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## The International Review | 2012 Spring/Summer

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# THE INTERNATIONAL REVIEW

CENTER FOR INTERNATIONAL LAW | NEW YORK LAW SCHOOL    SPRING/SUMMER 2012 | VOLUME 14, ISSUE 2

 **COMPARATIVE LAW**

## **Taking property for the public good: Eminent domain laws from around the world**.....PAGE 7

Governments have long used their powers of eminent domain to take private property for a public purpose such as building roads and laying down water and power lines. But they also carry out this power for more controversial reasons such as promoting economic development and social justice. How do different nations regulate and use the power of eminent domain? Does international law play any role?

 **INTERNATIONAL LABOR LAW**

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While the payment of minimum wages has become a long standing practice worldwide, the decision on whether to raise existing rates is wrought with debate, especially in these times of economic uncertainty. Still, many nations have, for the first time, recently set a minimum wage. How do nations establish a minimum wage? Does international law address whether and how nations must set a minimum wage?

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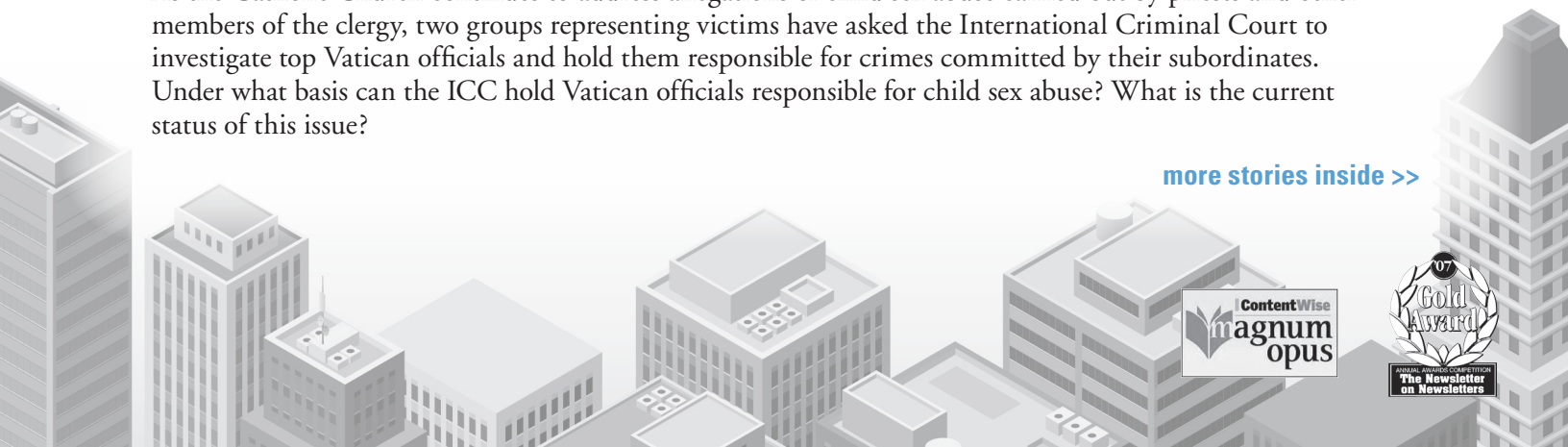
As the global pharmaceutical market becomes more competitive, nations are passing laws which are supposed to speed the approval process of new drugs while screening for their safety and effectiveness. How do nations currently approve new drugs? What kinds of laws have they passed in recent years to promote the likelihood that regulatory authorities will approve new drugs? And what role does international law play in this process?

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## THE INTERNATIONAL REVIEW

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International law in plain English™

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# Minimum wage policies in other nations and under international law

Even though many economies across the world are struggling to recover from the financial crisis of 2008 and are even facing new ones, most nations still require companies and government agencies to pay their workers a set minimum wage. Many others are even adopting minimum wage measures for the first time. While labor groups welcome such developments, businesses say that setting minimum wages could reduce their competitiveness and force them to lay off workers. This, in turn, could delay or even hurt economic recovery. What exactly is a minimum wage? How do nations set one? Do minimum wage requirements cover everyone in a nation's workforce? And how does international law address this contentious topic?

## Reasons for and against the setting of minimum wages

According to the International Labor Organization (or ILO), minimum wage is the “minimum sum payable to a worker for work performed or services rendered, within a given period, whether calculated on the basis of time or output.” While many industries in the United States fix their minimum wages by the hour, other nations do so per day or per month.

Supporters of minimum wages say that having one is necessary to help workers afford basic needs (such as clothing, food, and shelter) and to increase the standard of living of the most vulnerable people in society. They also argue that a minimum wage can encourage people to join the workforce instead of obtaining money through illegal means. Furthermore, it puts more money in the hands of those who will spend it. Moreover, the Organisation for Economic Co-operation and Development says that by requiring employers to pay a minimum wage, governments can spend less funds on costly social services to help those who cannot find work.

Opponents argue that requiring a minimum wage slows job growth. Why? A business may not be able to pay the minimum wage, and, as a result, will not hire more workers. In addition, setting a minimum wage may give companies an incentive to outsource jobs to nations with cheaper labor costs or to mechanize and automate tasks, which, in turn, will displace workers. Furthermore, other critics say that most families don't depend solely on the minimum wage for their total income. Bradley Schiller, an economics professor at the University of Nevada-Reno, concluded in a study that “family dependence on minimum wage is the exception rather than the rule. In most cases, minimum-wage earnings of adult workers are a small fraction of family income.”

How do nations set a minimum wage? Many do so simply by passing laws. They also set minimum wages through arbitration or collective bargaining, which are negotiations between employers and employees to establish conditions of employment, including the payment of a minimum wage. Currently, over 90 percent of nations have either laws or collective bargaining agreements which set minimum wages, according to the ILO. Still, the level

of minimum wages and the process of setting them vary greatly by country, industry, and even length of employment.

## Minimum wage laws from around the world

While the payment of minimum wages has become a firmly established practice worldwide, the decision on whether to raise existing rates is still wrought with debate. Yet even with this continuing debate, many nations in recent years have, for the first time, established a minimum wage.

**United States:** In 1938, the United States established a national minimum wage – currently set at \$7.25 per hour – and also required time-and-a-half overtime pay for certain types of jobs by passing the *Fair Labor Standards Act* (or FLSA), which is enforced by the Wage and Hour Division of the U.S. Department of Labor. Also known as the federal minimum wage law, the FLSA does not cover the entire workforce. Instead, it applies to “employees of enterprises that have annual gross volume of sales or business done of at least \$500,000,” says the Department of Labor. “It also applies to employees of smaller firms if the employees are engaged in interstate commerce or in the production of goods for commerce,” including those who work in transportation, communication, or others who perform duties closely related to interstate activities.

The federal minimum wage law further covers federal, state, and local agencies, and also hospitals, schools, and domestic workers. On the other hand, the FLSA does not cover workers with disabilities, criminal investigators, fisherman, or homeworkers making holiday wreaths, among other categories of workers.

Under the FLSA, the minimum wage does not increase automatically at set intervals. Instead, Congress must vote each time it wants to increase the federal minimum wage.



Today's value of the federal minimum wage is less than its peak in 1968 when it reached \$1.60 per hour (or \$10.42 today in inflation-adjusted dollars), according to *Time Moneyland*. And the current rate is "just over \$15,000 a year for a full-time worker," reported *CNN Money*. "That's less than the poverty rate for a family of four." The federal minimum wage is also significantly lower than the average national hourly wage which is \$22.60 per hour (or over \$48,000 per year). The National Employment Law Project estimates that to keep up with inflation, the federal hourly minimum wage would have to increase to \$10.39.

Many states also have their own minimum wage laws, and a worker covered by both federal and state minimum wages receives the higher rate. Despite uncertain economic times, many states continue to increase their minimum wage rates. For example, several last year, including Colorado, Montana, Ohio, Oregon, and Washington, had announced that their 2012 minimum wages would increase 28 to 37 cents per hour (or between \$582 and \$770 annually), according to *CNN Money*. These states – along with Arizona, Florida, and Vermont –

Beijing has the highest *hourly* wage at ¥13 (US\$2). Local offices of the Ministry of Labor and Social Security are responsible for ensuring that employers comply with the minimum wage requirements. Violators must give back pay to workers, said the Wage Indicator Foundation, and may even have to compensate them with five times the wages owed.

Hong Kong in May 2011 implemented its very first *Minimum Wage Ordinance*, setting an hourly minimum wage of HK\$28 (US\$3.60). The law applies to all employees except for student interns and hundreds of thousands of foreign domestic workers, among several other groups. *BBC News* reported that "the legislation was passed in response to public pressure to narrow the territory's wealth gap," and estimated that it would apply to 10 percent of all workers in Hong Kong. While business groups expressed concern about increased labor costs, worker organizations argued that the ordinance should have set an hourly minimum wage of HK\$33, reported the Law Library of Congress.

Malaysia in May 2012 passed its first minimum wage law requiring all employers to pay a monthly wage of at least RM900

Currently, over 90 percent of nations have either laws or collective bargaining agreements which set minimum wages, according to the ILO. Still, the level of minimum wages and the process of setting them vary greatly by country, industry, and even length of employment.

make cost of living adjustments each year for their minimum wage rates.

Along with national legislation, various industries in the United States set minimum wages through collective bargaining. In 1935, the United States gave employees the right to join trade unions (by adopting the *National Labor Relations Act*, or NLRA), which would then bargain collectively on their behalf on issues such as setting a minimum wage. The NLRA applies to most non-agricultural employees who engage in interstate commerce such as workers in manufacturing plants, retail centers, private universities, and health care facilities.

**Asia:** According to *BBC News*, "with the exception of Singapore, most Asian countries now have a minimum wage or are considering one." And in recent years, many have been increasing their minimum wage rates "in part, to head off the spread of the kind of unrest that has toppled Middle Eastern regimes . . . and to calm rising labor actions in their countries."

China in 2004 implemented its first minimum wage law known as *Provisions on Minimum Wage* under which every province must set its own monthly minimum wage for full-time workers and an hourly minimum wage for part-time workers based on factors such as the consumer price index, social insurance, and the economic development of its province, according to the Wage Indicator Foundation at the University of Amsterdam.

In 2011, 21 out of 31 provinces in China had raised their minimum wages by an average of 21.7 percent despite economic uncertainty around the world, reported *Bloomberg Businessweek*. The city of Shenzhen, for instance, has the highest *monthly* minimum wage in the country at ¥1,320 per month (US\$208).

(US\$297) starting in six months, though lower rates will apply in outlying areas of the nation. Companies with five or fewer workers will have one year to comply with the law, reported *The New York Times*. The law will affect 3.2 million workers, but will not include domestic sector workers.

Taiwan in January 2012 raised its monthly minimum wage by 5.03 percent from NT\$17,880 (US\$617) to NT\$18,780 (US\$651), which will affect 1.4 million people (or 17 percent of the workforce), according to reporting from the *China Post*. It noted that, since 1997, Taiwan had twice raised its minimum monthly wage. Labor groups had demanded a higher increase, pointing out that Taiwan's labor productivity increased greatly in 2010. They also claimed that workers could still not afford their basic needs even at the new rate.

**Canada:** The territories and provinces in Canada enforce their own minimum wage rates. (Canada does not have a national minimum wage.) In 2012, the territory of Nunavut had the highest hourly minimum wage of C\$11 (US\$11) while the Yukon Territory had the lowest at C\$9.27 (US\$9), according to a group called Human Resources and Skills Development Canada.

However, not all workers receive the same minimum wage within each province. For example, British Columbia's minimum wage for most workers is C\$9.50 per hour. But those who receive tips (such as liquor servers) are paid C\$8.75 per hour, said the Ministry of Labour. (The United States has a similar policy for workers who receive tips.)

**Egypt:** In July 2011, Egypt increased its minimum monthly wage for public sector employees from LE35 (around US\$7) – a figure set in place since 1984 – to LE700 (US\$120), according



to *Al-Abram*, one of the largest dailies in Egypt, and which is partly owned by the government. A body called the National Council for Wages had, under Article 34 of the *Labor Law*, set this minimum monthly wage, taking into account factors such as living expenses. Local labour manpower offices investigate complaints of and then sanction noncompliance with minimum wage requirements, though one group said that “sanctions are rarely applied.”

In November 2011, the government established its first-ever minimum wage for the private sector, requiring employers to pay the same monthly minimum rate as those paid to public sector employees.

The minimum wage requirements for the private sector apply neither to companies with fewer than 10 employees nor to businesses which give “sufficient proof” that they cannot afford to pay the minimum wage, according to the *Inter Press Service News Agency*. Critics interviewed by *Al-Abram* have questioned how the private sector will enforce a minimum wage, arguing that the public sector has not yet fully enforced the payment of the minimum wage among its own workers.

**European Union** (or EU): Currently, 18 out of 27 EU member states have laws which set a national minimum wage, according to European officials. Other members, rather than using a statute, have set minimum wages in broad sectors of their economies through collective bargaining agreements.

In November 2011, Germany debated whether to pass a law which would (for the first time) set a national minimum wage as the ranks of the working poor began to grow in recent years, reported the *Wall Street Journal*. In the absence of a national minimum wage, employers and a wide range of trade unions negotiate minimum wages in their respective industries through collective bargaining agreements. But critics say that low wages are pervasive in many sectors. According to *Reuters*, many workers earn € (US\$2.60) an hour. Government statistics also noted that

“the number of full-time workers on low wages – sometimes defined as less than two-thirds of middle income – rose by 13.5 percent to 4.3 million between 2005 and 2010.” But opposition from many industry groups prevented the passage of a national minimum wage.

**South Africa:** No national law sets minimum wages, according to the Wage Indicator Foundation. Instead, under the *Basic Conditions of Employment Act*, the Minister of Labour (advised by the Employment Conditions Commission) unilaterally sets a minimum wage for those economic sectors where workers are more likely to receive low wages, including domestic help, farming, and forestry, among others. Minimum wage for farm workers ranges from R989 to R1,041 per month (US\$118 to US\$124) and from R1,067 to R1,167 per month (US\$128 to US\$140 per month) for domestic workers employed more than 27 hours per week.

Along with the Minister of Labour, other bodies such as bargaining councils composed of employers and trade unions help to set minimum wages.

To ensure that employers are paying the minimum wage, inspectors from the Department of Labour investigate complaints from workers. It imposes fines on companies which don't pay the minimum wage and also requires them to pay arrears. But even with a minimum wage in place, a study commissioned by the Department of Labour revealed that 45 percent of companies did not pay it.

### International law and the minimum wage

Does international law address whether and how nations must set a minimum wage? Currently, the ILO administers several international treaties concerning the minimum wage. (The ILO is the UN agency responsible for overseeing global labor standards and policies, and works with government representatives, employers, and workers to shape them.)



**C26 Minimum Wage-Fixing Machinery Convention (1928):** This international agreement was one of the first ever to call on its member states to establish “machinery” (i.e., some sort of system and process) to set minimum wages for trades specifically in the manufacturing and commerce sectors of their economies, but only if effective wage regulations did not already cover these sectors and also if existing wages were “exceptionally low.” (The agreement does not cover agricultural workers. According to the U.S. Department of Agriculture, more than half of the American population lived on farms in the early 20th-century, and these farms also employed half of the U.S. workforce. Others estimate that other nations had similar or even a higher percentage of people living and working on farms.)

But the 1928 convention does not tell nations what type of system they must adopt (whether a legislative or collective bargaining process) when setting minimum wages in their manufacturing and commerce sectors. Instead, a nation is “free

workers concerned are informed of the minimum rates of wages in force.” These measures include “supervision, inspection, and sanctions,” though it does not provide further guidance. A worker who is covered under the 1951 agreement but is not paid the minimum rate will be entitled to recover the amount underpaid “by judicial or other appropriate proceedings.”

Similar to the 1928 convention, the 1951 convention does not set a specific minimum wage which all nations must adopt. It also does not give any specific guidance on how nations should calculate a minimum wage. As of May 2012, 52 nations have ratified the 1951 convention, which does not include the United States.

**C131 Minimum Wage-Fixing Convention (1970):** Unlike the previous two conventions which call on nations to fix minimum wages for workers in specific economic sectors, the 1970 convention encourages its signatories “to establish a system of minimum wages which covers all groups of wage earners.” At

**While several international agreements call on nations to establish a process which will set minimum wages, none of them have an enforcement measure, meaning that their signatory nations will not face any penalties if they don't carry out their obligations.**

to decide the nature and form of the minimum wage-fixing machinery.” And once it sets a minimum wage, a nation must “ensure that the employers and workers concerned are informed of the minimum rates of wages in force” through an undefined “system of supervision and sanctions.” A worker who is covered under the 1928 agreement but is paid below the minimum rate must be entitled to recover the amount he was underpaid “by judicial or other legalized proceedings.”

The 1928 convention does not set a specific minimum wage which all nations must adopt. It also does not give any specific guidance on how nations should calculate a minimum wage.

As of May 2012, 103 nations have ratified the 1928 convention. Although the United States has not joined this agreement, observers note that it does have legal systems in place for setting a minimum wage, and that the federal and state governments generally enforce their laws concerning the payment of a minimum wage.

**C99 Minimum Wage-Fixing Machinery (Agriculture) Convention (1951):** This agreement addresses minimum wages specifically in the agricultural sector. Similar to the 1928 convention, this one calls on its signatory nations to establish a “machinery” which will set minimum wages for “workers employed in agricultural undertakings and related occupations.”

The 1951 convention does not require nations to apply its provisions to every single worker in their agricultural sectors. Instead, the signatories themselves “shall be free to determine . . . which undertakings, occupations, and categories of persons” will be covered under the agreement.

As in the case of the 1928 convention, the 1951 convention also says that nations are free to decide the type of wage-setting system to adopt. And once they adopt a minimum wage, they must take “necessary measures to ensure that the employers and

the same time, the 1970 agreement says that every government itself will “determine the groups of wage earners to be covered” under that agreement’s provisions, and also “whose terms of employment are such that coverage would be appropriate.”

The 1970 convention differs significantly from the two previous conventions in several aspects. For example, it explicitly says that “minimum wages shall have the force of law and shall not be subject to abatement,” meaning that a nation may not decrease a set minimum wage. In addition, the 1970 agreement calls on nations to respect the freedom of collective bargaining. Furthermore, it requires them to take specific factors into account when calculating a minimum wage, including their own levels of economic development, the needs of workers and their families, the general level of wages, the cost of living, social security benefits, and also the “desirability of attaining and maintaining a high level of employment.”

Still, as in the case of the two previous agreements, the 1970 convention does not set a specific minimum wage which all nations must adopt. As of May 2012, 51 nations have ratified the 1970 convention.

Have these agreements been effective in promoting the use of minimum wages around the world? Observers note that while more than 100 nations have ratified the 1928 convention, only half that number has ratified the subsequent agreements. Still, even those nations which did not ratify the 1951 and 1970 conventions have passed laws which require a minimum wage in a wide range of industries. But all nations continue to face problems in enforcing their minimum wage requirements. Analysts also point out that none of the conventions have an enforcement measure, meaning that their signatory nations will not face any penalties if they don't carry out their obligations. 🌐

# Taking property for the public good: Eminent domain laws from around the world

Governments throughout the world regularly undertake projects for what they describe as the public interest, public use, and other variations of these terms. They include building roads and laying down electrical and water lines, among numerous other examples. But these undertakings usually require them to seize private property. Under the power of eminent domain, a government or other authorized body takes private property (usually in the form of land) for a public purpose.

But using this power still creates controversies. Many governments have, for instance, expanded their definition of public interest to include economic development and social justice. While others have laws overseeing the use of eminent domain, their authorities ignore or do not regularly enforce them.

How do various nations use and regulate their powers of eminent domain? How are they addressing various controversies concerning the exercise of this power? And what role does international law play in how nations regulate and carry out eminent domain?

## United States: Eminent domain across different jurisdictions

In an 1879 ruling called *Boom Co. v. Patterson*, the U.S. Supreme Court noted that eminent domain is an inherent power of the government. The power of eminent domain, it said, “requires no constitutional recognition; it is an attribute of sovereignty.”

Still, experts note that the Fifth Amendment of the U.S. Constitution places certain restrictions on the government’s use of eminent domain. That amendment says, in part, “. . . nor shall private property be taken for public use, without just compensation.” (Analysts refer to this excerpt as the “takings clause.”) While these restrictions on eminent domain originally applied only to the federal government, the Supreme Court progressively ruled that they – along with restrictions on government power set by other amendments – applied also to the states.

Today, state governments (i.e., legislatures) regulate the exercise of eminent domain by passing their own laws which largely conform to the requirements set out in the Fifth Amendment. In fact, eminent domain, “though it is inherent in organized governments, may only be exercised through





legislation,” according to FindLaw.com. (That way, no entity can arbitrarily declare on its own that it has the power to exercise eminent domain.) Legal analyst Aaron Larson adds that “all U.S. states have legislation specifying [eminent domain] procedures within their respective territories,” though they “vary, sometimes significantly, between jurisdictions.”

What exactly constitutes public use under the Fifth Amendment? Jurists generally say that no comprehensive definition exists either at the federal or state level. Instead, both levels of government have largely set their own respective criteria. And once a legislature sets its definition of public use, the Supreme Court “has always insisted on a high degree of judicial deference to [that] legislative determination,” according to one

receiving just compensation, “the owner should be placed in as good a financial position as he or she would have been in had the property not been taken.”

Though every state has its own laws regulating eminent domain, the process of carrying out that power follows a general route. Contrary to popular belief, the process of exercising eminent domain does not start immediately with a court proceeding. Generally, a government (or similar entity) must first try to buy the property in question from its owner. In other cases, the state may need only part of the property or simply use it for a limited period of time.

If the government and property owner cannot reach an agreement – for instance, the owner may not want to sell his

**While governments have long carried out their power of eminent domain, doing so still creates controversy. For example, in recent years, courts in the United States have upheld the government’s power to exercise eminent domain for reasons such as facilitating urban renewal, erecting low-cost housing, and promoting aesthetic values as well as economic ones.**

expert. Even the Supreme Court itself said that no complete and comprehensive definition of public use is possible because such “definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition . . .”

Even though a comprehensive definition of public use does not exist, the federal and state governments have historically taken private property (or parts of it) to build roads, or lay down electrical and water lines. Takings for public use have also included reasons of “public safety, public health, morality, peace and quiet, [and] law and order,” noted the Supreme Court. It has even ruled that property can be taken “to establish public parks, to preserve public places of historic interest, and to promote beautification . . .”

On the other hand, the Supreme Court did say that the power of eminent domain does not allow the government to seize property for the sole purpose of transferring it from one private individual to another individual (who simply wants it) even with the payment of compensation.

