender Balance in Boards*; Deloitte Global Center for Corporate Governance, *Women in the Boardroom: A Global Perspective, 2011*.

Supporters of Directive 2012/0299 and these individual national efforts say that quotas are "the quickest and most effective way to ensure equal numbers on boards." The EU, in its 2012 report, argues that because "women control about 70% of global consumer spending," they are able to "provide a broader insight in economic behavior and consumers' choices." In addition, diversity among board members "boosts creativity and innovation," and improves corporate ethics, claims the report. Furthermore, it says that keeping women out of senior positions hampers economic growth by reducing the supply of labor, something an aging population and depleted pension system cannot afford to lose.

Does the public support the use of quotas? A 2011 Eurobarometer poll showed that 88 percent of all Europeans

believed that "women should be equally represented in company leadership positions," but only 26 percent said that binding legal measures should be used to achieve gender balance on company boards. At the same time, the poll also revealed that "75% of Europeans are in favour of legislation provided that it takes qualifications into account and does not automatically favour members of one sex."

Current efforts in other nations for gender diversity in boardrooms

While many EU nations are carrying out their own mandatory and voluntary plans to increase the percentage of women on corporate boards, how are other nations outside of Europe addressing this issue?

Non-EU nation (date of passage of gender quota law or recommendation)	Details concerning gender quota laws or gender diversity recommendations on corporate boards
United States (2009)	<ul style="list-style-type: none"> • The United States does not require the use of quotas to fill corporate board openings with women. • In 2009, the Securities Exchange Commission (SEC) approved several rules that require publicly listed companies to disclose more information to investors. One of these rules amended Regulation S-K, which sets the reporting requirements for such companies. • Item 407 (Corporate Governance) of Regulation S-K now requires companies to disclose their process for identifying and evaluating nominees for their corporate boards, and also “whether and, if so, how the nominating committee . . . considers diversity in identifying nominees for director.” • If a company does take diversity into account, it must “describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy.” • The rule itself does not define diversity because, according to the SEC, “companies should be allowed to define diversity in ways that they consider appropriate.” But that agency notes that diversity can include professional experience, education, race, and gender, among other factors.
Australia (2010)	<ul style="list-style-type: none"> • Australia does not require companies to use gender quotas when filling positions on corporate boards. • Instead, in 2010, the Australian Securities Exchange (ASX) Governance Council—a private organization of businesses, shareholders, and industry groups—updated its Corporate Governance Principles and Recommendations, which establish corporate governance practices for companies listed on the ASX. • Recommendation 1.5 says that listed companies should have policies that increase the proportion of women in senior executive positions, management roles, and “across the whole organization.” To measure whether their policies are effective in doing so, companies should set specific numerical targets. • To encourage these efforts, companies should disclose at the end of each reporting period (and also in their annual reports) their progress in achieving gender diversity. • All of the principles and recommendations are voluntary. In fact, the ASX Governance Council says that “if the board of a listed entity considers that a Council recommendation is not appropriate to particular circumstances, it is entitled not to adopt it.” But, in such a case, “it must explain why it has not adopted the recommendation.”
Brazil (2010)	<ul style="list-style-type: none"> • Brazil does not require companies to use quotas as a way to increase the ranks of women in their corporate boardrooms. • But in 2010, the Senate introduced Bill No. 112, which would set a minimum quota of 40 percent for women on the boards of publicly listed companies and their subsidiaries, and also of companies in which the government directly or indirectly holds the majority of shares with voting rights. • Companies would have nine years to implement the quota while state-owned enterprises would have to increase the percentage of women on their boards by 10 percent every two years until they reached the 40 percent mark, according to a 2013 report—<i>Breaking the Glass Ceiling: Women in the Boardroom</i>—by law firm Paul Hastings LLP. • The government is still debating the bill today.
Canada (Not applicable)	<ul style="list-style-type: none"> • Canada does not use a quota system to fill corporate board positions with women. • Instead, a business-funded group called the Canadian Board Diversity Council has undertaken several voluntary efforts to increase diversity on Canada’s corporate boards. The Council says that it does not support the use of quotas. • For example, it created an educational program called “Get on Board,” which trains a diverse group of men and women for corporate board service. While the term “diversity” includes industry and management experience, functional expertise, education, and age, the Council also uses other considerations such as “ethnicity, gender, and aboriginal status.” • To help companies identify these board-ready candidates, the Council created a national database called Diversity 50, which allows users to carry out searches using specific parameters such as industry experience, expertise, and gender, among other criteria. • The Council also issues an annual report card on the progress made by the boards of the 500 largest companies in Canada (known as the <i>Financial Post 500</i>) in achieving gender diversity. The 2013 Annual Report Card revealed that women make up 15.6 percent of FP500 board seats. The Council noted that, at this rate of change, “women will not represent 50% of FP500 directors for another three-quarters of a century.”
China (2001/2011)	<ul style="list-style-type: none"> • China does not require state-owned or privately-held companies to use quotas as a way to increase gender diversity on corporate boards, according to the 2013 Paul Hastings LLP report <i>Breaking the Glass Ceiling</i>. • The report noted that the government in 2001 had called on state-owned enterprises to increase voluntarily the number of women on their boards. In a follow-up effort in 2011, it called on all companies—state-owned and private ones—to do the same. • The Code of Corporate Governance for Listed Companies in China does not mention gender diversity (or any other kinds of diversity) concerning board membership. It simply says in Paragraph 20 that “the nominated candidates shall possess certain relevant professional knowledge and the capability to make decisions or supervise.” And under Paragraph 55, one of the main duties of the nominating committee is to “extensively seek qualified candidates for directorship and management.”