After taking private property for public use, a government must offer “just compensation,” which is usually the property’s fair market value. In the case of a partial taking, it may also have to pay “severance damage” which is the loss of value of the remaining land as a result of its separation from the land seized by a government. Every state also has its own rules concerning compensation, say legal observers. Some allow parties to collect attorney and appraisal fees while others allow compensation for loss of business. Said analyst Aaron Larson: “If a business is operating from the condemned real estate, the owner is ordinarily entitled to compensation for the loss or disruption of the business resulting from the condemnation.”

Because an exact formula for determining just compensation does not exist, it is “the subject of frequent litigation,” according to *West’s Encyclopedia of American Law*. It also adds that when

property, or the two sides cannot decide on a mutually acceptable price – then the government can file a petition with a court to exercise its power of eminent domain. This is the start of what legal observers call a “condemnation” proceeding. (While the popular conception of “condemnation” usually evokes cases where a government declares that a specific property poses a threat to public health or safety, such a definition does not apply in situations where a government needs a particular piece of property to expand, say, a highway, note legal observers.)

During condemnation proceedings, a court will schedule a hearing where the government (or similar party) must show that it had carried out good faith negotiations with the owner to purchase his property, but that the two sides couldn’t reach an agreement. The government must also show that the taking of the property is for a public purpose set out in the laws of the jurisdiction where the property is located. The property owner may also challenge the eminent domain petition during the proceeding, arguing that the other party is not, for instance, taking the property for public purpose or may not even have the authority to do so.

After weighing the evidence, the judge will decide whether to approve the government’s petition to take the property. If he does so, the court will then hold hearings to determine the property’s fair market value. Both sides can appeal the court’s decision.

While governments have long carried out their power of eminent domain, doing so still creates controversy. For example, in recent years, the U.S. Supreme Court and some state courts have upheld the government’s power to exercise eminent domain “in conjunction with private companies to facilitate urban renewal, destruction of slums [i.e., blighted property], erection of low-cost housing in place of deteriorated housing, and the promotion of aesthetic values as well as economic ones,” said one analyst. Also, in recent months, a high-profile oil pipeline project involving Canada has raised certain issues concerning

eminent domain. Below is a description of some of these cases and controversies:

***Kelo v. New London*** (2005): In what has become a controversial 5-4 decision, the U.S. Supreme Court ruled that a government may use its power of eminent domain in cases which benefit private interests if the taking of property is carried out as part of a comprehensive economic development plan that leads to public benefits such as the creation of jobs and increases in tax revenue. The city of New London, CT, had used its power of eminent domain to seize private property (including residences) in an economically-depressed area with plans to lease it to private developers who would build a hotel, conference center, private residences, and a pedestrian walkway along a river – all in hopes that doing so would economically revitalize the area under a plan crafted by the New London Development Corporation.

The majority opinion also reaffirmed that the U.S. Constitution does not allow a government to take one person's private property for the sole purpose of simply giving it to another person even if compensation is offered. And to prevent any misunderstandings, the Supreme Court said that its decision still allowed states to impose stricter standards as to when a government may take property for public use. In direct response to the ruling, many states did just that.

Since 2005, 43 states have passed laws which don't allow the use of eminent domain for economic development, according to the National Conference of State Legislatures. And in June 2006, President George W. Bush issued Executive Order 13406 which said that the federal government would limit its taking of private property to situations where it is done for public use, provides just compensation, and benefits the general public, and not "merely for the purpose of advancing the economic interest of private parties." (This executive order does not apply to the states.)

On the other hand, the dissenting opinion argued that "under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded."

***Matter of Goldstein, et al. v. New York State Urban Development Corporation*** (2009): In a 6-1 ruling, the New York Court of Appeals (the highest court in New York) ruled that a state development agency may use its power of eminent domain to seize what the agency called blighted property in downtown Brooklyn so that a private developer may carry out a 22-acre mixed-use economic development project (known as Atlantic Yards) which officials say will benefit the public through the construction of a basketball arena, commercial space, and high-rise residential buildings.

The development agency argued that state laws allowed it to seize property specifically for land use improvement projects benefiting the public if such property is deemed blighted (and even if others disagree with that designation). In determining whether an area is blighted, the court ruled that it would not substitute its own view in place of a finding made by a legislative agency. Unlike the 43 states which – after the U.S. Supreme Court's *Kelo* decision – passed laws limiting the use of eminent domain for economic development, New York did not pass such a law.

***Matter of Kaur v. New York State Urban Development Corporation*** (2010): In a unanimous decision similar to the one in *Goldstein*, the New York Court of Appeals ruled that a state development agency may, under its power of eminent domain, seize private property in West Harlem which the agency had determined was blighted so that Columbia University (a non-profit organization) may carry out a 17-acre expansion project which not only includes the construction of buildings for educational and research purposes, but also civic and market spaces for use by the public.

The decision rejected arguments made by opponents who claimed that the project did not have any public use, and that the blight findings were made in "bad faith." As it had argued in *Goldstein*, the appeals court said that "the determinations of blight and public purpose are the province of the Legislature, and are entitled to deference by the Judiciary."

***Keystone XL pipeline controversy***: In September 2008, a Canadian oil company, Calgary-based TransCanada Corp., applied for a permit from the U.S. Department of State to build a 1,700-mile pipeline (called Keystone XL) from the province of Alberta to major refineries near the Texas Gulf coast. To receive the permit, say analysts, the project must be in the "national interest" of the United States and must also undergo an assessment of its environmental impact on the six America states – Kansas, Nebraska, North Dakota, Oklahoma, South Dakota, and Texas – through which the pipeline will travel, among other requirements.

Currently, the United States imports more oil from Canada than any other nation in the world, including Saudi Arabia. Experts say that Canada has the second largest proven reserves of oil, though much of it (170 billion barrels out of 174 billion) is contained in oil sands, which has been described as a "goey mixture of earth and oil." Oil companies say that they hope to increase their production of oil sands (from 1.5 million barrels a day in 2010 to 3.7 million barrels in 2025), and that they need to build more pipelines to transport crude oil to refineries in Canada and the United States.

Supporters of the Keystone XL pipeline say that it will allow Canada to export an additional 1.1 million barrels of oil to the United States, and help to reduce that nation's dependence on oil from nations in politically volatile regions of the world such as the Middle East. On the other hand, opponents believe that the Keystone XL pipeline will threaten the environment. The process of extracting crude oil from oil sands, say environmental groups, creates not only more greenhouse gases than regular oil drilling, but also tons of toxic sludge.

During the permit review by the State Department, the media pointed out that TransCanada had filed 56 eminent domain actions in local courts in South Dakota and Texas against residents who refused to sell parts of their land so that the company can lay its pipeline once it received approval from the federal government.

But critics have questioned whether a foreign company has "the right to use the courts to demand easements from property owners in advance of final approval for the project." A U.S. government official said to the *New York Times*: "It is presumptuous for the company to take on eminent domain cases before there is any decision made." In response, a spokesperson for the company claimed: "We have been given

the legal advice that we can do this in parallel to the process going on in Washington,” though he didn’t provide any more information.

Still, once the State Department approves the permit, TransCanada will be on “firmer ground” to file eminent domain claims, said Timothy Sandefur, a lawyer with the Pacific Legal Foundation, in an interview with *The New York Times*. And whether the party filing an eminent domain claim is foreign-owned would be irrelevant, he added.

But several lawyers who represent landowners contacted by TransCanada argued that the company had “not met the requirements to invoke eminent domain” in the states where they had filed their claims. For example, they claim that the company had not negotiated with the landowners in good faith, and that they had “low-balled” compensation for their property.

### How do other nations address the taking of property for public use?

Most countries in every region of the world – stretching from South America to Northeast Asia – have regulations which govern when and exactly how their respective governments may take private property for public use and other public purposes. These regulations also oversee how nations determine and then pay compensation for taken property.

But unlike the United States, most nations don’t use the term eminent domain to describe the government’s power to take private property. According to Rachelle Alterman, editor of *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights*, “the American terms *eminent domain*, *condemnation*, or *physical taking* . . . are unknown outside the United States; the internationally used terms are *expropriation* or (in British-influenced countries) *compulsory purchase*.”

Also, eminent domain is not the same as nationalization which occurs when a government acquires and takes control of a particular sector of an economy (such as the oil industry) once owned and operated by private companies and individuals. In the case of eminent domain, the government usually destroys the property on the acquired land, and then carries out a public works project, for example. On the other hand, in the process of nationalization, the state takes the property or business, keeps it intact, and collects any revenues it may generate.

The following sections describe a few specific examples of how other nations use and regulate the power of what people in the United States describes as eminent domain.

### United Kingdom: Compulsory purchase and the 2012 Summer Olympics

In the United Kingdom, a local government or agency may need to purchase part or an entire tract of property for public use or in the public interest such as building roads and housing developments, expanding airports, or laying down gas, electrical, sewer, or water lines, according to the Royal Institution of Chartered Surveyors (or RICS).

As in the case of other nations, various laws in the United Kingdom authorize government agencies to seize and then purchase private land for public use without the consent of the owner, says RICS. The power to do so is called “compulsory purchase.” (The United Kingdom does not use the term “eminent domain” or expropriation.)

For example, to lay down water pipes, the acquiring authority (i.e., the government body which needs the land) requests the power of compulsory purchase under the *Water Industry Act 1991*. To build a road bypass, a government authority turns to the *Acquisition of Land Act 1981*. For railways, agencies usually turn to the *Transport and Water Act 1992*. Bodies which have sought permission to use compulsory purchase powers include local governments, regional development agencies, urban development corporations, utility companies, and, in particular, the Highway Agency.

**The process of compulsory purchase:** The process of compulsory purchase has several stages, according to the Department for Communities and Local Government of the British government. As in the case of the United States, the compulsory purchase process does not start immediately with legal proceedings. Instead, the acquiring authority must first try to reach a mutual agreement with the property owner to purchase the property.

If the two sides are unable to reach an agreement, the agency will prepare and then submit to a government ministry what is called a “compulsory purchase order” (or CPO), which includes information on the property being sought for purchase by the acquiring agency, the reasons why the agency needs to acquire the land, and the specific law which authorizes the government to purchase such property. Once approved by a government ministry, a CPO formally authorizes an agency “to acquire land or property for a scheme without the consent of the owner,” said Geoff Fisher, a past president of the Institute of Revenues, Rating, and Valuation in the United Kingdom. (The government notes that an acquiring agency may apply for a CPO even during negotiations with private land owners.)

Before the acquiring authority submits the CPO for approval, the people on the property being sought (including “every owner, leaseholder, tenant, and occupier”) may file objections with the government ministry which has jurisdiction over the matter. In their objections, people may agree with the government’s reason to purchase their property, but would like to see minor changes to the property taking. Others may ask the government to relocate its plans elsewhere while some may be completely opposed to the government’s plans, says the Department for Communities and Local Government.

That ministry will then hold what is called an “inquiry” where it appoints an Inspector (i.e., specialists, including “surveyors, engineers, or architects”) to oversee informal proceedings where both the acquiring agency and those who object to the government’s action argue their cases and present witnesses. (The Inspector must follow procedures established by the *Compulsory Purchase (Inquiries Procedure) Rules 2007*.) At the end of the inquiry, the Inspector will present a report to the government ministry with his conclusions and recommendations. The ministry will then “confirm, modify, or reject the CPO.” People may challenge the confirmation of a CPO by appealing to the High Court of Justice.

**Compensation:** When an acquiring authority carries out a compulsory purchase of private property, several laws give a right to property owners and businesses to apply for compensation. (These laws include the *Land Compensation Acts of 1961* and *1973*, the *Compulsory Purchase Act of 1965*, and also various Acts of Parliament, according to the Department for Communities and Local Government.) When providing compensation, the



government uses what it calls the principle of equivalence. “This means that you should be no worse off in financial terms after the acquisition than you were before,” it said. “Likewise, you should not be any better off.”

When the government seizes the land, the owner may claim compensation for the land’s market value. If only part of a property is acquired, the owner may claim compensation when the retained land loses its value because it is severed from the acquired land. (The government, in various publications, uses an example of where it takes part of a private parking lot to build a railway project. In such a case, the retained land will lose part

the agency’s compensation offer (of around US\$1 million/acre to US\$1.5 million/acre) was inadequate compared to other sites in the area. An LDA spokesman replied: “We are confident our offers represent the market value of the properties concerned . . . It is very unlikely any of the businesses affected will be offered less than they originally paid for their sites.” Many critics also said that the Olympic park would eliminate more jobs than it would create. But an LDA spokesperson told the *BBC News* that the area would see a net gain of 4,000 permanent jobs, and that the housing in the Olympic village would be converted into 9,000 new homes at the end of the Olympics.

## The most recent publicized matter concerning compulsory purchase in the United Kingdom occurred in 2005 when, after being chosen to host the 2012 Summer Olympics, London decided to build an Olympic Park in an area described as “one of the UK’s most deprived areas with a very high level of unemployment and low level of skills.”

of its value because it is separated from the acquired property.) People and businesses may also claim compensation for costs and expenses of moving elsewhere. If a business cannot move to another location, it can apply for compensation to close it down.

The laws also give people a right to claim compensation in cases when the government does not purchase their land, but instead acquires neighboring land and then begins construction of a public works project whose physical effects – such as noise, vibration, fumes, and artificial light – cause a decrease in the value of their own properties.

**Compulsory purchase and the London Olympic Park.** The most recent publicized matter concerning compulsory purchase in the United Kingdom occurred in 2005 when the International Olympic Committee selected London to host the 2012 Summer Olympics. To prepare for these games, the London Development Agency (or LDA) chose an 764-acre site in east London to build an Olympic Park, which would include a newly built 80,000-seat stadium, venues for specific competitions, and an Olympic village to house athletes from around the world. The site is specifically located in the area of Lower Lea Valley, which analysts have described as “one of the UK’s most deprived areas with a very high level of unemployment and low level of skills,” adding that “much of its land is taken up with derelict industrial land and poor housing.”

To keep on schedule for construction of the Olympic Park, the LDA in 2005 began negotiations with around 200 businesses and 450 residents already on the site to vacate the area by the summer of 2007. At the same time, the LDA submitted a request for a CPO to the Secretary of State for Trade and Industry which would give it the legal right to purchase property if negotiations with any resident or business did not lead to a mutual agreement to move elsewhere. A government official told *BBC News* that the LDA applied for a CPO “only to safeguard the land needed for the Olympic Park if negotiations with individual landowners broke down.”

While many accepted the LDA’s compensation offers, the media reported that 100 people had filed around 400 objections to the LDA’s plan to build the Olympic site, including claims that

By 2007, the LDA had reached agreements to purchase around 94 percent of all the land in the proposed Olympic site. The Secretary of State for Trade and Industry had also approved LDA’s request for a CPO in December 2006. Observers say that LDA had used the CPO to purchase the remainder of the land from their respective owners. According to *The Independent*, the LDA spent over US\$1 billion to acquire the land for the Olympic site, and also to pay relocation and other costs.

In one case, three gypsies and their families (some of whom were living for decades on government-owned caravan sites which were later marked for Olympic construction) had filed a lawsuit to prevent their evictions and to reverse the government’s decision to approve the CPO for the Olympic site. They argued that forcing them and 35 other gypsy families to move would violate the *European Convention on Human Rights*. Specifically, the approval of the CPO would disproportionately interfere with their right to private and family life under Article 8 of the convention. (The costs of hosting the Olympics games would outweigh the benefits, claimed the families.) They also noted that the government had not yet found another site for their caravans.

In May 2007, Justice Wyn Williams of the High Court of Justice (in *Smith & Others v. Secretary of State for Trade and Industry*) ruled that the Secretary of State had justification to approve the CPO, and that doing so would not disproportionately interfere with the claimants’ right to private and family life. Justice Williams believed, for instance, that the benefits of hosting the Olympics would outweigh its costs. He also noted that the government had later found “new sites with modern amenities for all of the travelers living on the Olympic park site.”

### South Africa: The effects of political and social change on expropriation of property

Unlike the United Kingdom and the United States, the nation of South Africa uses the term “expropriation” to describe the power of the government to take property from its owner for a public purpose.

Analysts say that the legacy of *apartheid* – a term derived from the Afrikaans word for “apartness” – has affected how South Africa



carries out expropriation. Under apartheid, the government had created a legal system that strictly segregated people in every aspect of society according to their respective races. Various laws prohibited interracial marriage, maintained separate public facilities, and created separate educational systems for whites and other races. Political analysts say that the apartheid system

as Act 126) – which authorize the Minister of Agriculture and Land Affairs to expropriate land as part of land reform.

In 2008, South Africa passed the *Expropriation Act, 2008*, which formally replaced the outdated *Expropriation Act of 1975*. (Legal analysts said that several provisions in the 1975 act had conflicted with the 1996 constitution up to that time.) The 2008

## Under South Africa's constitution adopted in 1996 (reflecting that nation's dramatic change in governance to black majority rule), the government may take private property as part of various reform efforts to address the wrongdoings under the era of apartheid.

had widened an already-existing income gap among the different races in South Africa and led to increasing poverty and economic stagnation in the black population, which still persist today.

The legal process of expropriation during the era of apartheid was similar to those found in other nations. The *Expropriation Act of 1975* allowed the government to take private property for only a public purpose such as a public works project. When carrying out an expropriation, the government had to give compensation to the owner for only the market value of the property along with any financial losses. If the two sides failed to reach an agreement on compensation, then a court would decide the matter.

In 1994, South Africa held its first democratic elections and then adopted a new constitution which ended apartheid. Under the 1996 *Constitution of the Republic of South Africa*, which reflected South Africa's change in governance, the government may take private property as part of various reform efforts to address the wrongdoings under the era of apartheid. Specifically, under Section 25, the government may take private property for a public purpose and – in contrast to the *Expropriation Act of 1975* – also in the public interest.

According to the 1996 constitution, the term “public interest” includes “the nation's commitment to land reform, and to reforms to bring about equitable access to all [of] South Africa's natural resources.” That is to say, the government has the authority to redistribute white-owned farmland and other properties. (“Land reform is meant to redress both present conditions of inequality and the historical injustice of racially discriminatory laws,” said the South Africa-based Centre for Rural Legal Studies.) Section 25(5) of the constitution explicitly allows the government to expropriate land to carry out land reform. It says that “the state must take reasonable legislative and other measures . . . to foster conditions which enable citizens to gain access to land on an equitable basis.”

Under the 1996 constitution, the payment of compensation is not based solely on the market value of the property, but may also include factors such as how long the current owners had owned the land and also “the history of the acquisition and use of the property,” meaning that the government may, for instance, consider claims that the previous regime had forcibly (and perhaps illegally) removed non-whites from the property in question, according to *BuaNews*, the government's news service.

To implement Section 25 of the constitution, South Africa passed two laws – the *Extension of Security and Tenure Act* (or ESTA), and the *Provisions of Certain Land for Settlement Act* (popularly known

act repeats the expropriation provisions already found in the 1996 constitution. For example, it allows the government to take private property not only for a public purpose, but also in the public interest, including efforts to bring about land reform. In addition, compensation would not be based solely on the market value of the taken property, but also on factors listed in the constitution. The 2008 act also includes a new provision which designates the Minister of Public Works (rather than the courts) as the “primary decision maker” in determining the amount of compensation given to a property owner, though it must consult with an Expropriation Advisory Board.

While critics had worried that these laws would lead to mass expropriations of white-owned land by the government, analysts say that such a development had not occurred. The Centre for Rural Legal Studies points out that the policy guidelines which implemented ESTA and Act 126 allow the government to expropriate a property (as part of land reform) when no other alternative land is available for a specific land reform project, and also when the property owner will not sell the land or refuses to sell it for a fair price. “The policy does not envision a proactive role for the state in expropriating and making available large amounts of property for rapid and efficient redistribution,” said the Centre in a 2003 briefing paper called *Expropriating land for redistribution*.

### China: Will future stability hinge on how the government regulates expropriation?

In 2010, China surpassed Japan to become the second largest economy in the world. (The largest is the United States.) To maintain political and social stability, China – whose population of 1.3 billion people is world's largest – must ensure that its economy continues to grow at a rapid pace. But by focusing on economic growth, the government has placed less emphasis on complying with laws which regulate their power to take property, say observers. They also believe that the central government must reform the existing legal framework overseeing the taking of property.

During the last decade, the media have reported that people in China have carried out increasingly violent protests against government authorities whom they believe had wrongfully taken their property and also violated their property rights. How the central government addresses these protests and whether it carries out further legal reforms in the area of property takings could play an important factor in whether China can maintain political and social stability in the future.

Currently, the People's Republic of China does not allow the private ownership of land. Under Article 10 of that nation's constitution, the state (i.e., the central government) owns all urban land, and village collectives own all suburban and rural land. "In China, no units or individuals can purchase or [sell] the ownership of land" since it is always owned by the government, said Liao Junping, professor and director of the Institute for Real Estate Studies at Sun Yat-Sen University in China. Along with the constitution, a statute called the *Land Administration Law* (or LAL) governs the basic administration of land in China.

**Expropriating rural land in China:** In rural areas, village collectives own most of the land, and a village committee in each collective is responsible for its management. Around 900 million people (close to 70 percent of the total population) live in rural areas.

Under various laws, rural land may only be used for agricultural purposes such as farming and raising livestock. Article 63 of the LAL, for instance, says that "no right to the use of land owned by peasant collectives may be assigned, transferred, or leased for non-agricultural construction" such as the construction of commercial centers and large residential complexes.

The purpose of such regulations, say political analysts, is to safeguard the interests of the rural population which largely depend on agricultural activities to provide its primary – and, in many cases, probably the only – source of employment and income. They note that following the Communist takeover of China in 1949, "it was the redistribution of land to the poorest peasants that gave the Communist Party its greatest enduring legitimacy in rural areas."

While village collectives own most rural land, they grant only *the right* to use such land to people within their respective areas, generally for a term of 30 years.

The ownership of rural land by village collectives is not absolute. Under Article 10 of China's constitution, the central government may expropriate land (i.e., take complete ownership) from village collectives for the "public interest," but must provide "compensation for the land expropriated." (China does not use the

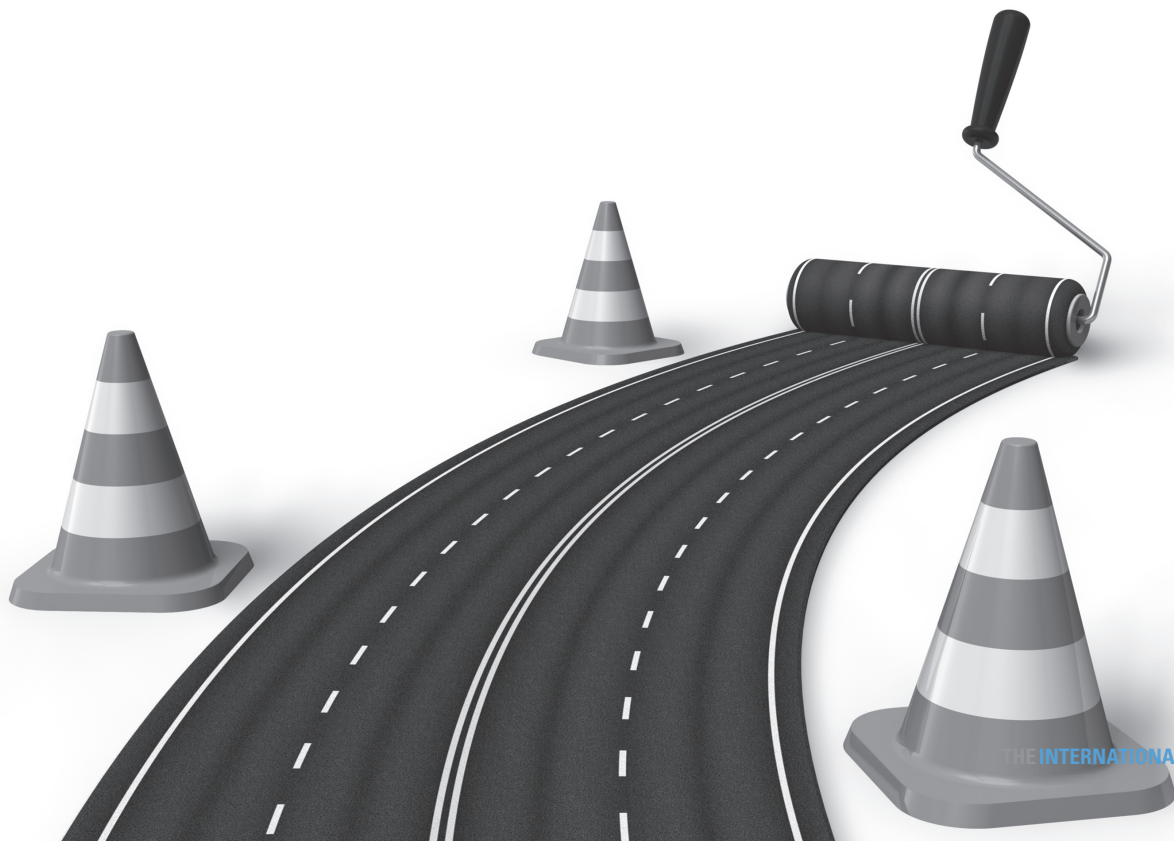
term "eminent domain.") According to the Asian Development Bank (or ADB), rural land is the only kind of land which can be expropriated in China. On the other hand, "the peasant collectives have no power to expropriate [urban] land from the state," said Liao Junping of Sun Yat-Sen University.

In contrast to the constitution, the LAL provides much more guidance on how the state must determine compensation for expropriated land. Specifically, under Article 47, compensation for expropriated rural land is based on the "original use of the land," and not on its market price. Currently, it is set at "6 to 10 times the average annual output value of the land" for the three years before the taking. A resettlement subsidy (for moving expenses) is set at "4 to 6 times the average annual output value." Compensation for standing crops is based on the "average annual yield of the preceding 3 years." For housing structures on expropriated land which is to be demolished, the ADB says that each province sets compensation based on "ad hoc standards that are highly discretionary."

As in the case of the United Kingdom and the United States, paying compensation must follow the principle that the amount paid should not reduce the living standard of the person whose land was taken, say legal experts. At the end of the expropriation process, the rural land in question becomes state-owned land. The state, in turn, may sell the right to use the land to businesses for significant sums of money. (Again, China does not allow the private ownership of land itself.)

**Shortcomings in the expropriation process of rural land:** Demographic experts in China's State Council Development Research Center say that the nation will undergo a much more rapid pace of urbanization in the coming decades. They estimate that the rural population will decrease from 900 million to 400 million within 30 years as more people move to metropolitan areas in search of job opportunities. Around 200 million migrants (a population twice as large as that of Mexico) travel across China in search of work, reported the *New York Times*.

To accommodate urban areas which provide much of China's



economic activity, the central government has been expropriating surrounding rural land at a faster pace in the last decade.

But critics say that several shortcomings in the laws which regulate the expropriation process have hurt the interests of the rural population whose land is being taken away by the state government. What are some of these shortcomings?

**Using expropriated rural land for commercial development:** As mentioned previously, various laws in China say that the state must use expropriated rural land for the “public interest.” They also prohibit non-agricultural construction on rural lands. (Such construction can only take place on state-owned (i.e., urban) land.) But critics say that another law has been undercutting these protections for the rural population.

Specifically, Article 43 of the LAL says that “all units and individuals that need land for [non-agricultural] construction purposes shall, in accordance with law, apply for the use of State-owned land . . .” But the term “State-owned land” under Article 43 includes land that was “originally owned by peasant collectives but expropriated by the State,” point out critics. So Article 43, say legal practitioners, has allowed developers in China to use expropriated rural land (purportedly taken by the state for the public interest) for non-agricultural purposes.

In a review of statistical data on rural land expropriations in China from 2000-2001, the ADB said that “the land expropriated for nonprofit ‘public interests’ only accounted for a small proportion” of all land takings. Observers say that the central government has, indeed, expropriated rural land to build “roads, power plants, dams, factories, [and] waste dumps.” But the ADB concluded that “current laws view public interests almost identical with national construction,” and added “in reality, the purposes of land expropriation have not been limited to ‘public interests’ but have already been extended to corporate interests and individual interests.”

**Lack of adequate compensation:** While the expropriation of rural land should not lead to a lower standard of living for those whose property was taken from them, many analysts say that compensation levels embodied in current laws are inadequate because they are based primarily on the original use of the land and not on its market value.

“For either public interests or any commercial purpose,” compensation for expropriated farmland has been “well below the fair market value,” said the ADB. It noted, for example, that “the sum of land compensation and resettlement subsidy was, in general, less than 20% of the price at which [the] government sold the use rights [of] the same land to developers.” A study carried out by Renmin University in Beijing and published in February 2012 said that the price of selling use rights for expropriated land was “more than 40 times the average compensation sum given to farmers,” reported *Agence France-Presse*. The Renmin University study also said that almost 25 percent of farmers did not receive any compensation when the government expropriated their land.

Analysts also point out that when a village collective receives compensation for expropriated land, the compensation is not automatically distributed to the people whose land was taken. Instead, under implementing regulations for the LAL, compensation goes directly to the village collective itself (which is represented by the village committee). As to how and even whether compensation is given to the people who lost their

land is “entirely subject to the collective landowner’s discretion,” said the ADB. It said that “more than 50% of affected farmers reported that their living standard had been reduced because of land expropriations.”

Critics also believe that individual members of the village committees secretly take a large share of any compensation, leaving an inadequate amount for hundreds or thousands of farmers. (Legal observers point out that, under Article 49 of the LAL, the village committee must make “known to its members the income and expenses of the compensation received for land expropriation.”)

**No clear definition of “public interest”:** Many analysts point out that, until recently, the term “public interest” was “not defined in either statutory or case law,” which, in turn, gave the government “virtually unlimited power in taking farmland for any purpose.” It also remains undefined in China’s constitution. According to analyst Peter Yuan Cai of Australian National University, such ambiguity “provides fertile ground for corrupt officials and real estate developers to expropriate land in the name of public interest without the need to compensate people on just terms.”

**Lack of involvement in the expropriation process:** Critics point out that laws such as the LAL generally don’t require village collectives to keep people in rural areas fully informed during the expropriation process. For instance, procedures set under the LAL require the state to notify collective landowners of the expropriation of their land only *after* it has been approved. As a result, “this notification is, in effect, a simple ultimatum demanding that farmers get ready for the taking within a predetermined timeframe,” said the ADB.

Also, while the village collective may file complaints concerning the amount of compensation for the expropriation of its land, such a matter “shall not affect the implementation of the expropriation” itself, according to Article 25 of the LAL Implementing Regulations.

An investigation of 17 villages in three provinces carried out under the auspices of the ADB “did not find a single farmer who had been consulted before and after the expropriation plans were made,” and that “none of the affected farmers in these 17 villages was allowed to participate in the expropriation process or appeal the land expropriation decisions.”

**Protests against expropriation of rural lands:** According to a 2005 ADB research report called *China’s Capacity Building of Risk Management of Land Acquisition Resettlement*, as urban areas continue to expand in China, “more than 36 million farmers had lost all or part of their land between 1993 and 2003.” It estimated that an additional 26.5 million farmers would lose their land between 2001 and 2010. Officials in China say that more than 70 million farmers are presently landless, though others say that this number is probably higher. And according to an August 2011 report from China’s Academy of Social Sciences, the number of landless farmers grows by three million every year. “Farmlands have been lost at an unprecedented pace,” said the ADB.

Political observers say that the shortcomings in the legal framework governing rural land expropriation (discussed in the previous section) have led to growing complaints and tens of thousands of increasingly violent protests in China’s rural areas. Analysts such as Joshua Muldavin, a professor of Asian studies at Sarah Lawrence College, believe that the issue of land



expropriation is eroding the legitimacy of the Communist Party in the eyes of the rural population.

According to the government's Research Center for Social Contradictions, forced evictions from expropriated rural land was the main driving force behind the 180,000 protests, riots, and strikes in China in 2010. (In contrast, fewer than 10,000 incidents took place during the 1990s.) The Research Center also noted that the number of protests concerning expropriated land was greater than all other issues combined. Examples of recent protests include the following:

- According to reporting from the *New York Times*, in September 2011, hundreds of rioters in the city of Lufeng had "besieged government buildings, attacked police officers, and overturned SWAT team vehicles" after the municipal government expropriated and then sold the land use rights of around 800 acres of farmland to a developer for \$156 million to build "industrial parks and high-priced housing" while allegedly offering each villager compensation "barely enough to buy a new bed."
- In December 2011, protestors in the coastal city of Wukan chased out municipal government officials and set up roadblocks after the government expropriated 130 acres of rural land (half of which was occupied by a pig farm and the other half by farmers) and then sold the land use rights to a Hong Kong-based developer for over \$150 million to build "villa homes and shopping centers," but offered farmers what they considered inadequate compensation. During the last decade, residents say that the government had expropriated over 1,000 acres of rural land and then sold the land use rights to developers.

#### ***Reforming the process of expropriating rural land and houses:***

In response to growing complaints and protests, the central and several provincial governments issued further clarifications to protect the interests of China's rural population.

For example, in 2004, the State Council issued Document No. 28, which specifically calls on local governments to increase compensation to those farmers whose previous standards of living has not yet been restored after the expropriation of their land. In addition, Document 28 says that "compensation for loss of land . . . must be primarily used for the farmer households who have lost their contracted land through requisition." Furthermore, it says that before submitting a land taking for approval, an expropriating agency must inform farmers about the "purposes, location, [and] compensation standard" of such a taking. But observers say that authorities do not regularly enforce this law.

In 2007, the national legislature passed what analysts described as a landmark law (called the *Property Rights Law of the People's Republic of China*) which, for the first time in China's modern legal history, created specific legal rights and safeguards that people can use to protect their private property, among other provisions. As China's moves its economy farther away from its socialist beginnings to a market-oriented approach, the government wanted to "reassure the country's fast growing middle class that their assets are secure" from the "whims of the state," said observers such as the editors at the *Economist*, a news magazine. Passing a law which gives explicit legal protections to private property would, in the words of one government official, stimulate "people's initiative to create and accumulate wealth and to promote social harmony."

Under Chapter I of the 2007 property rights law, the government

says that while socialism will continue to play a dominant role in the economy, it will now equally protect both state and private properties. "The property rights of the State, collective, individual, and other obligees shall be protected by laws and shall not be infringed by any institute or individuals," says Article 4. (Previously, the government gave "state property rights priority over individual property rights," said legal analyst Dan Harris of Harris & Moure, and a contributor to ChinaLawBlog.com.) Chapter I further says that property includes personal property (basic items which people can readily move) and real property such as buildings. But, under the 2007 law, both the state and collectives still own land.

Chapter III says that people may resolve property disputes – such as those concerning who actually owns a disputed piece of property, whether one party must return property to another, and who must pay for damages to property – through mediation, arbitration, or litigation.

How does the 2007 property rights law address the expropriation of rural land from village collectives for development reasons? Legal observers say that it neither expands nor places new limits on the central government from carrying out expropriations.

Under Article 42 of Chapter IV, the 2007 property rights law reaffirms that the government may expropriate "collectively-owned land, houses, and other real property," but may only do so "for the purpose of public interest" and "within the authority provided by laws." But Article 42 does not define the term "public interest."

In the area of compensation for expropriated land and houses, Article 42 doesn't provide clear and specific guidance on how exactly the government must determine compensation such as whether it must use a market-based system or whether it must rely solely on provisions in existing regulations. For example, under Article 42, when the government expropriates collectively-owned land, it must provide compensation "in full" for the land itself, subsidies for resettlement, and compensation for fixtures and young crops on the land "in order to guarantee [the] normal lives" of farmers. For expropriated housing, Article 42 says that the "residential conditions of the expropriated shall be guaranteed," and must include compensation for demolition and resettlement "according to law." But in both of these cases, Article 42 doesn't provide any further information.

To address problems concerning corruption (such as cases where farmers accuse village committees of selling rural land to developers and keeping most, if not all, of the compensation), Article 42 says that "no institution or individual shall withhold, misappropriate, embezzle, or privately divide the compensation for expropriation." But it doesn't say whether the government must pass new laws to enforce this provision.

Does the property rights law provide any measures to prevent expropriation of rural land for questionable purposes? Article 43 says that the state will adopt "special protections with regard to the agricultural land, strictly limiting the transfer of agricultural land to construction land." But it neither describes these protections nor does it say to what extent the government must limit the use of agricultural land for construction purposes.

Why does the property rights law contain these and many other vague provisions? Several analysts point out that when the national legislature first introduced the law in 2005, it led to an



ideological struggle which pitted Communist party members who wanted to retain a socialist economy against those who wanted to incorporate market-based reforms. To facilitate passage of the law, its supporters deliberately crafted many vague provisions. “This vagueness,” said analyst Dan Harris, “was the price paid to allow any form of [the] Property Law to be adopted.”

Observers say that while the property rights law clarified some issues and, for the first time, established legal protections for private property, they don’t believe that it has played a significant role in how the government takes and provides compensation for expropriated rural land and houses.

**Urban land: “Withdrawing” land use rights:** Just as village collectives grant only *the right* to use rural land, the state grants only *the right* to use urban land to individuals and companies (among other entities) for various purposes such as constructing factories and residential complexes, according to a 2007 ADB report – *Expropriation Laws and Practices: The People’s Republic of China* – describing China’s land practices. Under various regulations, these “use rights” for urban land can be bought, sold, and leased among different parties, and the terms of their use can range anywhere between 40 to 70 years. (These transactions give “somewhat of an appearance of actual individual ownership,” said legal analyst Elizabeth Lynch of ChinaLawandPolicy.com.) The rights holder can also ask the government to renew his right to use the land.

As in the case of other nations, China may need to use a piece of urban property for a certain reason such as building a road or laying down power lines. Since the state already owns all urban land, it carries out a process called “withdrawal” where it forcibly takes the use rights of a particular piece of urban land from the current rights holder and transfers them to another party, including state agencies and even private developers. Under Article 58 of the LAL, the state may forcibly take away urban land use rights only in certain situations such as those involving “public interests,” the renovation of old towns, and also upon the expiration of use rights which the state has decided not to renew, among others.

In contrast to many Western nations, “the [Chinese] government itself is not allowed to conduct condemnation [or provide compensation] for the condemned property,” noted the ADB report. Instead, the entity which gained the right to use a piece of urban property (at the end of the withdrawal process) must negotiate with and pay compensation to the party whose use rights were taken away. Said the ADB: “Under this legal framework, the government delegates its eminent domain power and shifts its duty of compensating property owners to developers or contractors of public facility construction . . . [U]rban condemnation is essentially an act conducted by one private entity on another private entity.”

Compensation includes payment for the value of physical structures which will be demolished (such as private homes and those used for businesses), a subsidy for resettling elsewhere, and even for the value of land use rights itself.

**Urban land: Shortcomings in the withdrawal process:** As in cases of expropriation of rural land, observers point to what they describe as shortcomings in the withdrawal process concerning urban land use rights.

**No compensation for land use rights:** The 2007 ADB report said that while the government (under Article 58 of the LAL) must provide “appropriate compensation” not only for the value of

physical structures on the urban land, but also for the withdrawal of urban land use rights themselves, it doesn’t give more details on what would be considered appropriate compensation.

Legal practitioners in China say that, in actual practice, parties whose urban land use rights had been taken by the government do not receive any compensation for those rights. Said the 2007 ADB report: “There have been no reported examples of compensating the holders for the loss of their urban land use rights.” While compensation includes the value of physical structures on the land itself along with resettlement subsidies, analysts note that the value of the urban land use rights themselves “may be much higher in value than structures erected on the land.” As a result, an individual can face a substantial financial loss if his urban land use rights are taken away. (Again, individuals in China buy, sell, and lease urban land use rights rather than the physical land itself.)

**Inadequate compensation for other properties:** The process for determining compensation for the demolition of existing physical structures on urban land often favors parties such as private developers which receive the urban land use rights, say critics. The 2007 ADB report said that private developers often hire their own appraisers to determine compensation levels, and that such compensation is usually lower than what the former rights holder would like to receive. “Property owners . . . are usually powerless, with inadequate sources of information, and without access to unbiased appraisal organization,” it said.

**Urban land: Reforming the process for land use rights:** In response to growing complaints, China during the last decade has changed its laws regarding certain aspects of the withdrawal process of urban land use rights. For example, the State Council in January 2011 passed new regulations (called the *Regulations on Expropriation and Compensation of Housing on State-Owned Land*) which address the expropriation and demolition of existing *homes* (and not other structures) located on urban land whose use rights have been transferred to another party. (These regulations don’t apply to rural lands.)

Under the new regulations, a home may be expropriated only for reasons of public interest, which include, among others, “land used for national defense, energy and transportation infrastructure, public causes of education and health, and well as construction of homes for low-income people.” According to an analysis by Yan Jun and Chen Haiting of the law firm King & Wood, these new regulations represent the first instance in modern Chinese legal history where the government defines the term “public interest,” though it applies only in cases involving the expropriation of homes in urban areas only.

In addition, before a home is expropriated, the government must present a compensation plan to the homeowner after a public hearing. In their translation of the new regulations (which are published in Chinese), Yun and Haiting said that compensation for the home “should be set no lower than market prices on the date when the expropriation decision is announced.” Furthermore, a homeowner can file a lawsuit to contest an expropriation decision.

The new regulations, moreover, don’t allow real estate builders and demolition companies to get involved in the expropriation and compensation process.

Even though the central government has been reforming the process of how it expropriates rural land and how it withdraws urban land rights, experts say that it will be very difficult to

balance the protection of rights of rural and urban populations while trying to accommodate China's growing economy.

### Eminent domain and international law

The previous sections explained how different nations regulate and carry out the process of eminent domain. While sharing many similarities, the legal system overseeing eminent domain in each nation has been shaped by its history and system of governance, among other factors. But what about the area of international law? Does international law set one standard for all nations to follow when exercising eminent domain?

Currently, no international treaty confers nations with the power or authority to use their powers of eminent domain. Instead, as mentioned earlier in the section concerning the United States, exercising eminent domain is an inherent power of a government. Although governments have the inherent power to take private property for public use in return for compensation, legal observers point out that a few existing international instruments have established some minimum standards for nations to follow when they exercise such authority. But these standards can vary greatly among different agreements.

**The Universal Declaration of Human Rights** (or Universal Declaration): Adopted by the United Nations General Assembly in 1948, the Universal 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.

Under Article 17, nations must recognize everyone's right “to own property alone as well as in association with others.” It adds that “no one shall be arbitrarily deprived of his property.” While the Universal Declaration does not explicitly mention the term “eminent domain” or “expropriation,” analysts say that Article 17 implicitly calls on nations to set some minimum standard when taking property. At the same time, they note that the Universal Declaration does not provide any further guidance on exactly when and how nations may take property, or whether to provide compensation.

Observers also 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 a certain issue which is 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 actual international treaty.

**International and regional treaties:** Experts say that no international treaty calls on all nations to recognize and respect a person's right to own and use property or even sets minimum standards which governments must follow when they take property for a public interest. For example, while both the 1966 *International Covenant on Economic, Social and Cultural Rights* and the 1967 *International Covenant on Civil and Political Rights* give more specific guidance on the various rights contained in the Universal Declaration, neither treaty even mentions a right to own property. Also, no international treaty focuses solely on the right to property or oversees the taking of property.

Instead, several *regional* treaties call on nations in specific areas of the world to recognize the right to property and also set minimum standards when they take property. They include the following:

**The European Convention for the Protection of Human Rights and Fundamental Freedoms** (also known as the European Convention on Human Rights): Adopted in 1950, the European Convention is a regional treaty which calls on its 47 signatory nations – all located in Europe – to recognize and protect fundamental human rights and freedoms (including the right to liberty, a fair trial, and life, and also freedom from torture and slavery, among many others) 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.

In the area of property takings, the European Convention provides some vague guidance. Article 8 says that “everyone has the right to respect for his private and family life, his home, and his correspondence.” It also says that a public authority may interfere with these rights only if a certain law allows it to do so, and also when doing so is necessary “in the interests of national security, public safety, or the economic well-being of the country,” among other reasons.

But as in the case of the Universal Declaration, the European Convention does not provide more detailed guidelines. For instance, it does not define the term “home,” and whether it would include, for instance, a person's dwelling and surrounding property. (But experts believe that Article 8 alludes to eminent domain). The European Convention also does not describe what would constitute interfering with a person's “economic well-being.” Furthermore, it does not say whether a government must provide compensation for interfering with a person's right to respect for, say, his home.

**Protocol I: Enforcement of certain Rights and Freedoms not included in Section I of the Convention:** In 1952, the signatories to the European Convention adopted Protocol I to clarify that agreement. (A protocol adds more provisions to an existing treaty.)

For example, in contrast to the European Convention which uses the term “home” in Article 8, the 1952 protocol specifically addresses what it calls the right to possession (i.e., property) in Article 1, which has three provisions. First, it says that “every natural or legal person is entitled to the peaceful enjoyment of his possessions.” Second, the 1952 protocol says that “no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law . . .” (In other words, the state may take property only in the public interest, and only if a law allows it to do so.) Third, it says that these provisions must not “impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest . . .” (That is to say, a nation may pass and enforce laws which control how people use their property, but only if the purpose of doing so is to promote the general interest.)

In contrast to eminent domain in the United States, Article 1 of the 1952 protocol addresses more than the seizure of private land. Legal experts say that the right to property under Article 1 covers a much wider range of economic interests, including “shares [of a company], patents, an arbitration award, the entitlement to a pension, . . . [and] the economic interests connected with the running of a business,” among many other examples.