Non-EU nation (date of passage of gender quota law or recommendation)	Details concerning gender quota laws or gender diversity recommendations on corporate boards
Malaysia (2011)	<ul style="list-style-type: none"> • In 2011, the government approved a law that requires publicly listed companies to increase the percentage of women on their corporate boards to a minimum 30 percent. • To help companies comply with the law by a 2016 deadline, an agency called the NAM Institute for the Empowerment of Women began a Women's Directors Programme, which trains qualified women to serve on corporate boards. • Companies can then access a database called the Women Corporate Directors' Registry to find qualified candidates to fill their corporate boards.

Gender quotas: Advancing or hurting women?


Do quotas really help women advance in the business world, and do they also make good business sense? Case studies of Norway—again, the first nation in Europe to require mandatory quotas—have supposedly shown mixed results. The *New York Law Journal* reported that “a study of the aftermath of the Norwegian law showed that not only did the quota requirement cause a significant drop in stock price at the announcement of the law, but the quota then ‘led to younger and less experienced boards, increases in leverage and acquisitions, and deterioration in operating performance,’” an effect perhaps owed in part to the short time frame the companies were given to fill the quotas.

However, the *Journal* also points to a 2012 worldwide study performed by the Credit Suisse Research Institute, which found “companies with women directors outperformed peers with no women directors by 26 percent, . . . experienced higher returns on equity, lower leverage, better growth, and higher price/book value multiples.” In a report issued by the Deloitte Global Center for Corporate Governance, a board member of Singapore Exchange Limited, Jane Diplock, said that “gender diversity was not only the right thing to do, but the bright thing to do.”

Not all EU member governments support the proposed directive. Currently, nine of them—Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, the Netherlands, and the United Kingdom—oppose gender quotas. One British politician, Marina Yannakoudakis, said that “member states are tired of [the EU] interfering in employment law and trussing up their businesses in red tape, making them less competitive.” In a letter sent to EU headquarters in September 2012, the countries acknowledged that there were “still too few women on the boards of publicly listed companies,” and that “the myriad barriers women encounter throughout their career are unacceptable from a gender equality point of view.” But they argue that “it is first and foremost up to Member States to find their own national approaches” to achieving gender equality in this area.

“Many of us,” continues the letter, “are considering or have implemented various and differing national measures . . . to facilitate raising the proportion of women in boardrooms.” The letter argues that these measures must be given “more time in order to establish whether they can achieve fair female participation in economic decision-making on Europe’s company boards.”

Martin Holterman, a researcher at the Florence School of Regulation, argued that “introducing such a quota taints all female

board members everywhere with the suspicion that they are not good enough, that they are only there to help the company meet its quota.” Other drawbacks of requiring quotas for women range from practical considerations (such as implementing the quotas in areas that have relatively few women, such as the manufacturing and technology sectors) to future implications (including possible discrimination against men), according to London-based news magazine *New Statesman*. 



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