Even with these clarifications to the European Convention, Article 1 of the 1952 protocol does not provide, for example, any further guidance on what would constitute a taking in either

the public or general interest. Also, the text of the 1952 protocol does not say whether a government in Europe must provide compensation to a property owner.

But over a period of several decades, the European Court of Human Rights had issued a wide range of decisions which eventually established minimum standards to determine whether a

owner bears “an individual and excessive burden,” then the interference would not be fair.

- In addition to serving a public interest carried out in a proportionate manner, the interference must also be authorized through a specific law or regulation. (The 1952 protocol says, in fact, that a taking is “subject to the conditions provided for

**Although governments have the inherent power to take private property for public use in return for compensation, legal observers point out that a few existing international instruments have established some minimum standards for nations to follow when they exercise such authority. But these standards can vary greatly among different agreements.**

government had legally carried out a taking of a person’s property (including land) under Article 1 of the 1952 protocol, said legal analyst Monica Carss-Frisk of the Council of Europe in a publication called *The Right to Property: A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention of Human Rights*. (And in that time, individuals and companies have filed scores of property taking cases at the European Court of Human Rights when they believed that their respective home governments had violated the 1952 protocol.) These procedures are as follows:

- The court must first determine whether Article 1 of the 1952 protocol applies to the property (or economic interest) in question. (People may not simply declare on their own that Article 1 applies to their property.)
- If Article 1 does apply to a certain property, the court must then determine whether a government is actually interfering with the owner’s use of that property. Did the government, for instance, pass a law which expropriated (or had the effect of expropriating) his property? Did it enact regulations which control how the owner uses his property such as those which prohibit construction on property?
- If the court determines that a government is interfering with a person’s right to property, it then analyzes which one of the three provisions of Article 1 is being violated.
- The court then asks the government whether its interference with a person’s right to property serves a legitimate public or general interest. In making this assessment, the court said that it would give national authorities “a certain amount of margin of appreciation.” Why? “Because of their direct knowledge of their society and its needs,” said the court, “the national authorities are in principle better placed than the international judge to appreciate what is ‘in the public interest.’” Still, noted analyst Monica Carss-Frisk, “there have been many cases in which the European Court of Human Rights has found that the State has exceeded its margin of appreciation, and has violated the right to property” under the 1952 protocol.
- Even if an interference with a person’s right to property is being carried out for a legitimate public or general interest, that interference must also be proportionate, said the court. That is to say, an interference must fairly balance the general interests of the community with the protection of a person’s right to use his property. The court had previously ruled that if a property

by law.”) So the court must evaluate whether a government had carried out an interference of a person’s right to property through “precise domestic legal provisions” which include “procedural safeguards against the misuse of powers of the State,” among other requirements.

- If all three requirements (i.e., the interference must serve a public interest, is proportionate, and must be authorized through a law) are not met, then a government’s interference with a person’s right to property violates the 1952 protocol.
- In the area of compensation for taken property, the 1952 protocol does not explicitly say that a government must provide compensation. But the court ruled that giving compensation is implicit in that agreement. It ruled that “compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake.”

**The American Convention on Human Rights:** Adopted in 1969, the American Convention is a regional treaty which calls on its 24 signatory nations – all located in the Western Hemisphere – to pass domestic laws which recognize and protect a broad range of human rights, including the right to a fair trial, privacy, freedom of religion, peaceful assembly, and a right to a nationality, among many others. The convention also established a judicial body called the Inter-American Court of Human Rights to issue interpretations of the convention’s provisions and also to resolve cases where an individual accuses a government of violating a human right listed in that agreement.

Under Article 21, the American Convention calls on its signatory nations to protect the right to property and to set minimum standards for the taking of property. Specifically, it says that “everyone has the right to the use and enjoyment of his property,” but that “the law may subordinate such use and enjoyment to the interest of society.” It adds that “no one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”

The American Convention shares many terms – such as property and compensation – found in treaties such as Protocol I of the *European Convention on Human Rights* and in documents such as the U.S. Constitution, though (as in the case of those instruments) it does not explicitly define them. But in contrast to the U.S. Constitution, the American Convention allows



governments to take property for what it calls social interest, which is undefined.

Unlike the European Court of Human Rights which – through a series of cases and rulings – had established minimum standards for the taking of a person’s property (see the previous section on Protocol I of the European Convention on Human Rights), the Inter-American Court of Human Rights has not established a similarly detailed framework for signatories of the American Convention.

Still, individual cases decided by the Inter-American Court show that it has used criteria cited by bodies including the European Court of Human Rights and other global tribunals to determine whether a government had legally carried out the taking of a person’s property.

For example, in the *Case of Ivcher-Bronstein v. Peru* (issued in 2001), the Inter-American Court – as in the case of the European Court of Human Rights – broadly defined property as “those material objects that may be appropriated, and also any right that may form part of a person’s patrimony; this concept includes all movable and immovable property, corporal and incorporeal elements, and any other intangible object of any value.” (In the United States, cases of eminent domain mainly involve instances where a government specifically takes *private land* – and not other economic interests – for public use.)

To determine whether Peru had expropriated the complainant’s right to property (i.e., his majority shares in a media company) when it passed a law requiring owners of media companies to be Peruvian nationals, the Inter-American Court cited a decision from the European Court of Human Rights where it examined the actual effects of that law, and not whether the Peruvian government had actually seized his majority shares.

**The African Charter on Human and Peoples’ Rights:** Adopted in 1981, the African Charter calls on its 53 signatory nations – all located in Africa – to pass domestic legislation which recognizes and protects a wide range of rights for people in their respective jurisdictions, including the right to liberty, equality before the law, and free association, along with rights to work, education, and health, among many others. To interpret the provisions in the African Charter and also to decide cases where complainants allege that a signatory nation had violated their rights under that agreement, parties to the African Charter created the African Commission on Human and Peoples’ Rights.

In the area of property, Article 14 says that “the right to property shall be guaranteed,” and that this right “may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.” As in the case of other regional agreements, the African Charter does not define terms such as “public need” or “general interest,” though it does say that a government may take a person’s property for such purposes only if a law authorizes it to do so.

But unlike agreements such as the American Convention, the African Charter does not explicitly say whether a government which takes property for, say, a public need must provide compensation to the owner. On the other hand, Article 21 of the Charter does mention a right to receive adequate compensation, but it does so specifically in cases where people are deprived of their natural resources such as oil. (Still, many African nations have laws which require the government to provide compensation when it takes people’s properties.)

Unlike the European Court of Human Rights, the African Commission has not established a detailed framework for nations to follow when they take a person’s property for a public need. An examination of individual cases instead shows that complainants had argued that their respective governments had violated their right to property under Article 14 for reasons which didn’t involve eminent domain. And in each case, the Commission called on the government to provide compensation.

For example, in case 155/96 brought by the Social and Economic Rights Action Center and the Center for Economic and Social Rights, the African Commission in October 2001 ruled that the government of Nigeria had violated the right to property when its forces destroyed the homes of people who were protesting against an oil development project. (The complainants did not argue that the government had taken their land as part of an oil development project.) It then called on the government to provide compensation to those people who had lost their homes.

In case 292/04 brought by the Institute for Human Rights and Development in Africa on behalf of Esmaila Connateh and 13 other people, the African Commission in May 2008 ruled that the government of Angola had violated the right to property when its law enforcement officials arrested Gambian workers, seized their property (such as “television sets, shoes, wristwatches, clothing, generators, television, furniture, and cash”), and then prevented the workers from taking their property before being deported. It called on Angola to provide “adequate compensation of all those whose rights were violated.”

**The Association of Southeast Asian Nations** (or ASEAN): Formed in 1967, this association promotes political, economic, and social cooperation among its 10 member nations, all of which are located in southeast Asia. (China is not a member.) ASEAN later instituted a system of preferential tariffs for member nations on basic commodities and raw materials. An agreement called the ASEAN Charter governs the activities of its member nations.

Unlike regional treaties such as the European Convention and the American Convention, the main purpose of the ASEAN Charter is not to call on its member nations to respect and protect human rights. In fact, there is no regional human rights treaty for Asia, though individual countries have joined specific international human rights treaties.

Instead, that agreement calls on them to abide by several broad principles which maintain the sovereignty and security of its members. For example, it says that members must not interfere in the “internal affairs” of other member states, meaning that members should not tell others how to carry out their human rights and other domestic practices, say political analysts. It also says that they must renounce aggression and the threat or use of force contrary to international law, and to rely on peaceful means of settling disputes.

At the same time, members must still adhere to the “rule of law, good governance, the principles of democracy, and constitutional government.” Also, they must respect “fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice.” But the ASEAN Charter does not define any of these terms. And analysts say that human rights groups have not relied on the ASEAN Charter to promote the protection of human rights (such as the right to property) or to call on nations to develop minimum standards to govern the taking of property. 🌐



# Flag desecration laws at home and abroad

Most countries around the world use their respective flags as a symbol to represent their culture, history, and values, and also to bring together a diverse range of people under a single national identity. People in the United States, for instance, associate their nation with now-famous historical images of the flag. They include U.S. soldiers raising a flag on the Japanese island of Iwo Jima during World War II, and also the first person on the Moon saluting the American flag which he had planted on the lunar surface.

Because flags, in the minds of most people, embody their nation and also invoke memories of historical importance, their desecration often brings about sharp reactions, says legal analyst Ute Krüdwagen. She says that many people view disrespectful treatment of a flag as an attack on the nation itself. To protect their national flags, many countries have passed laws which prohibit flag desecration.

But critics say that provisions in many of these laws are written so broadly that people may not be sure which specific acts constitute flag desecration. Others argue that enforcing flag desecration laws could, in certain circumstances, violate fundamental rights such as the right to freedom of speech and expression.

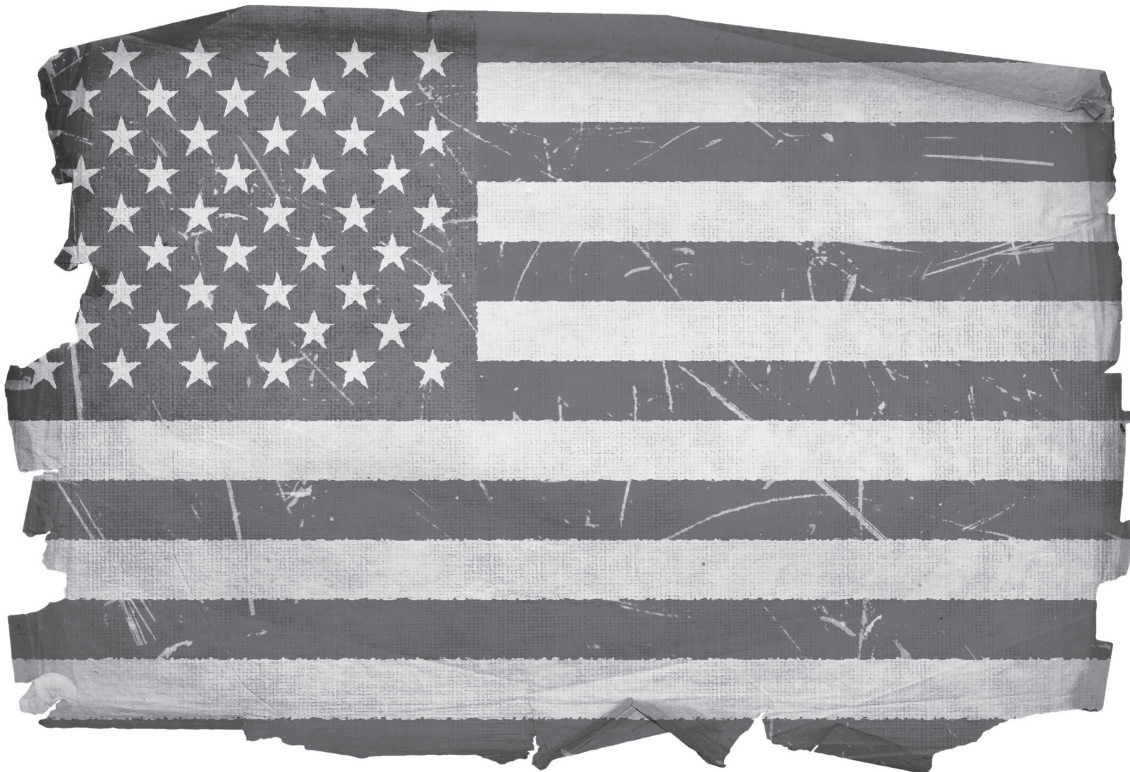
What is flag desecration? How do the United States and other countries address flag desecration? And does international law provide guidelines to nations on this controversial topic?

## What is flag desecration?

Flag desecration is a broad term used to describe intentional acts of damaging, destroying, or mutilating a flag. Political analysts say that most acts of flag desecration – whether someone tears, steps on, subordinates, burns, or displays it upside down – are carried out in public to protest a country's actions and policies. For instance, in the United States, acts of flag desecration occur frequently during times of protest against its foreign policies, say observers. In other nations, people desecrate the flags of those countries whom they perceive as enemies or believe are carrying out policies contrary to their interests.

Yet given the controversy surrounding flag desecration, people disagree on which acts constitute desecration. For instance, various businesses use images of a flag in their advertisements. But many say that using a flag for commercial purposes is an act of desecration. According to the U.S. Flag Code (found in 4 USC § 1 - § 10), “the flag should never be used for advertising purposes in any manner whatsoever.” But some analysts say that the Flag Code serves only an advisory function, and that the federal government does not enforce its provisions.

People use the flag for many other purposes. In the late 1800s, people in the United States used images of the national flag for “skirts for ballet dancers, trunks by prize fighters, and garb of circus clowns and professional bicycle riders,” according to Emmet Mittlebeeler, a legal scholar. People have also used flags for hammocks, dog blankets, and equine fly nets. Today, images



of the flag can be found on blankets, caps, and tee-shirts. But, according to the Flag Code, the flag “should not be embroidered on such articles as cushions or handkerchiefs and the like, printed or otherwise impressed on paper napkins or boxes, or anything that is designed for temporary use and discard.” It adds that “the flag should never be used as wearing apparel, bedding, or drapery.”

Despite these rules, many people use images of the flag as they see fit, and don't consider their acts as a form of desecration.

### The United States and flag desecration

The flag's role in American society seems unique, argue some legal analysts. Ute Krüdewagen says that the American flag is a “ubiquitous feature of the American society,” pointing out that it can be found “in schools, government buildings, museums, factories, parks, and private homes.” She adds that “America was

Over a period of several decades, the U.S. Supreme Court issued several opinions concerning the legality of various flag protection laws under the Constitution. But these decisions, up until 1989, did not address whether the Constitution allowed the federal and state governments to punish a person for desecrating the flag specifically as a means of expression during a public protest.

the first nation to adopt a Flag Code, to celebrate Flag Day, or to make the pledge of allegiance part of the regular school day.” Muriel Morisey, a law professor at Temple University, believes that the reverence given to the American flag has become a form of civil religion. Still others point back to the Flag Code itself which says that the flag “represents a living country and is itself considered a living thing.”

Even today, people become incensed when viewing an act which they consider desecration. For instance, in September 2011, the *Wichita Eagle* reported that a teacher at a Kansas high school apologized to the school community for giving a lesson where she stepped on the American flag to demonstrate how the First Amendment protects controversial acts. In March 2012, veterans in Florida held protests against a person who displayed a flag where an image of President Barack Obama replaced the 50 stars.

As a reflection of their reverence for the flag, most states in the United States had, by the 20th century, enacted laws criminalizing flag desecration. South Dakota, for example, became the first state to enact a flag protection law, according to Emmet Mittlebeeler. He said that while the law targeted the use of the flag for commercial and political purposes, its language was broad enough “to include all kinds of deliberate mutilation.” Other states such as Montana passed laws which even prohibited verbal abuse of the flag.

### The U.S. Constitution and flag desecration

In response to numerous protests during the Vietnam War where people burned the flag, Congress in 1968 passed the *Flag Protection Act* which made it a federal crime to “knowingly cast contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it.”

But critics argued that this law (along with others) could, in certain situations, violate a person's right to freedom of speech under the First Amendment. Legal observers such as John Luckey of the non-partisan Congressional Research Service say

that a tension exists between respecting the symbol of the flag and desecrating the flag as a proxy to express one's message and opinions.

Over a period of several decades, the U.S. Supreme Court issued several opinions concerning the legality of various flag protection laws under the Constitution. But these decisions, up until 1989, did not address whether the Constitution allowed the federal and state governments to punish a person for desecrating the flag specifically as a means of expression during a public protest. What are some of these decisions?

***Street v. New York*** (1969): The Supreme Court, in a 5-4 ruling, overturned the conviction of a man, Sydney Street, for violating New York's flag desecration law (1425-16-D of the Penal Code) which made it a crime to “publicly defy . . . or cast contempt upon [any American flag] either by words or act.” A decorated veteran,

Street protested the shooting of James Meredith, a prominent civil rights activist, by publicly burning a flag and uttering the words: “We don't need no damn flag,” and “If they let that happen to Meredith, we don't need an American flag.”

In its decision, the Court ruled that New York could not convict Street for *verbally disparaging* the flag under its desecration statute, arguing that doing so violated his First Amendment right to free expression. The decision said that New York may not punish a person for his speech simply because it was likely to shock on-lookers. “It is firmly settled that, under our Constitution, the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers,” said the Court.

On the other hand, the ruling did not address whether the First Amendment specifically protected the act of *physically desecrating* the flag during a public protest.

***Smith v. Goguen*** (1972): In a 6-3 decision, the Supreme Court voided a Massachusetts flag-misuse statute which made it a crime for a person who, in public, “treats contemptuously the flag of the United States,” among other acts.

In this case, a teenager had sewn a flag patch to the seat of his pants and was later convicted for showing “contempt” to the flag, even though the law did not define that phrase. (The police did not charge him for physically desecrating the flag.) The Court concluded that the law did not “provide adequate warning of forbidden conduct, and sets forth a standard so indefinite that police, court, and jury are free to react to nothing more than their own preferences for treatment of the flag.” Because the “inherently vague statutory language permits selective law enforcement, there is a denial of due process” under the 14th Amendment, it said.

But as in the case of *Street v. New York*, this decision did not address whether the First Amendment protected the act of flag desecration as part of a public protest.

*Spence v. Washington* (1974): The Supreme Court, in another 6-3 decision, said that a Washington state law which prohibited a person from *improperly using* a flag to convey a certain message violated the First Amendment's right to free expression.

The appellant, a college student, made two peace signs out of removable tape, placed them on each side of his privately owned flag, and hung it upside down out of his apartment building window in protest of the United States' invasion of Cambodia during the Vietnam War, and also for the shootings of student demonstrators at Kent State University. The student testified that his purpose in displaying the flag was to associate the American flag with peace instead of war and violence. After being arrested by police, the court did not convict him of violating Washington's flag desecration statute, but rather for violating an "improper use" statute which prohibited the public display of the United States flag with "any word, figure, mark, picture, design, drawing or advertisement."

The Court held that the statute, as applied to the student's activities, violated his right to expression under the First Amendment. At oral arguments, the State said that the statute was necessary to prevent a breach of the peace. But the Court rejected this argument, pointing out that the flag did not cause any disturbance. It then reaffirmed its view that the State may not restrict the First Amendment to preserve the sensibilities of passersby: "The public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."

But as in the previous three cases, this ruling did not address whether the government may prohibit the physical desecration of the flag during a public protest.

*Texas v. Johnson* (1989): Over 20 years after the passage of the federal *Flag Protection Act*, the Supreme Court directly addressed the issue of whether the First Amendment protected acts of flag desecration during public protests. (Again, many observers note that most acts of flag desecration take place publicly as part of a protest.) In *Texas v. Johnson*, it struck down a Texas law which made it illegal to do so. The law, said the Court, violated the right to freedom of expression under the First Amendment.

The Court has long held that the First Amendment – which, in part, says that "Congress shall make no law . . . abridging the freedom of speech" – protects not only pure speech such as spoken and written words, but also speech which a person communicates through certain conduct or acts. Said one analyst: "The conduct itself is the idea or message." Analysts refer to such acts as expressive conduct or symbolic speech.

Over the course of American history, the federal and state governments have passed laws prohibiting certain acts. Many people have challenged such laws by arguing that a particular prohibited act (such as wearing a black armband to protest a war, for instance) was a form of expressive conduct protected by the First Amendment. Of course, just because a person claims that a certain act is expressive conduct does not automatically make it so.

To decide whether a certain act constitutes expressive conduct, a court tries to determine: (1) whether the person carrying out the act intended to convey a "particularized message," and (2) whether those who viewed the message would likely understand it. If the act satisfies these two criteria, then the person who carried out the

prohibited act can argue that the First Amendment protects such conduct.

Then, to decide if the First Amendment actually protects the prohibited act in question, a court determines whether the main purpose of a law was to suppress a person's expression simply because the government disagreed with his message or whether the government wanted to protect a substantial governmental interest that is not related to free expression. If the main purpose of the law is to suppress certain kinds of expression (a fundamental right under the Constitution) based on its content, a court must apply what is called a strict scrutiny test where it automatically strikes down the law as a violation of the First Amendment unless the state shows that the law was necessary to achieve a compelling governmental interest such as protecting public safety, among other reasons.

In the case of *Texas v. Johnson*, Gregory Lee Johnson in 1984 burned an American flag while participating in a political protest against the Reagan administration at the Republic National Convention in Dallas, Texas. A state court convicted and sentenced him to one year in prison for violating a law which prohibits a person from intentionally desecrating a venerated object such as a state or national flag "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."

Lawyers for Johnson argued that the law violated his right to freedom of expression under the First Amendment. On the other hand, Texas said that it had to criminalize flag desecration. Doing so, it argued, would achieve two compelling interests: (1) prevent breaches to the peace, and (2) preserve the flag as a symbol of nationhood and national unity.

In a 5-4 decision, the majority concluded that Johnson's act of burning the flag constituted expressive conduct because, in the context of the political demonstration, it specifically conveyed the message of opposition to the policies of the Reagan administration, and those who viewed the flag burning understood it was being carried out for that reason alone.

After finding that Johnson's act of flag burning constituted expressive conduct, the Court determined that the direct aim of the Texas statute was to suppress Johnson's expression (a fundamental right under the Constitution) solely on the basis of its content. (That is to say, the government disagreed with the content of the message.) Because the statute restricted Johnson's political expression, the Court applied a strict scrutiny standard where the state would have to show that the law was necessary to achieve a compelling governmental interest.

The decision rejected Texas' argument that it had to criminalize flag desecration to prevent breaches to the peace. It noted that Johnson's act of flag burning did not, in fact, disturb the peace during the political convention, and that onlookers would not have seen his action as "a direct personal insult or an invitation to exchange fisticuffs." The court added that an already-existing criminal statute prohibited breaches to the peace.

It also rejected Texas' argument that it had to criminalize flag desecration to preserve the flag as a symbol of nationhood and national unity, noting that the law criminalized desecration only when it offended other people. One of the "bedrock principles underlying the First Amendment," said the Court, was that "the government may not prohibit the expression of an idea [such



as opposition conveyed through the act of flag burning] simply because society finds the idea itself offensive or disagreeable.”

The Court ultimately concluded that “forbidding criminal punishment for conduct such as Johnson’s will not endanger the special role played by our flag or the feelings it inspires.”

**United States v. Eichman** (1990): In response to *Texas v. Johnson*, Congress in 1989 amended the 1968 *Flag Protection Act* by deleting the words “cast contempt.” The 1989 version made it a crime for anyone who “knowingly mutilates, defaces, physically defiles, burns, maintains upon the floor or ground, or tramples upon any flag of the United States.”

Supporters of the bill claimed that the purpose of the 1989 act was different from the statute in the Texas case, which prohibited an act of flag desecration when the person carrying it out knows that doing so would seriously offend onlookers. (That is to say, the Texas statute targeted expressive conduct based solely on its message, which could violate the First Amendment.)

Instead, they claimed that its main purpose was to prevent mistreatment of the flag – “without regard to the actor’s motive, his intended message, or the likely effects of his conduct on onlookers” – as a way to preserve its symbol of the nation and its ideals. (That is why Congress deleted the words “cast contempt” from the 1968 law.) After the passage of the act, police arrested and convicted Shawn Eichman who, as part of his protest against various government policies, burned a flag outside of the United States Capitol. A court convicted him of violating the 1989 act.

In *United States v. Eichman*, the Supreme Court ruled in a 5-4 decision that the 1989 act violated the right to freedom of expression under First Amendment. Despite the government’s assertions to the contrary, the Court said that the act’s purpose in protecting the “physical integrity” of the flag (as a way to preserve its symbol for the nation’s ideals) was still related to the suppression of free expression. How so?

The Court reasoned that the act of flag desecration itself conveyed a message about the person’s beliefs about the flag as a symbol of the nation’s ideals, and that the 1989 act seemed to attract the government’s attention “only when a person’s treatment of the flag communicates [a] message to others that is inconsistent

**In contrast to the United States, the emotional sentiment surrounding flags seems less intense in other nations. But their flag desecration laws (in many cases) impose harsher penalties. The laws in China, Germany, and India, for example, can impose up to a three-year jail sentence on people who desecrate not only a nation’s flag, but also its emblems.**

with those ideals.” Therefore, as in the case of the Texas statute, the 1989 act “suppresses expression out of concern for its likely communicative impact.”

Because the 1989 act suppressed a person’s expressive conduct based on his message (a fundamental right under the Constitution), the Court applied a strict scrutiny standard where the government would have to show that the law was necessary to achieve a compelling interest. After the government cited what it said was a national consensus to prohibit flag burning, the Court countered that the government may not ban flag desecration

simply because it offends other people.

**Flag protection amendment:** After the U.S. Supreme Court ruled against flag desecration laws in the *Texas* and *Eichman* cases, supporters of protecting the flag have been trying to give Congress the legal authority to prohibit flag desecration by amending the Constitution. The amendment reads: “The Congress shall have power to prohibit the physical desecration of the flag of the United States.”

Legal observers note that amendment (if passed) would neither automatically prohibit flag desecration nor would it require Congress to pass legislation prohibiting such an act. Rather, it simply gives Congress *the power* to prohibit flag desecration if it chooses to enact such a power. As one sponsor of the amendment, Senator Orrin Hatch (R-UT), noted: “Should Congress propose and the states ratify this amendment, it might not result in any change in the law.” Rather, it would be “up to Congress and the people [they] represent to decide” whether to pass a law prohibiting flag desecration.

A two-thirds majority in the Senate and the House of Representatives must first approve the amendment. Afterwards, three-quarters of all state legislatures must ratify it.

Passage of a constitutional amendment to give Congress the power to prohibit flag desecration remains possible. According to the ACLU, every state legislature has already passed a resolution supporting such an amendment. But the amendment has not yet received approval in Congress. For example, in 2006, the Senate failed to approve a flag burning amendment by one vote.

### Flag desecration in other nations

While the U.S. flag continues to play a controversial role in American life, many other nations have also enacted their own flag desecration laws. Political science professor Robert Justin Goldstein observed that, late in the last century, “well over fifty nations, including such relatively democratic countries as Austria, Denmark, France, Germany, Italy, New Zealand, and Switzerland penalized flag desecration.”

While the emotional sentiment surrounding the flag seems less intense in other nations, their flag desecration laws (in many

cases) impose harsher penalties. “In several countries, including Argentina, Brazil, France, Germany, Greece, India, Italy, Mexico, Spain, and Turkey, the penalty for violating such flag laws far exceeded the one-year jail term that was provided in the U.S. federal flag desecration laws of 1968 and 1989,” noted Goldstein in his book *Burning the Flag*.

Still in other countries, desecrating one’s own flag is not a crime. But it is a crime to desecrate the flags of *other nations*. The table on next page provides a snapshot of current flag desecration laws around the world.

Country	Laws addressing flag desecration
<p><b>China/ Hong Kong</b></p>	<ul style="list-style-type: none"> <li>• In June 1990, the National People’s Congress (the legislative body of China) adopted the nation’s first flag law.</li> <li>• Specifically, Article 299 of the <i>Criminal Law of the People’s Republic of China</i> states: “Whoever desecrates the National Flag or the National Emblem of the People’s Republic of China by intentionally burning, mutilating, scrawling on, defiling, or trampling upon it in a public place shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance, or deprivation of political rights.”</li> <li>• The government also does not allow the use of the national flag in advertisements, said the government-run <i>New China News Agency</i>, now known as <i>Xinhua News Agency</i>.</li> <li>• In Hong Kong (a former colony of the United Kingdom which rejoined China in 1997, though with a more democratic form of governance), the <i>National Flag and National Emblem Ordinance</i> (Section 7) states that “a person who desecrates the national flag or national emblem by publicly and willfully burning, mutilating, scrawling on, defiling, or trampling on it commits an offence and is liable on conviction to a fine . . . and to imprisonment for 3 years.”</li> </ul>
<p><b>Denmark</b></p>	<ul style="list-style-type: none"> <li>• Legal observers believe that desecrating the Danish flag (known as the Dannebrog) is generally not illegal under the <i>Constitutional Act of Denmark</i> (its constitution), arguing that doing so is protected as part of freedom of speech and expression.</li> <li>• Specifically, under § 77, “anyone is entitled to in print, writing and speech to publish his or her thoughts.” But it also says that a court may place limits on people’s expression by prohibiting acts such as libel or racism. In an interview with the <i>Copenhagen Post</i>, criminal law professor Gorm Toftegaard Nielsen of Aarhus University said: “As far as I know, [the constitution] does not say anywhere that you can’t burn the Danish flag.”</li> <li>• While analysts seem to agree that people may legally desecrate the Dannebrog, they point out that Section 110(e) of the criminal code prohibits people from desecrating the symbols and flags of other nations. One observer believes that Denmark passed this law to protect its foreign policy interests. (Another nation may, for instance, view the burning of its flag as a threat and form of intimidation against its ambassadors.)</li> <li>• But others say that the act of burning another country’s flag should be protected by the constitution. “Desecrating other nations’ flags is often an expression of political convictions which are protected by freedom of speech,” said Nielsen of Aarhus University.</li> </ul>
<p><b>Germany</b></p>	<ul style="list-style-type: none"> <li>• Section 90(a) of the <i>Criminal Code</i> says that anyone who “insults the colours, flag, coat of arms, or the anthem of the Federal Republic of Germany or one of its states” (and does so publicly, in a meeting, or by disseminating written materials) shall be fined or imprisoned up to three years.</li> <li>• In addition, Section 90(a) says that anyone who “removes, destroys, damages, renders unusable or defaces, or otherwise insults by mischief” the national flag or a state flag shall be punished by a fine or imprisoned for up to three years.</li> <li>• But legal analysts note that German courts have tried to balance the protection of the national and state flags with the right to freedom of speech and expression. Article 5 of the <i>Basic Law for the Federal Republic of Germany</i> (which is the equivalent of Germany’s constitution) states: “Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures . . .” But it also adds: “These rights shall find their limits in the provisions of general laws.”</li> <li>• Germany also protects foreign flags from desecration in certain cases. Section 104 of the <i>Criminal Code</i> says that anyone who “removes, destroys, damages, renders unrecognizable, or insults by mischief a flag [or even symbol] of a foreign state” which has been publicly installed and displayed shall be fined or imprisoned up to two years in jail.</li> <li>• Even with these laws on flag desecration, legal analysts such as Ute Krüdwagen note that “the German federal flag, though based on the idea of freedom and national unity and protected by the [Criminal Code], never gained the central role that the American flag has occupied in the minds of many Americans.”</li> </ul>
<p><b>India</b></p>	<ul style="list-style-type: none"> <li>• According to the <i>Prevention of Insults to National Honour Act, 1971</i>, “whoever in any public place (or in any other place within public view) burns, mutilates, defaces, defiles, disfigures, destroys, tramples upon, or otherwise shows disrespect to or brings into contempt (whether by words, either spoken or written, or by acts) the Indian National Flag or the Constitution of India or any part thereof, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.”</li> <li>• Officials had also argued that another law – <i>The Emblems and Names (Prevention of Improper Use) Act, 1950</i> – prohibited people from displaying the national flag on private residences and buildings “except on special occasions,” according to the Indian government’s Press Information Bureau.</li> <li>• In January 2004, the Supreme Court of India (in a case called <i>Union of India v. Naveen Jindal</i>) ruled that “right to fly the National Flag freely with respect and dignity is a fundamental right of a citizen” within the meaning of Article 19(1) of India’s constitution, which states that “all citizens shall have the right to freedom of speech and expression.” But it also added that “the fundamental right to fly [the] National Flag is not an absolute right, but a qualified one being subject to reasonable restrictions.”</li> <li>• Under the <i>Flag Code of India, 2002</i> (which the Indian government describes as “an attempt to bring together all such laws, conventions, practices, and instructions” concerning proper use and display of the national flag), people may not use the flag for commercial purposes, as costumes or uniforms, for drapery in private funerals, or print it on “cushions, handkerchiefs, [or] napkins,” among many other restrictions.”</li> </ul>

Country	Laws addressing flag desecration
Japan	<ul style="list-style-type: none"> <li>• No law in Japan explicitly prohibits the desecration of the national flag, say analysts. They believe that the <i>Constitution of Japan</i> would implicitly protect an act of flag desecration. Specifically, Article 21 states that “freedom of assembly and association as well as speech, press, and all other forms of expression are guaranteed.”</li> <li>• On the other hand, the <i>Criminal Code of Japan</i> (under Chapter IV, Article 92) states that “a person who, for the purpose of insulting a foreign state, damages, removes, or defiles the national flag or other national emblem of the state shall be punished by imprisonment with work for not more than 2 years or a fine of not more than 200,000 yen,” which is about US \$2,400. But the government won’t pursue violations of this law unless the foreign government whose flag was desecrated makes a request for it to do so.</li> <li>• In February 2011, Russian officials called on Japan to prosecute those individuals who had dragged the Russian national flag in front of their embassy in Tokyo during a protest concerning territorial claims between the two nations, according to reporting from <i>RIA Novosti</i>, a state news agency based in Moscow. Japan later refused to prosecute the incident, saying that the protestors had desecrated “a self-made object” which resembled the Russian flag.</li> </ul>
Saudi Arabia	<ul style="list-style-type: none"> <li>• The national flag of Saudi Arabia has a green background with a picture of a sword and also text called the <i>shahada</i>, which is the Islamic declaration of faith. It reads: “There is but one God and Mohammed is His Prophet.”</li> <li>• Because Saudi Arabia considers the <i>shahada</i> as holy, its laws call for the respectful treatment of the flag. One analyst said: “[E]ven the slightest violation amounts to desecration, not only of the flag but also of Islam itself.”</li> <li>• Over the past several decades, the media have reported several incidents concerning the use of the Saudi Arabian flag. For example, in 2002, Saudi Arabia protested the printing of its flag on soccer balls used during World Cup matches, arguing that doing so was a form of desecration not only against its flag, and also against Islam.</li> </ul>

### Flag desecration and international law

No treaty solely or explicitly addresses the issue of flag desecration. Instead, legal analysts point out that other treaties implicitly deal with this subject through provisions which call on nations to protect various political rights such as the right to freedom of speech and expression. They include the following treaties:

**International Covenant on Civil and Political Rights** (or ICCPR): This 1966 treaty calls on nations to pass domestic measures protecting many civil and political rights such as the right to equality before the law, freedom of association, the right of peaceful assembly, and the right to a fair trial, among many others. The UN Human Rights Committee, a body of independent legal experts, monitors the convention’s implementation by UN member nations and also issues official interpretations (called “general comments”) of ICCPR provisions.

In the area of freedom of expression, Article 19 of the ICCPR says that “everyone shall have the right to freedom of expression,” which includes “freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” However, because the ICCPR recognizes that these rights carry with them “special duties and responsibilities,” it allows nations to place “certain restrictions” on them, but only as provided by law and necessary for respect of the rights or reputations of others, or for the protection of national security or public order, health, or morals.

**Court cases concerning the ICCPR:** In a well-known case, Hong Kong’s highest court (in *Hong Kong SAR v. Ng Kung Siu*) upheld the convictions of two people who violated that region’s

flag desecration laws, and also concluded those laws did not violate the ICCPR or Hong Kong’s domestic law.

In January 1998, Hong Kong arrested two individuals – Lee Kin Yun and Ng Kung Siu – for violating the *National Flag and National Emblem Ordinance* by writing the word “shame” on the Hong Kong flag during a pro-democracy demonstration. (See the chart on page 24 for more information on Hong Kong’s flag desecration laws.) The government said that it criminalized flag desecration to protect public order. The court convicted the defendants and ordered them to pay a fine of \$2,000 and to stay out of trouble for one year.

The defendants appealed their convictions by arguing that the *Hong Kong Basic Law* (regarded as that region’s constitution) guaranteed freedom of speech. Flag desecration, they said, was a form of non-verbal speech. By criminalizing such acts, the flag ordinance violated Article 27 of the Basic Law which states, in part, that “Hong Kong residents shall have freedom of speech, of the press, and of publication.” They also pointed out that Article 39 of the Basic Law incorporates the provisions from ICCPR’s Article 19. As a result, the flag desecration laws also violated international law, said the defendants.

In 1999, the Court of Final Appeal (which is Hong Kong’s supreme court) upheld the convictions, saying that the flag desecration laws did not violate the Basic Law, and that, under certain circumstances, a government may restrict freedom of expression to protect public order.

In its ruling, the court said that “freedom of expression is a fundamental freedom in a democratic society,” and that it includes “the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticize governmental institutions . . .” At the same time, it noted that “freedom of expression is not an absolute,” pointing out that



Article 19 of the ICCPR allows nations to impose restrictions as long as they are embodied in a law and are necessary to protect, for instance, public order.

In deciding the case, the court first ruled that the concept of protecting “public order” included passing laws which prohibited flag desecration. The concept of public order, said the ruling, does not refer only to law-and-order in the strict sense of the term, but includes the protection of “the interests of the collectivity as a whole.” The court deferred to the views of the Hong Kong legislature which determined that prohibiting flag desecration would promote the interests of “national unity and territorial integrity” given that Hong Kong had become part of China just two years earlier. So, in this particular time and circumstance, criminalizing the desecration of the flag was within the concept of protecting public order, concluded the court.

**No treaty solely or explicitly addresses the issue of flag desecration. Instead, legal analysts point out that some treaties implicitly deal with this subject by calling on nations to protect various political rights such as the right to freedom of speech and expression.**

It then examined whether it was necessary for Hong Kong to limit freedom of expression by specifically criminalizing flag desecration. To answer this question, the court considered “whether the restriction on the guaranteed right to freedom of expression is proportionate to the aims sought to be achieved . . .” It ruled that a prohibition on flag desecration was a proportionate measure because it restricted only one means of expression – the act of flag desecration. It did not ban, for example, a broad range of other kinds of speech. In fact, the defendants could have expressed themselves using other methods, said the court.

This decision applies only to Hong Kong and not to other nations, say analysts. They also note that the decision applies only to the specific facts of this case, and is not meant to serve as the final word on the legality of every single aspect of flag desecration laws in every other nation.

**General Comment 34:** In September 2011, the Human Rights Committee (which, again, oversees and interprets provisions in the ICCPR) issued General Comment No. 34 (CCPR/C/GC/34) where it expressed concern over a wide range of practices and policies in various nations which could violate provisions in Article 19.

The Human Rights Committee broadly stated that the “value placed by the [ICCPR] upon uninhibited expression is particularly high” in circumstances of “public debate concerning public figures in the political domain and public institutions.” It then went on to say that “all public figures . . . are legitimately subject

to criticism and political opposition” and that, “[a]ccordingly, the Committee expresses concern regarding laws on such matters as . . . disrespect for flags and symbols . . .”


Asides from this very brief mention of flag desecration, the Committee did not include any further guidance to nations on this topic. Political analysts say that instead of explicitly calling on nations to modify or strike down flag desecration laws which could violate Article 19 of the ICCPR, the Committee did so in a roundabout manner to prevent a backlash from nations, many of which have long-standing laws against flag desecration.

**Vienna Convention on Diplomatic Relations:** Along with the ICCPR, the Vienna Convention implicitly addresses flag desecration. This agreement, adopted in 1961, provides the most comprehensive legal framework on how nations should establish, maintain, and terminate diplomatic relations with

other sovereign states. A receiving nation must, for example, provide immunity to diplomatic staff from civil and criminal prosecution, guarantee free communication between a mission and its sending state, and prohibit the entry of law enforcement agents into a foreign mission without permission, among many other provisions.

Under Article 22(2), “the receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.” This obligation to prevent the impairment of a mission’s dignity could arguably include restrictions on desecrating that mission’s national flag since such an act could likely inflame the sentiments of the sending nation, say some analysts.

For example, the Australian government during the 1990s placed restrictions on the display of placards and crosses during a protest carried out by Falun Gong members (a group banned in China) outside of the Chinese embassy to prevent the impairment of its dignity, noted Caslon Analytics, a private consulting firm. It also prohibited people from placing white wooden crosses within 50 meters of the Indonesian Embassy. (Indonesia is the largest Muslim nation in the world.)

In the case of flag desecration outside a foreign embassy, Caslon Analytics noted that no court in Australia has yet determined whether carrying out such an act would violate Article 22 of the Vienna Convention. 

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# Will new laws help develop effective and safe drugs more quickly?

Analysts say that competition in the global pharmaceutical industry will increase in the future as more and more drug patents expire and also as technological advances lead to the development of new drugs such as those derived from biotechnology. In an effort to aid their drug industries, the governments of the world's largest three pharmaceutical markets – the European Union (or EU), Japan, and the United States – have passed laws and regulations which they believe will help them approve new drugs more quickly without compromising public safety or the effectiveness of the drugs themselves.

How do nations regulate the approval of new drugs? What kinds of laws have nations passed in recent years to help promote the quicker approval of new drugs? And are there any international treaties or agreements which oversee the regulatory framework of a nation's drug approval process?

## Regulating the safety and effectiveness of new drugs

While people have been using drugs to treat a wide variety of ailments for thousands of years, experts say that – beginning only in the 20th century – nations began creating more robust regulatory systems to test their safety and effectiveness after several high profile incidents led to mass deaths and injuries.

For example, in the United States in 1937, the S.E. Massengill Company marketed a product called Elixir Sulfanilamide (which contained a poisonous liquid, diethylene glycol, used in antifreeze) to treat streptococcal infections. It killed over 100 people in 15 states. The company did not test the drug for toxicity even though “a few simple tests on experimental animals would have demonstrated the lethal properties of the elixir,” according to the U.S. Food and Drug Administration. That agency also noted that, “at the time, the food and drugs law did not require that safety studies be done on new drugs. Selling toxic drugs was, undoubtedly, bad for business and could damage a firm's

reputation, but it was not illegal.” This incident along with others pushed Congress to pass the *Food, Drug, and Cosmetic Act* in 1938, which required companies to carry out safety tests on all drugs before selling them on the market.

In another incident, analysts said that (from 1958 through 1960) around 46 nations had marketed a drug called thalidomide as a sleeping aid and anti-morning sickness remedy for pregnant women. But the drug caused 10,000 severe birth deformities in Europe. (Doctors now use thalidomide to treat multiple myeloma.) As a result, European nations began to implement more strict procedures for the approval of drugs. In the United States, Congress passed the *Drugs (Amendment) Act, 1962*, which “for the first time, demanded that a new drug should be proven to be effective and safe,” according to analysts Lembit Rāgo and Budiono Santoso of the World Health Organization.

Some have argued that, rather than relying on government agencies to determine whether a drug is safe and effective, people should make their own informed decisions. But others say that “even healthcare professional nowadays are not in [a] capacity to take informed decisions about all aspects of medicines without special training and access to necessary medicines,” and that the “use of ineffective, poor quality, harmful medicines can result in therapeutic failure, exacerbation of disease, resistance to medicines, and sometimes death.”

Currently, the EU, Japan, and the United States have the most developed regulatory framework in approving new drugs. (Analysts note these nations also have the world's largest pharmaceutical markets and also develop around 90 percent of new drugs.) Some even describe the drug approval process in the United States as the “gold standard,” although others believe that the EU process now rivals the American system. How do the EU, Japan, and the United States regulate the approval of new drugs?



## United States: The FDA and the drug approval process

The U.S. Food and Drug Administration (or FDA) is the federal agency responsible for protecting public health by overseeing human and veterinary drugs, medical devices, the nation's food supply, and cosmetics, among a host of other products. Among the six centers which comprise the FDA, the Center for Drug Evaluation and Research (or CDER) evaluates the safety and effectiveness of new drugs before companies can sell them on the market. CDER currently regulates more than 150,000 drugs and medical devices.

While people have been using drugs to treat a wide variety of ailments for thousands of years, experts say that – beginning only in the 20th century – nations began creating more robust regulatory systems to test their safety and effectiveness after several high profile incidents led to mass deaths and injuries.

**The drug approval process:** CDER itself does not test a drug, which it defines as any product used to cure, mitigate, prevent, or treat certain diseases and other illnesses. Instead, pharmaceutical and related companies test the drugs themselves using a long and rigorous process (broadly consisting of four steps) devised by the FDA.

First, when a company discovers or develops a new drug compound, it tests the drug on laboratory animals – usually mice because their genetic structure resembles that of humans – to gather initial information on its safety (i.e., whether the benefits of taking the drug outweighs its risks and side effects) and effectiveness (i.e., whether the drug actually treats a certain disease).

Second, the company submits an Investigational New Drug (or IND) application to the FDA, which includes data from its animal testing, and also information about the drug itself and how it would be manufactured. At this stage, the drug is called an “investigational drug” because a company is still in the process of investigating its safety and effectiveness.

The IND application also includes a detailed proposal on how the company would study and test the drug on humans. (These studies are known as clinical trials.) According to the FDA, this proposal should describe “the type of people who may participate in the clinical trial, the schedule of tests and procedures, the medications and dosages to be studied, the length of the study, the study's objectives, and other details.” A company may begin clinical trials only after it receives approval from the FDA, which tries to ensure that these trials “do not place human subjects at unreasonable risk of harm.”

Do many investigational drugs reach clinical testing? “Most drugs that undergo preclinical (animal) testing never even make it to human testing and review by the FDA,” said that agency.

Third, once the FDA approves an IND application, the company may begin to carry out clinical trials which consist of three phases. *Phase 1* uses between 20 and 80 healthy volunteers to determine the safety of taking a drug. If the drug is not toxic (meaning that its safety has been determined through testing “by all methods reasonably applicable”), then a

company may begin *Phase 2* – using hundreds of patients – to determine whether the drug actually treats a particular disease. (According to the FDA, a company must demonstrate a drug's effectiveness using “substantial evidence,” including “at least two adequate and well-controlled studies, each convincing on its own.”) If data shows that the drug is effective, the company and the FDA discuss how to carry out large-scale studies under *Phase 3* using hundreds to thousands of people. “These studies,” says that FDA referring to Phase 3, “gather more information about safety and effectiveness, study different populations and

different dosages, and uses the drug in combination with other drugs.”

Fourth, once a company concludes the clinical trials and determines that it has enough evidence to demonstrate a drug's safety and effectiveness, it will submit a New Drug Application (or NDA) which includes all data from the animal and clinical trials, and full technical information about the drug itself, among other details. Under current law, once the FDA receives the NDA, it has 60 days to decide whether to accept the application. (An application may be missing a certain studies or other important information, for instance.) Once it formally accepts an NDA, an FDA review team – consisting of highly trained “medical doctors, chemists, statisticians, microbiologists, pharmacologists, and other experts” – evaluates all of the data within a 10-month period to determine its safety and effectiveness. Once a review team approves a drug, a company may begin to market and sell it in the United States.

Even after it gives permission to market a drug, the FDA uses a “post-marketing safety system” where the drug manufacturer must submit safety updates and also report “unexpected adverse events” such as serious side effects.

Even with this rigorous process in place, the FDA still calls on companies hundreds of times every year to recall various drugs – 346 in 2006, 391 in 2007, 426 in 2008, and 1,742 in 2009 – due to certain problems, reported *CNN*. According to statistics collected by *ABC News*, from 2004 through 2011, 40 percent of drug recalls involved contaminated drugs, 25 percent for listing the wrong doses, and the remaining number for mislabeled products and product mix-ups.

In 2012, the FDA has called on companies to recall certain drugs for various reasons, including packaging flaws for an oral contraceptive, discoloration for an anaphylaxis, and for even failing to receive FDA approval for an erectile dysfunction drug.

**New laws to promote quicker drug approvals:** Legal analysts say that, decades ago, the FDA had relied primarily on its own budget to review NDAs submitted by drug companies. But soon, technological advances allowed drug companies to formulate



more promising drugs, which, in turn, led to an increase in the number of NDAs submitted to the FDA. (“At any time,” said that agency, “nearly 3,000 investigational new drugs are being developed.”) As the number of applications increased, so did the time in reviewing them. Experts say that reviewing an NDA took around 18 months.

As complaints rose about the timeliness of the FDA in reviewing NDAs, Congress in 1992 passed the *Prescription Drug User Fee Act* (known by its acronym PDUFA) under which drug manufacturers agreed to pay billions of dollars in “user fees” to

user fee program from 2013 through 2017. After nearly a year of negotiations, the FDA reached an agreement with the Pharmaceutical Research and Manufacturers of America (or PhRMA) and the Biotechnology Industry Organization (or BIO) where – under PDUFA V – pharmaceutical and biotechnology companies would pay more in user fees (\$4.1 billion over five years) in exchange for faster review times of NDAs by the FDA. PhRMA, an industry group, represents pharmaceutical companies while BIO, a non-profit group, advocates on behalf of companies and other members which make biotechnology

**Currently, the EU, Japan, and the United States have the most developed regulatory framework in approving new drugs. (Analysts note these nations also have the world’s largest pharmaceutical markets and also develop around 90 percent of new drugs.) Some even describe the drug approval process in the United States as the “gold standard,” although others believe that the EU process now rivals the American system.**

the FDA so that the agency would be able to hire more staff and increase its resources in reviewing the safety and efficacy of new *prescription drugs* within set time limits. “Under a user fee program,” said the FDA, “industry agrees to pay fees to help fund a portion of FDA’s drug review activities while FDA agrees to overall performance goals.” Last year, each company paid a \$1,542,000 application fee, a \$497,200 establishment fee, and an \$86,520 product fee to the FDA.

In return, the FDA would complete a “standard review” within 10 months for prescription drugs which offered “only minor improvement over existing marketed therapies.” On the other hand, it would complete a “priority review” within six months for prescription drugs which offered “major advances in treatment, or provide a treatment where none existed.” (Separate from PDUFA, the FDA also created an “accelerated approval process” where it would approve the NDAs for drugs which treated “serious and life-threatening illnesses that lack satisfactory treatments” even before clinical trials showed their effectiveness. The FDA notes that “most drugs to treat HIV have been approved under accelerated approval provisions.”) As a result of enacting the user fee system for prescription drugs, the FDA had “dramatically reduced the review time for new drugs.”

Since its original passage in 1992, Congress has reauthorized PDUFA four times (roughly once every five years). According to the FDA, with each reauthorization, PDUFA allowed it to spend user fees for various other functions such as broadening and upgrading the FDA’s drug safety program.

Critics believe that the user fee program gives the pharmaceutical industry “far too much influence over the regulatory process.” Since these fees allow the FDA to expedite its reviews, officials may be less likely to criticize drug companies, as the argument goes. Analysts estimate that these user fees “cover more than 60 percent of the cost of reviewing drug applications.”

Congress is currently working on its fifth reauthorization of PDUFA (known as PDUFA V), which will extend the

products.

According to various observers, drug manufacturers had complained that the FDA and its staff did not communicate with them on a regular and consistent basis during the review process of their products. They have argued, for example, that delays in answering routine questions – according to one industry newsletter, “BIO members say that, in recent years, [FDA] reviewers have refused to return telephone calls regarding . . . what species of rat to use in a toxicology experiment” – have made drug development more unpredictable and costly.



To “promote greater transparency and improve communication between the FDA and the applicant,” the FDA said that (under PDUFA V) it would increase the number of meetings between them which will then hopefully shorten the time for final drug approval.

For example, under PDUFA V, a drug company can review the contents of its NDA application with the FDA during a pre-submission meeting. During a mid-cycle meeting, the FDA will provide the drug company with an update on the status of its application. In a late-cycle meeting, the drug agency and the applicant can discuss any weaknesses in the application or provide further information to strengthen it.

Both the U.S. Senate (by a vote of 96 to 1) and the House of Representatives (387 to 5) had passed their version of PDUFA V in May 2012. Analysts say that President Barack Obama will most likely sign the final bill in the early summer.

Along with PDUFA V, the FDA has also sent Congress proposed laws allowing it to create user fee programs for other drugs. For example, the *Generic Drug User Fee Act of*

chemical compounds, biologic (or biotech) drugs are made from molecules extracted from living organisms, including humans. Generic versions of biologic drugs are called “biosimilars.”

While the FDA has not yet approved any biosimilar drug (and did not even have the legal authority to do so until 2010), it has asked Congress – in the BsUFA – to allow it to create a user fee program for the review and approval of those drugs. Similar to PDUFA, the user fee program for biosimilars would charge a user fee to biosimilar manufacturers in return for reviewing a biosimilar application within a certain time frame. In May 2012, the Senate passed its version of the BsUFA. Observers expect the House of Representatives to pass its version soon.

### European Union: A single market with different routes to drug approval

As its name implies, the EU is an economic and political union of 27 independent and sovereign states bound together by a series of complex international treaties, many of which stretch back several decades. The EU (with its population of over 500 million

**The EU has a single pharmaceutical market (the second largest in the world today) which uses common policies for the approval of drugs across 27 different nations. Industry experts say that a drug manufacturer can take one of several routes to have its drug approved for marketing in the EU.**

2012 (or GDUFA) would establish a user fee program for the review of generic drugs. According to the FDA, a generic drug “is the same as a brand-name drug in dosage, safety, strength, quality, the way it works, the way it is taken, and the way it should be used.” The only difference is that the generic version is “typically sold at substantial discounts.” According to government statistics, of the three billion new and refilled prescriptions dispensed in the United States last year, generic drugs accounted for 78 percent of them, which saved consumers close to one *trillion* dollars.

But analysts note that a user fee system does not exist to help the FDA review the safety and efficacy of generic drugs. As a result, the FDA said that it is unable to keep pace with the increasing number of generic drug applications. The current backlog of applications, said that agency, has increased to over 2,500, and the time to review an application has doubled to 31 months.

Under GDUFA, which the FDA submitted to Congress in January 2012, generic drug manufacturers would pay a user fee of \$299 million every year for five years. The proposed law also calls on the FDA to “undertake a series of immediate program enhancements and performance goals.” For example, it would review and act on a generic drug application within 10 months of receiving it. The Senate passed the law in May 2012. Analysts believe that the House of Representatives will soon pass its version of GDUFA.

In the area of biotechnology, Congress is considering a separate piece of legislation called the *Biosimilar User Fee Act of 2012* (or BsUFA). In contrast to traditional drugs which are derived from

people) currently has the largest economy in the world. Its cumulative GDP in 2011 was nearly US\$17 trillion. In contrast, the United States (with its 311 million people) had a GDP of US\$15 trillion.

To increase the economic competitiveness of Europe and to prevent future conflicts, these treaties created institutions – such as the European Council (which sets the political agenda) and the European Commission (which proposes and writes EU-wide legislation) – to establish common policies in certain areas such as trade, finance, environmental protection, and agricultural policy. As an example, the EU had passed a single, agreed-upon standard to address packaging waste from consumer goods which all EU member states must incorporate into their domestic laws. Other EU regulations require member states to implement a single standard on the labeling and advertising of foods.

The EU also created a single pharmaceutical market (the second largest in the world today) by establishing common policies for the approval of drugs. The United States, in contrast, has the largest pharmaceutical market where prescription drug sales reached \$307 billion in 2010, said the IMS Institute for Healthcare Informatics. According to the European Federation of Pharmaceutical Industries and Associations, “in 2009, North America accounted for 39.8% of world pharmaceutical sales compared with 30.6% for Europe.” Still, the U.S. Government Accountability Office noted that, during the 1990s, the value of EU pharmaceutical sales exceeded those in the United States.

Industry experts say that a drug manufacturer can take one of

several routes to have its drug approved for marketing in the EU.

**Centralized procedure:** This approach allows a company to market a drug in every single EU member state by submitting a single application – called a Marketing Authorization Application – to a body called the European Medicines Evaluation Agency (or EMEA), which evaluates drugs for safety and effectiveness. Under current EU laws, a drug company must also use this procedure if it wants to market a drug used to treat AIDS, autoimmune diseases, cancer, diabetes, neurodegenerative disorders, and viral diseases, among others. Because this list contains some of the most common diseases afflicting tens of millions of people, “the vast majority of medicinal products now reach the EU market via the EMEA,” said non-profit group UK Medicines Information. (Companies must also use the centralized procedure if they are trying to market specialized drugs, including biologic and orphan drugs.)

After a drug company files an application, the EMEA (based in London) forwards it to a Committee of Proprietary Medicinal Products (or CPMP) which then performs “independent scientific evaluations of the safety, efficacy, and quality of an application.” The CPMP requires an applicant to present “adequate” evidence (in contrast to the FDA’s “substantial” evidence) of a drug’s safety and effectiveness.

The CPMP must issue an opinion on the application (either favorable or unfavorable) within seven months of its receipt. (But analysts note that it usually takes an average of six months for the CPMP to do so.) If the EU approves an application, it issues a renewable 5-year license to the drug manufacturer, which can then market its product in all 27 EU member nations “without having to obtain separate approvals from each member state,” said the GAO. If the EMEA issues a negative opinion, the drug company may appeal the decision and ask for the views of other experts. But losing an appeal will prevent the company from marketing its drug in the entire EU.

A company which wants to market its drug in the EU must pay various user fees. For example, in 2011, it had to pay an application fee starting at US\$289,000 to the EMEA. Once the EMEA approves an application and issues a license, the drug company must pay an annual maintenance fee of US\$104,000,

a company may seek permission only in a few countries. In such a case, the manufacturer can use the decentralized procedure where it submits a drug application to an EU member state of its choosing – called the reference member state (or RMS) – which will then have seven months to approve or deny the application using its own domestic drug approval process. (The EU also requires a company to use the decentralized procedure if it is trying to market all other drugs not covered in the centralized procedure.)

If the RMS approves the application, the drug company may then ask other EU governments to “mutually recognize” the approval. (They will have 90 days to make their decision.) In many cases, other EU governments will simply accept the approval granted by the RMS without undertaking further safety tests. But if other nations do not grant mutual recognition, a drug company may ask the CPMP to arbitrate the matter. (Analysts note that the CPMP coordinates the decentralized procedure, but “does not take any part in the decision-making process.”)

**National procedure:** A drug company may decide that it wants to market a drug only in one EU nation. In such a case, it must simply follow the procedures set out by the domestic regulatory agency which oversees the drug application process. Some analysts say that many manufacturers don’t often choose this route because they must spend hundreds of millions to several billion dollars to develop and market a new drug, and that restricting sales to one country will prevent it from recouping their costs and making a profit on their investments.

While many describe the U.S. drug approval system as the “gold standard,” others believe that the EU system – with its generally lower costs and different routes for drug approval – will one day rival the American system and could attract more drug companies to its single pharmaceutical market.

### Japan and its drug approval process

Japan has the third largest pharmaceutical market in the world with sales of over US\$82 billion in 2008, said the Japan External Trade Organization. Currently, the Pharmaceuticals and Medical Devices Agency (or PMDA) reviews applications from companies which want to market their drugs and medical

Despite the large size of Japan’s pharmaceutical market, foreign companies say that they face difficulties in receiving approval for their drugs. Experts point out that new drug applications in Japan generally require a foreign drug company to carry out safety and efficacy studies using Japanese patients even if that company had already carried out its own clinical trials using people from other nations.

and also a renewal fee of US\$14,500 every five years if it wants to continue selling its drug in the EU market. According to one study, a company must pay around US\$260,000 to keep a drug in the EU market for five years (in contrast to over \$1 million in the United States.)

**Decentralized procedure:** Rather than receiving EU-wide authorization to market its drug (which is not an easy process),

devices in Japan. Just like the FDA in the United States and the EMEA in the EU, the PMDA evaluates whether drugs and medical devices marketed in its jurisdiction are safe and effective.

When the PMDA reviews applications for new drugs, it uses a process similar to the one in the United States. For example, a



drug company tests a new drug on animals and gathers data from these experiments. After reviewing data from animal experiments, the PMDA may grant permission to the company to carry out clinical trials on humans. As in the case of the FDA, the PMDA requires a drug manufacturer to provide extensive details on how it will conduct these clinical trials, which is carried out in three phases. The first phase tries to determine whether the drug is safe for use by humans. The second assesses its effectiveness. During the third phase, the company administers the drug in a large group of patients.

Once the company believes that it has enough information showing that a drug is both safe and effective, it files a new drug application with the PMDA, which will then review the data. If the PMDA approves the application, a company may begin to market and sell the drug in Japan. To ensure that a drug remains safe for its users, the PMDA (just like the FDA) uses a “post-marketing safety program” which requires a company to submit periodic safety updates and information concerning any serious side effects.

Various analysts have said that the PMDA does not charge user fees to review new drug applications. On the other hand, companies which manufacture medical devices must pay a user fee to the PMDA so that the agency can assess their safety and effectiveness. According to current government statistics, the approval time for new drug applications has decreased from a high of 41 months in 1998 to around 15 months in 2010, though analysts point out that, in the intervening years, the approval time had fluctuated by several months.

In recent years, PMDA said that it was trying to decrease the approval time for new drug applications by adopting measures

similar to those which will be implemented in PDUFA V in the United States. For example, during “face-to-face consultations,” PMDA now offers guidance to companies on how to improve clinical trials and whether such trials meet regulatory standards. It also holds consultations with a manufacturer to review the safety and efficacy of drug data before the company formally submits a new drug application.

Despite the large size of Japan’s pharmaceutical market, foreign companies say that they face difficulties in receiving approval for their drugs. Experts point out that new drug applications in Japan generally require a foreign drug company to carry out safety and efficacy studies using Japanese patients even if that company had already carried out its own clinical studies using people from other nations. As a result, the “most successful pharmaceutical products in Japan are still manufactured by Japanese companies,” according to analysts Edyta Frackiewicz and Stanford Jhee.

To address this problem, Japan began allowing drug companies to submit data from foreign clinical trials as long as they also submitted a supplemental study (also called a “bridging study”) showing that the drug will behave similarly in Japanese patients. According to recent statistics, new drug approvals in Japan based on bridging studies have increased from 3.2 percent in 1999 to almost 25 percent in 2003.

#### **A role for international law in the drug approval process?**

Currently, no international treaty explicitly regulates how all nations must approve new drugs in their respective jurisdictions. Instead, as described in previous sections, each nation approves drugs using its own domestic laws and regulations or does



so collectively with other countries. But as pharmaceutical companies began expanding their markets overseas, they also had to comply with the drug approval laws in other nations which, in many cases, called on them to carry out costly duplicate tests and other requirements, which, in turn, delayed market access for their products.

**An elite group harmonizing drug regulations:** Instead of pushing for an international treaty to address this problem (which could involve the participation of over 100 nations, many of which don't even have a pharmaceutical industry or regulations overseeing drug approvals), the three largest pharmaceutical markets in the world – the EU, Japan, and the United States – created a voluntary initiative in 1990 called the “International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use” (or ICH for short) where governments from those nations (along with their major drug industry representatives) would meet in periodic conferences to harmonize (i.e., establish common guidelines for) certain aspects of their drug approval regulations.

The purpose of harmonizing them is to develop the safest and highest-quality drugs in the most efficient manner without having to carry out duplicate and unnecessary animal testing and clinical trials, said the Geneva-based ICH Secretariat. Others add that streamlining different drug approval regulations from across the world would reduce the time and resources needed to develop drugs.

Since 1990, ICH members have organized six international conferences – and, starting in 2007, began to organize smaller and more frequent meetings – to harmonize their drug approval laws. Who attends these meetings? From the United States, they include officials from the FDA and the Pharmaceutical Research and Manufacturers of America. The EU sends its own officials along with representatives from the European Federation of Pharmaceutical Industries and Associations. From Japan, officials from the Ministry of Health, Labour, and Welfare, attend the meetings with members of the Japan Pharmaceutical Manufacturers Association.

The ICH and its members have passed over 50 harmonization guidelines concerning various aspects of the drug approval process, and have categorized these guidelines into four broad categories – quality (which is denoted with a “Q”), safety (denoted with an “S”), efficacy (“E”), and multidisciplinary topics (“M”). For example, in 1998, the ICH adopted what is called the Efficacy 5 guideline (popularly known as E5). Under this guideline, an ICH member agrees that if it has concerns about the effectiveness of a certain drug from another ICH member nation because of ethnic differences between the two nations, the ICH member reviewing the drug may accept a single bridging study from a drug company rather than requiring it to carry out new clinical trials.


The actual process of harmonizing drug approval regulations consists of several steps. An ICH steering committee prepares a proposal on a certain aspect of the drug approval process which its members believe should be harmonized. Topics have included the creation of a single application form for the registration of drugs, the establishment of good manufacturing practices, and how to carry out recalls, among others. The ICH then forwards the draft to the regulatory agencies of the

EU, Japan, and the United States for their comments. After receiving comments, the ICH steering committee revises the draft, and then sends a final proposal to the regulatory agencies, which adopt the proposal by incorporating its provisions into domestic regulations.

**The WHO and the rest of the world:** While the main participants of the ICH initiative are harmonizing their medicines regulation, the vast majority of other countries are not involved in this process. According to the World Health Organization (or WHO), while 20 percent of nations have “well-developed and operational medicines regulation,” around half of the remaining countries have drug regulations of “varying capacity,” and 30 percent have “either no or very limited medicines regulation.” The WHO adds that “many low income countries cannot ensure the safety, efficacy, and quality of medicines circulating in their markets.”

But experts point out that, for decades, the WHO has taken the lead in developing voluntary “global norms, international standards, and guidelines for the quality, safety, and efficacy of drugs.” For example, it has set minimum functions for drug approval authorities such as assessing the safety, efficacy, and quality of all drugs before a company markets them; inspecting facilities which manufacture them; monitoring the advertising and promotion of drugs; and providing independent information on drugs to the public. In addition, the WHO has set guidelines on good manufacturing practices for “ensuring that products are consistently produced and controlled according to quality standards.”

To help nations implement these various norms, standards, and guidelines (especially those with limited or no capability to develop their own regulatory systems), the WHO provides them with technical assistance, workshops and technical training courses, and regular exchange of information on the safety and efficacy of drugs. The WHO also serves as a liaison between ICH and non-ICH countries so that they can exchange information on pharmaceutical drugs.

The WHO points out that these efforts are important because more and more nations are developing their own pharmaceutical industries and are also importing and exporting more medicines. But it notes that many countries illegally manufacture and distribute drugs, and that others make counterfeit drugs. As a result, the WHO says that all nations must make greater efforts to adopt international standards which ensure the safety and efficacy of pharmaceutical drugs. The lacks of international standards, say experts, could “[undermine] confidence in health systems, health professional, pharmaceutical manufacturers, and distributors.” 



# Child sex abuse: Will the International Criminal Court investigate the Vatican?

For the past two decades, the Catholic Church has been trying to address thousands of allegations of child sex abuses carried out by priests and other members of the clergy. Law enforcement authorities have prosecuted predatory priests while dioceses across the world have paid compensation to victims. But critics believe that the leadership of the Catholic Church has actively covered up (and continues to conceal) cases of sex abuse, which, they say, allows other predatory priests to continue abusing children.

Last year, two groups in the United States asked the International Criminal Court (or ICC) to investigate the Vatican, saying that the actions of its top leaders (including Pope Benedict XVI) have allowed sex abuse to continue in the Catholic Church, and that the criminal tribunal should hold them partly responsible. How extensive is child sex abuse carried out by priests? Are nations holding officials of the Catholic Church responsible for the actions of abusive priests? Under what basis can the ICC hold Vatican officials responsible for child sex abuse? And what is the current status of this issue?

## Child sex abuse in the Catholic Church

While people have accused clergy from many Christian denominations (and other religions) of sexually abusing children and young people, the most numerous and publicized cases have, so far, involved the priests of the Catholic Church. In the United States, the U.S. Conference of Catholic Bishops (or

USCCB) commissioned a report which found that over 6,000 clerics (including “priests, bishops, deacons, and seminarians”) had been “credibly” and “not implausibly” accused of sexually abusing minors from 1950 through 2011. The USCCB also estimates that over 16,000 individuals have made allegations that clergy members had abused them when they were minors, though other groups claim numbers as high as 100,000.

In the Netherlands, a country with four million Catholics, around 2,000 individuals have complained of sexual abuse carried out by priests, reported *The New York Times*. In Belgium, according to a report commissioned by the Catholic Church, 13 individuals had committed suicide allegedly because they had been sexually abused by priests.

Critics say that clergy officials are more concerned about protecting the image of the Catholic Church rather than removing abusive priests from their ministerial duties. (Officials vehemently deny this characterization, pointing out that the church had undertaken many efforts to stop sex abuse by priests.) For instance, in Ireland, the media reported in March 2010 that, decades earlier, the current archbishop Seán Brady had asked two boys to sign documents promising not to share their sex abuse allegations against the Rev. Brendan Smyth who *The New York Times* said had later become “the most notorious child-abuser in the history of the Irish church.”

In 2011, the Irish government released a study (called the Cloyne Report) accusing the Irish Catholic Church of not following its own child protection guidelines issued in 1996. It said, for instance, that the Diocese of Cloyne covered up sex abuse complaints against 19 priests from 1996 through 2009. The study also accused the Vatican of indirectly encouraging the cover-up by refusing to recognize the 1996 guidelines.

Also in 2011, human rights group Amnesty International included the Vatican for the first time in its annual review of human rights in over 150 nations around the world. The *Annual Report 2011* noted “increasing evidence of widespread child sexual abuse committed by members of the clergy over the past decade” in many nations, and that, in its assessment, the Vatican (referred to as the Holy See) had demonstrated an “enduring failure” to address these abuses properly. For instance, it accused the Vatican of “not removing alleged perpetrators from their posts pending proper investigation, not co-operating with judicial authorities to bring them [i.e., priests] to justice, and not ensuring proper reparation to victims.”

The annual report added that the Vatican’s response to the sex abuse cases “did not sufficiently comply with its international obligations relating to the protection of children.” The *Catholic New Service* noted that the Vatican is a party to an international treaty called the *Convention on the Rights of the Child*, and that Article 19 of that agreement requires its signatories to 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, maltreatment or exploitation, including sexual abuse.”

### Addressing sex abuse cases: Criminal prosecutions and civil lawsuits

How have nations addressed sex abuse allegedly carried out by priests and other clergy? Authorities in Australia, Belgium, Canada, Germany, Ireland, the United States, among other countries, have filed criminal charges against those priests who had directly carried out the alleged abuses, according to *TIME* magazine and other media sources.

For example, prosecutors accused the Rev. John J. Geoghan of abusing close to 200 boys over a 30-year period across several parishes in Massachusetts. In February 2002, a court convicted Geoghan of indecent assault and battery for fondling a 10-year old boy in a swimming pool, and sentenced him to nine to 10 years in prison. (An inmate later killed him.) Prosecutors said that they couldn't file more criminal charges against Geoghan in other alleged cases because the accusers had waited too long in contacting them.

## How have nations addressed sex abuse allegedly carried out by priests and other clergy? Authorities in Australia, Belgium, Canada, Germany, Ireland, and the United States have prosecuted those individuals who had directly carried out the alleged abuses.

In 2005, a grand jury issued a report which said that the top leaders of the Archdiocese of Philadelphia had covered up (for over 40 years) well-documented cases of 63 priests accused of sexually abusing children, and that by transferring them to other parishes (and failing to alert law enforcement officials), it had endangered the safety and welfare of other children. Prosecutors at the time did not file any criminal charges against the accused priests because the time in which they could had already expired.

In February 2011, a grand jury issued another report which recommended that prosecutors charge three priests in the Philadelphia Archdiocese – Edward Avery, James Brennan, and Charles Engelhardt – for sexual assaulting children, among other charges. The following month, Avery pleaded guilty to sexual assault while Brennan and Engelhardt are still on trial.

In addition to pushing for criminal prosecution, families and supporters of sex abuse victims have filed civil lawsuits seeking monetary damages from specific archdioceses which had supervised priests accused of sexual abuse. So far, Catholic churches worldwide have paid billions of dollars in compensation to sex abuse victims, according to various sources. The Archdiocese of Boston, for example, agreed to pay \$10 million to settle a civil lawsuit filed by 86 people who had accused Geoghan of sexually molesting them. It later agreed to pay \$85 million to settle other sex abuse cases filed by over 500 alleged victims. As a result of settling these civil suits and paying compensation to the accusers, at least eight dioceses in the United States have declared bankruptcy, reported *TIME* magazine. In January 2011, the Archdiocese of Milwaukee – which had so far paid out

more than \$30 million in restitution to sex abuse victims – filed for bankruptcy protection, saying that it could not pay for sexual abuse claims filed by over 500 people.

While governments have prosecuted individual priests who had directly carried out sexual abuses, legal observers note that church leaders had rarely faced criminal charges for their alleged roles in covering up abuses, transferring many accused priests to unsuspecting parishes, and for failing to alert law enforcement officials.

For example, while the Archbishop of Boston, Cardinal Bernard F. Law, stepped down in 2002 when various documents suggested that he had tried to cover-up sex abuse allegations against Geoghan. The state attorney general said in a 2003 report that his department couldn't file criminal charges against Law or other church officials because the child abuse reporting law at the time did not include priests, and that the conduct of church officials “did not rise to the level of criminal intent.” The Archdiocese of Philadelphia in 2005 also did not face any criminal charges for allegations that it covered up sex abuse cases. According to *USA Today*, “no Roman Catholic bishop has been criminally charged for keeping accused clergy in parish jobs

without warning parents or police.” And while the Vatican had publicly sanctioned some priests for molesting children, it did not discipline their supervising priests.

But in what has been described by observers as a landmark prosecution in the United States, law enforcement officials in June 2012 had, for the first time, won a conviction against a senior church official (Monsignor William J. Lynn of the Philadelphia Archdiocese) for covering up alleged sex abuse crimes carried out by other priests under his supervision. Specifically, prosecutors had charged him with endangering child welfare, among other charges, by knowingly assigning priests suspected of sexual abuse – including Edward Avery and James Brennan – to other jobs which allowed them to continue preying on children. (Prosecutors did not charge Lynn for actual sexual abuse.)

### Addressing child sex abuse through the International Criminal Court?

In the midst of these ongoing civil suits and criminal prosecutions, two groups had recently taken an untested route in addressing the Catholic Church's child sex abuse scandal. In September 2011, two American advocacy groups – New York-based Center for Constitutional Rights (or CCR) and the Survivors Network of those Abused by Priests (or SNAP, a group which supports the rights of sex abuse victims by clergy) – had filed an 84-page complaint (and 20,000 pages of supporting documents) with the ICC, requesting that its prosecutors investigate four top Vatican officials (including Pope Benedict XVI) for facilitating, failing to prevent, and covering up crimes against humanity (i.e., sexual abuse carried out by priests against children).

What is the ICC? In 1998, the world community adopted an international treaty called the *Rome Statute of the International Criminal Court* (or Rome Statute) which created the ICC, the world's first permanent criminal tribunal. It has the legal authority to prosecute individuals only for genocide, war crimes, and crimes of aggression which occurred after July 1, 2002 (the date when the *Rome Statute* and the ICC came into force and operation, respectively). The ICC can also prosecute individuals for crimes against humanity which Article 7 of the *Rome Statute* defines as rape, sexual slavery, and "any other form of sexual violence of comparable gravity," which are carried out "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."

Unlike previous tribunals which were formed on a temporary basis by the United Nations to prosecute offenses which had taken place only in specific conflicts (such as those in Rwanda and the former Yugoslavia), the ICC has much wider jurisdiction to try individuals from countries which have ratified the Rome Statute. Over 120 countries have joined that agreement as of June 2012.

The ICC may prosecute not only those individuals who had directly carried out prohibited acts under the Rome Statute, but also those who had "command authority" over them, including high ranking officials and even heads-of-state. Specifically, Article 28(b) of the *Rome Statute* says that the ICC will hold a superior responsible for crimes committed by subordinates under his authority if he knew that they were committing crimes, if the crimes concerned activities within his effective control, and if he failed to take "all necessary and reasonable measures" within his power to prevent them.

The ICC is described by legal experts as a "court of last resort" because it will prosecute individuals only when a particular member state is unable or unwilling to do so. Political observers say that the framers of the *Rome Statute* did not intend for the ICC to "supplant the authority of national courts" of its signatory nations (most of which can and most likely will turn to their own legal systems to investigate human rights abuses.)

Still, several provisions in the Rome Statute allow the ICC and its members states to begin taking some action to address unfolding human rights concerns. For example, a nation may (under Article 14) refer a human rights "situation" to the ICC for an investigation. In addition, the ICC Prosecutor may (under Article 15) initiate one on his own. Furthermore, under Article 13(b), the UN Security Council may call on the ICC to investigate a particular situation – even in nations which had not signed the Rome Statute. Moreover, the ICC Prosecutor's Office accepts allegations of human rights abuses from private individuals and groups. According to the *Wall Street Journal*, the ICC had received more than 9,000 requests for investigations from various individuals and advocacy groups from across the globe, though almost half were "manifestly outside" its jurisdiction.

The ICC does not have jurisdiction over the citizens of nations which did not sign or ratify the *Rome Statute*, a list which currently includes the United States and the Holy See. But experts say that the ICC may prosecute an individual from a non-signatory state who had allegedly carried out violations in a signatory state. The ICC may also prosecute alleged violations carried out by an individual of a signatory nation who currently resides in a non-signatory nation.

### Is the Vatican responsible for priests accused of sexual abuse?

The complaint filed by CCR and SNAP did not accuse top Vatican officials of directly abusing any child. Instead, CCR senior staff attorney Pamela Spees said that – under Article 28(b) of the Rome Statute – they exercised (and continue to exercise) command authority over bishops and priests and, therefore, can be held responsible for crimes carried out by them. "The church hierarchy is a clear, rigid, ancient hierarchy with the Pope at the top and the unquestioned and long-standing authority to hire and fire bishops and Vatican officials and to set the policies followed within the Church," said CCR in a press release.

Vatican leaders, said the complaint, knew that many priests had abused and continued to abuse children. But instead of taking decisive action to address the issue, it accused them of helping to conceal and minimize the severity of the sex abuse allegations. And doing so effectively allowed many priests to continue their abuses, which, in the assessment of the two groups, should be considered crimes against humanity under the Rome Statute because many priests had carried them out in what they claimed was a systematic and widespread manner against a civilian population. The complaint also explained how each person exercised command authority:

- Pope Benedict XVI (a German national) "yields supreme and sole authority over all entitled persons within the church . . . and is ultimately responsible for policies and practices of the Church as a whole."
- Cardinal Tarcisio Bertone (of Italy), serving as Vatican Secretary of State, "had authority to help oversee and implement church policy with respect to sexual violence by priests." The complaint alleged that "Sodano openly rejected the notion that a bishop be obligated to contact police to denounce a priest who admitted pedophilia."
- Cardinal William Levada (of the United States), as Archbishop of Portland and then San Francisco for nearly 20 years, oversaw the handling of numerous cases of sexual assault by priests, and was, therefore, in a position to help curb child sex abuse. But he failed to take reasonable measures within his power to prevent such crimes, said the complaint.
- Cardinal Angelo Sodano (of Italy), "as the Vatican's [former] Secretary of State, was tasked with helping John Paul II and then Benedict XVI implement and oversee the Pope's and church polices and procedures." According to the complaint,



“Sodano was in a position to prevent and punish crimes of rape and sexual violation, which he referred to as ‘petty gossip,’ but instead furthered the Church’s practice of concealment and protecting predator priests.”

Why did these two groups file a complaint at the ICC even though many nations are addressing the child sex abuse scandal through their respective legal systems? In a press release, CCR and SNAP said that new sex abuse policies set by the Catholic Church were “weak, vague, and at best, only sporadically implemented or enforced,” and that church officials still allegedly transferred abusive priests to unsuspecting parishes. They also believe that “in all but a few countries, no real steps have been taken by the church hierarchy to genuinely protect the wounded, heal the wounded, or discover and disclose the truth about clergy sex crimes and cover ups.”

Barbara Blaine, the founder of SNAP and also herself a victim of clergy sex abuse, claimed that going to the ICC court was a last resort. “We have tried everything,” she explained to the *Associated Press*. “If the Pope wanted to, he could take dramatic action that would help protect children. And he refuses to take action.” CCR added that the ICC was the “appropriate forum to ensure

are still investigating and prosecuting alleged sexual offenders. The *Wall Street Journal* reported that, in August 2011, the Vatican had turned over files of a predator priest to lawyers representing a victim in Oregon. Carsten Stahn of Leiden University, said: “The Petitioners will first have to convince the [ICC] prosecutor that the case cannot be better handled by domestic authorities.”

In addition, several legal analysts argued that the world community did not create the ICC to investigate and prosecute sex abuse cases such as those involving the Vatican. Giorgio Sacerdoti, a law professor at Bocconi University in Milan, said: “The [ICC] is likely to view the sex abuses cases as beyond its jurisdiction, they were not part of a systematic attack on human rights.” Another commentator, Neil Addison (author of the textbook *Religious Discrimination and Hatred Law*), said: “It’s a publicity stunt, it’s nothing more. The ICC is supposed to exist for situations of war crime and where there isn’t a legal remedy within the country where the offenses took place.” And the Executive Director of the International Bar Association, Mark Ellis, explained: “When you look at the concept of why and how the ICC was created, I just don’t think this fits.”

Furthermore, critics say that the ICC does not have jurisdiction

## A complaint filed at the International Criminal Court did not accuse top Vatican officials of directly abusing children. Instead, it argued that these officials exercised (and continue to exercise) command authority over bishops and priests and, therefore, can be held responsible for crimes carried out by them.

accountability given the magnitude, scope, and global reach of the pervasive system of sexual violence within the Catholic Church.”

Even though the Vatican did not sign of the *Rome Statute*, CCR and SNAP argued that the ICC has jurisdiction to prosecute the individuals named in the complaint. Cardinals Sodano and Bertone, for example, are nationals of Italy, which is a signatory of the Rome Statute, while Pope Benedict XVI is a national of Germany, which had also signed the Rome Statute. (According to *Reuters*, Pope Benedict XVI retained his German nationality when he became a national of the Vatican.) In a letter to Luis Moreno Ocampo, the Chief Prosecutor of the ICC, the advocacy groups explained that “the offenses were committed on territories of State Parties to the Rome Statute, and by nationals of State Parties.”

The Office of the ICC Prosecutor confirmed that it had received the complaint and corresponding documents, and will determine “whether the alleged crimes fall under the court’s jurisdiction,” said spokeswoman Florence Olara. As of June 2012, the Prosecutor’s Office is still reviewing the complaint.


### Will the International Criminal Court investigate the Vatican?

Many believe that the ICC will decide not to carry out an investigation. For example, even though CCR and SNAP argued that the Catholic Church had not done enough to stop child sex abuse, critics note that the ICC is still a court of last resort and will take cases only when nations are unwilling or unable to prosecute alleged violators. In the situation of the Catholic Church and child sex abuse, that does not seem to be the case because many nations

over the Vatican because it did not sign the Rome Statute, though they have not responded to the specific arguments made by CCR and SNAP concerning this matter.

How did the Vatican respond to the complaint? According to the *Associated Press*, its legal counsel in the United States, Jeffrey Lena, called the complaint a “ludicrous publicity stunt and misuse of international judicial processes.” Cardinal Crescenzo Sepe – the former head of the Vatican’s missionary office – described it as “the usual anti-Catholic attempt that tends in some ways to obscure the image of the Church.”

Despite the Vatican’s critique of the suit, Pope Benedict XVI has expressed his grief and shame over the sex scandals, reported *BBC News*, and called on all bishops to create a common guideline on addressing pedophile priests by May 2012.

Others point out that bishops, catholic university rectors, religious superiors, and abuse victims gathered in Rome in February 2012 for a symposium (called “Toward Healing and Renewal”) where Cardinal Levada – one of the Vatican officials named in the complaint – addressed the delegates in a keynote speech where he said: “We need to help each other find the best ways to help victims, protect children, and to educate priests to be aware of this scourge and to eliminate it from the priesthood.” According to The New York Times, Monsignor Charles Scicluna, a Vatican top official handling the sex abuse issue, called on bishops to follow civil law when dealing with abuse cases. “Child abuse is a sin,” he said. “But it is also a crime, and the church has a duty to cooperate with civil society and with its requests for cooperation to prevent the crime.” 



# International Law News Roundup

## COMPARATIVE LAW

### Australia: Women soldiers at the front line of combat?

Where exactly is a woman's place during warfare? Under a new policy announced by Australia, women soldiers may apply for all front line positions where they will fight directly against enemy forces. While many applauded the new policy, others expressed dismay at the thought of women fighting directly in battle. Why did Australia change its policy? Will more women now apply for direct combat positions? Do other nations allow women to engage the enemy directly? And does international law address whether women can fight at the front lines?

Analysts note that women play an integral role in Australia. The Australian Bureau of Statistics said that women constitute almost half of its workforce and about 25 percent of corporate board appointments. More than 30 percent of Australia's small business operators are women, according to the Australian Department of Foreign Affairs and Trade. Also, more women than men attend high schools and universities. (In recent years, more women have even graduated from college with bachelor's degrees than men.) In government, 28.3 percent of the members of Parliament are women. And, for the first time in Australia's history, a woman (Julia Gillard) currently holds the position of Prime Minister.

Under its new policy, Australia became the fourth nation allowing women to apply for direct combat positions. Canada, Israel, and New Zealand had largely removed such gender restrictions years ago.

In stark contrast to these civilian statistics, women make up 14.5 percent (or around 8,000) of all permanent soldiers in the Australian Defence Force (or ADF), which includes the army, navy, and air force. According to the ADF's latest figures, of all enlisted women, 9.7 percent serve in the Army, 17.8 percent in the Air Force, and 18.4 percent in the Navy. Only 214 women are currently enrolled in the Australian Defence Force Academy (or ADFA, a military college which trains future officers), said an ADF spokesman. *CNN International* reported that the 336 women soldiers serving in Australia's overseas operations make up about 10 percent of its total deployment. Women also make up less than 5 percent of the most senior ranked officers. The highest-ranked women officers are a two-star general in the Air Force and her counterpart in the Army.

Under its former policy, Australia did not allow women soldiers to serve in positions involving "direct combat duties," which the law defined as "duties exposing a person to a high probability of direct physical contact with an armed adversary." It also did not allow women to serve in positions involving "combat related duties," defined as "duties requiring a person to work in support of, and in close proximity to, a person

performing combat duties, in circumstances in which the person may be killed or injured by an act of violence by an adversary."

Some positions involving direct combat duties include those in the infantry, combat engineers, clearance diving personnel, airfield guards, and those in the Special Forces. These positions and others currently make up seven percent of all ADF positions, reported *ABC Melbourne*.

Despite the ban on combat duties, women had already occupied formal and informal positions on the front line, said Dr. Georgia Lysaght – a research fellow at the Centre for Transnational Crime Prevention – in an opinion piece for the *Sydney Morning Herald*. "While the contribution of women as medics and nurses in war has been recognized," wrote Dr. Lysaght, "women have also participated in all aspects of war and have been both subject to and responsible for wartime violence, murder, torture, and rape." In recent operations in Afghanistan, women served with front line artillery units and also in drone aircraft operations, reported *The Australian*, a news daily.

In 1984, the Australian government had implemented a law called the *Sex Discrimination Act* which prohibited any form of discrimination based on a person's gender, said the Australian Attorney-General's Department. But the act did not cover the ADF, which allowed it to ban women from applying for direct combat duties. According to one legal analyst, the ADF pushed for the exception, believing that it would protect women from the brutality of front line fighting.

In April 2011, Defence Minister Stephen Smith proposed to end restrictions which prevented women soldiers from applying for direct combat positions. The move gained strong support from Prime Minister Gillard and also Defence Force chiefs, noted *The Australian*. In September 2011, with broad political support, the government formally lifted these restrictions and will now use a gender-blind, merit-based policy to fill all front line positions. (That is to say, women will be judged for a position in the same manner as men.)

"In the future, your role in the defence force will be determined on your ability, not on the basis of your sex," said Defence Minister Smith, adding that the ADF will test whether an applicant has "the right physical, psychological and mental attributes to be able to do that job."

But joining front line combat forces will still be grueling, said observers. For instance, joining the Special Air Service Regiment will require at least one year in an army unit followed by a combination of the most demanding physical and mental tests. Such tests are designed to remove all but the most committed applicants, reported *The Australian*. Past physical tests involve carrying a 176-pound backpack on multiple-day grueling endurance marches. In addition, physiological tests include extended question-and-answer sessions, being woken at night, and ordered to strip, among others.

According to Smith, the ADF will implement the new policy over a five-year period. "The move is a significant and major cultural change," he said, "This is why we'd rather err on the

side of caution in expressing a five-year [implementation] period.” Once the government fully implements the new policy, the ADF will have opened 100 percent of military positions to women. The government will review the ADF’s first implementation report in 2012, according to *CNN*. The new policy will also end the ADF’s exemption from the *Sex Discrimination Act*, said Elizabeth Broderick, Australia’s Sex Discrimination Commissioner.

Expansion of women’s roles into front line positions has already met resistance. The Australian Defence Association, an influential security think tank, accused the government of “jumping the gun” by not first completing its research of women’s capabilities in the military. “Humping a heavy pack around for months are more likely to cause injuries to women than men,” said Neil James, its executive director. “It’s an issue of biomechanics, not just physicality.” Other common objections, noted one analyst, include the supposed inability of male soldiers to engage in combat after witnessing wounded female soldiers.

Some believe that the government had lifted the ban on women at the front lines to divert attention away from inquiries announced by Smith in what has been dubbed the “Skype sex scandal” at the ADFA. In April 2011, authorities charged two ADFA cadets for filming an 18-year-old female air force cadet having sex with a fellow cadet and then broadcasting the footage to others over the Internet, reported *The Daily Telegraph*, a British newspaper.

But supporters of the new policy such as Defence Force Chief General David Hurley say that the armed forces will gain more from capable women joining the front lines than excluding them on the basis of sex. Another supporter, journalism professor Catharine Lumby of the University of New South Wales, argued that while critics say that people will be shocked to see severely injured women returning from battle, why shouldn’t society feel just as mortified by the sight of injured men or bodies of male soldiers returning home in body bags or without their legs?

Despite the new gender-blind policy, some experts believe that opening up direct combat positions to women will have a minimal effect on the fighting ability of the ADF. Peter Leahy, a retired Army chief and senior academic at the University of Canberra, is a supporter of the initiative but believes that fewer than two or three percent of female applicants will pass the infantry selection tests, for instance. Dr. Rodger Shanahan, a military analyst at the Lowy Institute, a Sydney-based independent international policy think tank, said: “Opening up doesn’t mean it’s going to change the whole balance of force structure overnight or even decades later.” He pointed out that under the five-year implementation period, women probably won’t participate at the front lines of Afghanistan where Australia will end its mission against the Taliban in 2014.

Under its new policy, Australia became the fourth nation to remove gender restrictions on combat positions. Canada, Israel, and New Zealand had largely removed such restrictions years ago. But in some of these nations, the number of women joining direct combat positions has remained low.

**Canada:** Canada’s policy of equal access began in 1989 when the Canadian Human Rights Tribunal (following a discrimination complaint) ordered the Canadian Armed Forces

to fully integrate women into regular and reserve forces within 10 years. Today, women make up 15 percent of the Canadian military, according to *CBC News*, a news station. However, out of a total of 13,000 combat personnel, only about 250 women (or less than two percent) serve in direct combat positions, reported thestar.com, an online news site. In May 2006, Canada experienced its first loss of an active combat female soldier, Captain Nichola Goddard, who died on the front lines in Afghanistan, said *CBC News*, when a rocket-propelled grenade struck her armored vehicle during a battle against the Taliban at the front lines.

**In May 2012, two women in the U.S. army reserves had filed the first lawsuit in federal court challenging the nation’s policy of barring women from applying for direct combat roles.**

**New Zealand:** In 2001, New Zealand formally allowed women to serve in direct combat roles. Women serve in the Special Air Service, and also in infantry and artillery units, although exact statistics are not available. According to the New Zealand Defence Force, women make up 17 percent of the military.

Retired Australian major general Jim Molan criticized his government for citing Canada and New Zealand as nations which allow women to serve on the front lines. “Name one big battle that New Zealand has been in in the last 50 years?” asked Molan. “Name one big battle that Canada has been in in which women have been in the infantry?” He also said that Australia had more important work than using its armed forces as a “social laboratory,” reported *ABC Melbourne*.

**Israel:** In 2000, Israel implemented a policy allowing women to join direct combat positions in the Israel Defense Forces (or IDF). According to the Israel Ministry of Foreign Affairs, Israel amended its *Military Service Law*. It now states that “the right of women to serve in any role in the IDF is equal to the right of men.” Israel currently allows women to serve as armored vehicle and tank driver-operators, explosives detector dog handlers, combat medics, fast jet pilots, and search and rescue personnel, reported *The Australian*.

Yet despite these open opportunities, Israeli women may join only 90 percent of all IDF positions, said the Ministry of Foreign Affairs. Certain positions such as border protection roles (considered by the IDF to be more dangerous) are open only to men, reported the *Sydney Morning Herald*. Despite this restriction, the IDF maintains that, since 2000, every rank in the IDF has seen a moderate increase in the number of women. A spokeswoman for the Israeli embassy said: “A revolution is under way in terms of opportunities for women to enlist in the IDF.” And in contrast to Canada’s and New Zealand’s low percentage of women soldiers in the overall military, Israeli women represent a third of all IDF soldiers, said the Ministry of Foreign Affairs.

**United States:** The federal government currently bans women from joining direct combat units such as infantry and Special Forces, among others. The Office of the Secretary of Defense in January 1994 issued a memorandum (called the “Direct Ground Combat Definition and Assignment Rule”) which states that

“service members are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground . . .” (The memo is still in effect.)

According to statistics compiled by the Women in Military Service for America Foundation, women make up 14.6 percent of the U.S. armed forces. Percentages range from 7.5 percent in the Marine Corps to 19.2 percent in the Air Force. Despite the ban on participating in direct combat, about 800 women working in a wide range of front line jobs over the last 10 years had been injured, and more than 100 killed in Afghanistan and Iraq, according to the Pentagon. In September 2011, *CNN* reported that, in Iraq, the military had awarded combat action badges to women soldiers (who worked as cooks) after attacks compelled them into direct combat duties.

According to Lori Manning, Director of the Women in the Military Project at the Washington-based Women’s Research and Education Institute, the fact that American women informally serve in various combat situations with ground units reflects the changing nature of warfare and the disappearance of “typical” front lines. “U.S. policy on utilization of women has been based on old (outdated) Cold War concepts of what wars look like,” said Manning.

Along these lines, Defense Secretary Robert Gates grabbed the attention of the military when he openly admitted to soldiers in Baghdad on April 7, 2011, that America’s policy regarding women in combat has not kept up with reality. “The truth is that women have been serving in combat already,” Mr. Gates said. “I had some women complain to me in Afghanistan that because of the rules in terms of searching Afghan women and so on, a lot of combat patrols would take women soldiers along with them. And their complaint was that because they are not in combat, they have not had combat training. So there is a certain contradiction here.”

Still, Gates could not pinpoint when (or even whether) the United States would change its policies on women in combat. “Time scale of the change? I have no idea,” he said. “We are just starting out with putting women on submarines. That will be a learning process. I think they’re doing it smart and cleverly and carefully, and my guess is they’ll do the same thing with respect to women in combat.”

In May 2012, the media reported that two women in the U.S. army reserves – Command Sgt. Maj. Jane Baldwin and Col. Ellen Coughlin – had filed the first lawsuit in federal court against the U.S. Department of Defense, challenging its policy of barring women from applying for direct combat roles. While the Defense Department allowed male soldiers to apply for direct combat positions, it prohibited female soldiers from doing the same solely on the basis of their sex. This policy, argued the plaintiffs, violated their right to equal protection under the Fifth Amendment of the U.S. Constitution.


Are there any international treaties which address the issue of women in combat? The world community in 1979 adopted an international treaty – the *Convention on the Elimination of All forms of Discrimination against Women* (or CEDAW) – which addresses discrimination against women. CEDAW requires its 187 signatory nations to take measures to end discrimination against

women in various fields and areas of life, including employment, education, health care, family life, among many others. CEDAW also requires its signatory nations to incorporate the principle of equality of men and women into their laws.

CEDAW does not specifically address the issue of women at the front lines or gender equality in the military. But one provision could be applicable to this issue. Article 11 states, in part, that “parties shall take all appropriate measures to eliminate discrimination against women in the field of employment.” It adds that women have the “right to the same employment opportunities, including the application of the same criteria in matters of employment.” Under one interpretation, when a nation bans women from front line combat roles, it could be violating Article 11 by using a person’s gender as a criterion for employment. (Analysts note that people around the world choose military service as a career path.) Still, no party has filed a formal legal complaint against a country for what it believes to be a violation of Article 11 concerning positions in the military.

Some opponents of CEDAW claimed that the treaty would, under Article 11, force nations to put women in the front lines of direct combat. They point to a 1997 report from a CEDAW committee of experts (who review progress in the implementation of CEDAW) which urged “full participation of women in the military.” But according to [globalsolutions.org](http://globalsolutions.org), the committee was actually calling for more participation by women to participate in peacemaking and diplomacy efforts in the context of military decision-making.

When Australia ratified CEDAW in 1983, it had also filed what is called a reservation, saying that it would not abide by any CEDAW provision affecting its policy of excluding women from direct combat duties. Under Australia’s new policy, however, the nation will now fully meet its obligations under CEDAW, according to the *International Business Times*.

The United States has not yet ratified CEDAW. While President Jimmy Carter signed CEDAW in 1980, the U.S. Senate has not yet voted on whether to approve that treaty. Still, the United States had filed a reservation which states, in part, that it would not allow women soldiers to serve in positions requiring direct combat. 

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#### COMPARATIVE LAW

### European Union: No more added sugar in fruit juices

Companies can no longer add sugar to all fruit juices sold in the 27 member nations of the European Union (or EU) under a recent change to existing regulations. Which laws currently regulate the production and marketing of fruit juices in the EU? How will the new law effect other nations which sell fruit juices in the European market?

According to trade groups, fruit juice is very popular among European consumers. A report by the AIJN European Fruit Juice Association claimed that “the combined EU 27 countries represent the largest regional market for fruit juice and nectars in the world and have the second highest intake per person globally, behind North America.”



Decades ago, every nation had their own laws and regulations overseeing the production and labeling of fruit juices. In some cases, companies would manufacture and label their juices in ways which could mislead consumers. For example, a company combining several fruits together would market that product as a juice coming from a single fruit, but would not list all of the ingredients on a label.

**Europe is the second largest fruit juice market in the world. Under a recently passed regulation, no company anywhere in the world may sell fruit juice containing added sugar in the European market.**

This practice occurred not only in the fruit juice sector, but throughout the entire foodstuff industry where each EU member state had their own domestic laws and regulations overseeing the labeling and advertising of foodstuffs. For example, while some nations required companies to list all of the ingredients contained in a package of food along with an expiration date on a food label, other nations had much less stringent requirements. Many companies also claimed that their foods had certain properties which prevented or cured human illnesses when, in fact, they did not.

In 1979, the EU passed a directive (79/112) setting a single standard on the labeling and advertising of foodstuff which every EU member nation had to incorporate into their own domestic laws. For example, under the directive, all manufacturers had to list specific types of information on labels appearing on food packages, including a list of ingredients, an expiration date, and special storage requirements. The directive also prohibited companies from advertising health claims which their foods did not possess. In 2000, the EU replaced the 1979 directive with Directive 2000/13/EC, which added more requirements concerning the labeling and advertising of foodstuffs.

In September 2001, the EU adopted a single standard for the production and labeling of fruit and other juices (through Directive 2001/112/EC) which every EU member state had to implement through their own domestic laws. Under this single standard:

- Companies which manufacture juices from two or more fruits must list (on a label) the fruits they had used “in descending order [according to] the volume of the fruit juices or purées included.” But for juices using three or more fruits, they can use the words “several fruits” or similar wording.
- Companies may add only authorized ingredients to fruit juice, including, for instance, vitamins and minerals, pulp, carbon dioxide, and sugars.
- When adding sugars, companies may do so only to regulate the acidic taste of or to sweeten the fruit juices. If a company adds sugar to regulate its acidic taste, “the quantity of sugars added . . . may not exceed 15g per litre of juice.” For sweetening purposes, “the quantity of sugars added . . . may not exceed 150g per litre of juice.”
- If companies sweeten their juices with sugar, the directive requires packages to include the word “sweetened” or “with added sugar,” along with “an indication of the maximum quantity of sugar added.”

- Companies must use the official definition for fruit juice under the directive, which is the “product obtained from fruit which is sound and ripe, fresh or preserved by chilling, of one or more kinds mixed together, having the characteristic color, flavor, and taste typical of the juice of the fruit from which it comes.”


In March 2012, the EU amended the 2001 directive by adopting yet another directive (2012/12/EU). The 2012 directive made several changes. First, it banned companies from adding sugars to anything labeled as fruit juices. (It does so by removing sugar from the list of authorized ingredients which can be added to fruit juice.) On the other hand, the directive still allows them to add sugar to nectars because “nectars cannot be produced without added sugar,” said EU officials.

Second, fruit juice products can no longer print nutritional claims which say “With no added sugars.” (Officials point out that many companies use these words to differentiate their products from those made by rival businesses.) However, food companies may print a statement on their fruit juice labels saying that, after a certain date, “no fruit juices contain added sugars.”

Third, the directive officially lists tomatoes as a fruit. As a result, all of the rules overseeing the production and labeling of fruit juices will apply to tomato juice.

The 2012 directive – which came into force in April 2012 – will apply to all fruit juices marketed and sold in the EU regardless of their origin. So, for instance, an American company exporting fruit juices to any EU member nation will have to comply with all of the provisions of the directive. (According to a report presented to the European Parliament’s Committee on the Environment, Public Health, and Food Safety, more than 80 percent of all orange juice sold in Europe comes from the United States and Brazil.)

EU member states must implement the new rules into their national laws by October 2013. (In contrast, the United States does not have a similar regulation concerning added sugars in fruit juices.) Fruit juice products made or labeled before October 2012 can still be sold in the EU market until April 2015.

Reports say that Germany was the only EU nation to vote against the 2012 amendments to the fruit juice directive, voicing concerns that it would lead to “a deterioration of the quality of the affected products.” 

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#### INTERNATIONAL CRIMINAL COURT

### The first judgment

In its very first judgment, the International Criminal Court (or ICC) announced in March 2012 that prosecutors had proved beyond a reasonable doubt that a defendant from the Democratic Republic of the Congo (or DRC) had committed war crimes by recruiting and using child soldiers during a civil war in that nation. While human rights groups welcomed the conviction, others point out that the ICC had also criticized the prosecution for several missteps.

The ICC is the world’s only permanent criminal tribunal, and has the authority to prosecute individuals accused of genocide, crimes against humanity, crimes of aggression, and war crimes. Unlike previous tribunals which were formed on a temporary

basis by the United Nations to prosecute offenses which had taken place in specific conflicts such as those in Rwanda and the former Yugoslavia, the ICC (based in The Hague, and which began operations in 2002) has much wider jurisdiction to try individuals from the 121 countries which have ratified the *Rome Statute of the International Criminal Court*, the agreement creating that tribunal.

Legal experts describe the ICC as a “court of last resort” because it will prosecute individuals only when a particular member state is unable or unwilling to do so. For example, after a major civil conflict (as in the case of the DRC), a nation’s legal system may lack the ability – and even the political will – to carry out an effective prosecution. (The DRC joined the Rome Statute in 2002.)

Under Article 8 of the Rome Statute, war crimes include “conscripting or enlisting children under the age of [15] years into armed forces or groups or using them to participate actively in hostilities” during both civil and international conflicts. Under Article 25(3)(a), the ICC will hold a person criminally responsible for committing a war crime “whether as an individual, jointly with another or through another person . . .”

In June 2004, after receiving a formal request from the then-transitional government in the DRC, the ICC began an investigation into alleged crimes committed by the military wing of a group called the Union des Patriotes Congolais (UPC) during that country’s five-year civil war, which ended in 2003. Congolese authorities arrested Thomas Lubanga Dyilo – the founder and president of the UPC – and transferred him to the ICC in March 2006. Lubanga was the first person ever arrested and transferred to the custody of the ICC, said observers. The case of *The Prosecutor v. Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06) began in January 2009.

### In its first judgment ever, the International Criminal Court said that prosecutors had shown beyond a reasonable doubt that a defendant had intentionally carried out a campaign to recruit child soldiers.

Trial proceedings at the ICC have many similarities with the American criminal justice system. For example, the ICC presumes that a defendant is innocent until prosecutors prove his guilty beyond a reasonable doubt. In addition, the accused is entitled to defend himself either in person or through an appointed legal counsel. Unlike a criminal proceeding in the United States, the ICC does not use a jury during a trial. Instead, a “trial chamber,” which is a panel of three judges, decides a case. (Throughout the world, in fact, trial by jury for criminal proceedings is more of the exception than the rule, according to the U.S. Department of Justice.)

ICC prosecutors alleged that under the leadership of Lubanga and other officials, the UPC army carried out a campaign – from September 2002 to August 2003 – to conscript children under the age of 15 and force many of them to participate in hostilities in order to gain political and military control of a district called Ituri. (Human rights groups said that the UPC army had recruited so many children that it later came to be known as the “army of children.”) Participating in hostilities involves not

only fighting at the front lines of battle, but also carrying out supporting roles such as delivering ammunition or working as cooks, said prosecutors. Some observers believe that over tens of thousands of children served as fighters, cooks, carriers, and sex slaves for the UPC army.

Around 300,000 children serve as soldiers in some capacity in many nations around the world, say human rights experts. Several international treaties – including the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* – call on nations to raise the minimum recruitment age to 18 and also to take “all feasible measures” to ensure that only soldiers who are at least 18 years old are involved in direct hostilities. (But the Rome Statute uses the lower age of 15.)

Prosecutors also argued that Lubanga should be held criminally responsible for the recruitment campaign because, according to evidence, he had “de facto ultimate control over the adoption and implementation of plans to forcibly recruit children.” (Article 30 of the Rome Statute states that the ICC may hold a person guilty of an alleged crime only if he carries it out “with intent and knowledge.”)

The defense, according to various media reports, challenged the credibility of witnesses (which included several child soldiers) during cross examinations. It said that ICC prosecutors had delegated some of its investigative duties to “local intermediaries” who are people hired to find witnesses across the DRC because of their deep knowledge of that nation and its people. But the defense questioned the credibility of witnesses found by these intermediaries since they received more payments by finding more witnesses. In several instances during the trial (which ended in April 2011), the defense accused intermediaries of coaching their witnesses.


In its 624-page decision issued in March 2012, the ICC trial chamber unanimously agreed that evidence presented by the prosecutor had shown beyond a reasonable doubt that the UPC army had, indeed, enlisted and forced children under the age of 15 to participate in hostilities. For example, it said that “multiple witnesses testified credibly and reliably that children under 15 were ‘voluntarily’ or forcibly recruited” into the UPC army. In addition, the trial chamber also said that evidence credibly showed that “children in the military camps endured harsh training regimes and were subjected to a variety of severe punishments.” Furthermore, the trial chamber said that evidence had credibly shown that the UPC army had deployed children under 15 and forced them to take part in actual fighting in many areas in the DRC.

The trial chamber also unanimously held Lubanga criminally responsible for the campaign of recruiting children under the age of 15 and then using them in hostilities. Prosecutors had shown beyond a reasonable doubt that he had intentionally carried out the campaign with full knowledge of its consequences, said the judges. For example, the trial chamber said evidence showed that, in addition to being the political leader, Lubanga was the Commander-in-Chief of the UPC army. In addition, “he was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives, for instance by giving speeches to the local population and the recruits.” Furthermore, the trial chamber noted that “at the Rwampara military camp, he

encouraged children, including those under the age of 15 years, to join the army.”

Under Article 77 of the Rome Statute, the trial judges can impose a prison sentence which cannot exceed 30 years along with a fine and the forfeiture of assets which the defendant had gained by carrying out a criminal act. In extreme cases, the ICC may impose life imprisonment. (The Rome Statute does not allow the death penalty.) An ICC prosecutor said to the *Associated Press* that he would seek a sentence “close to the maximum.” A defendant may also appeal his conviction if he believes that the ICC had made procedural or factual errors, or if it misapplied a provision of the Rome Statute. (In July 2012, the trial judges sentenced Lubanga to 14 years in prison.)

While the trial judges said that the prosecutors had credibly shown that Lubanga had carried out war crimes, they also criticized them for failing to supervise the activities of certain intermediaries in finding and then verifying the accuracy of evidence presented by witnesses. “The Chamber is of the view that the prosecution should not have delegated its investigative responsibilities to the intermediaries,” they said. “A series of witnesses have been called during the trial whose evidence, as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot be safely relied on.” They had even described some of the witnesses’ evidence as “inaccurate or dishonest.” The judges also concluded that certain intermediaries had probably “persuaded, encouraged, or assisted witnesses to give false evidence.”

To prevent similar problems with intermediaries in future cases, the ICC in 2011 circulated a “Draft Guidelines Concerning the Relationship between Intermediaries and the International Criminal Court of October 2010” among its member states. They will consider its adoption later in 2012, said analysts. 

#### INTERNATIONAL CRIMINAL LAW

### First conviction of a former head of state since the end of World War II

In April 2012, the Special Court for Sierra Leone found Charles Taylor – the former president of Liberia – criminally responsible for war crimes and crimes against humanity carried out by rebel forces during an 11-year civil war in Sierra Leone, making him “the first head of state to be indicted, tried, and convicted by an international tribunal” since the Nuremberg trials at the end of World War II, according to the prosecutor.

In 1991, Sierra Leone plunged into a civil war where fighting among three different armed groups – the insurgent Revolutionary United Front (or RUF), the pro-government Civil Defence Forces (or CDF), and a group called the Armed Forces Revolutionary Council (or AFRC) led by army officers who had temporarily overthrown the government – killed tens of thousands of people, according to various estimates. The conflict came to an end in 2002.

To address the atrocities committed during the war, the government of Sierra Leone and the United Nations signed an agreement in 2002 which created a temporary Special Court for Sierra Leone (or SCSL) which would “have the power to prosecute persons who bear the greatest responsibility for serious

violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone” after November 1996.

### A temporary criminal court concluded that the former president of Liberia had aided and abetted combatants during a civil conflict in Sierra Leone, and sentenced him to 50 years in prison for doing so.

Specifically, the agreement (known as the *Statute of the Special Court for Sierra Leone*) gave authority to the SCSL to prosecute people who ordered or committed crimes against humanity, violated treaties embodying the laws of war, violated Sierra Leonean law, or carried out other serious violations of international humanitarian law.

Analysts say that the SCSL differs from other criminal tribunals such as the ones created to investigate and prosecute alleged crimes carried out in the former Yugoslavia and Rwanda. For example, the United Nations had created those tribunals to prosecute defendants for alleged violations of only international human rights law (and not the domestic laws of those respective nations). On other hand, the SCSL is a hybrid court which has jurisdiction to prosecute both international and domestic crimes, said the International Committee of the Red Cross.

The SCSL also differs from the International Criminal Court (or ICC), a permanent criminal tribunal with jurisdiction over its 121 States parties. The SCSL, on the other hand, is a temporary tribunal which has authority over crimes committed only in Sierra Leone and will shut down once it completes its prosecutions.

Unlike the U.S. criminal justice system which uses juries, an SCSL trial chamber (which is a panel of three judges) decides on the guilt or innocence of a defendant. Throughout the world, trial by jury for criminal proceedings is more of the exception than the rule, according to the U.S. Department of Justice.

The SCSL indicted Taylor in March 2003 while he was still president of Liberia, alleging that he was criminally responsible for war crimes and crimes against humanity carried out by rebel forces in the neighboring country of Sierra Leone. “The conflict in Sierra Leone,” said *The New York Times*, “became notorious for its gruesome tactics, including the calculated mutilation of thousands of civilians, the widespread use of drugged children, and the mining of diamonds to pay for guns and ammunition.” According to Human Rights Watch, “[Taylor’s] forces participated in armed conflict and cross-border raids in neighboring countries, including Sierra Leone, Guinea, Côte d’Ivoire, where they committed numerous abuses.” Why did Taylor get involved in these various conflicts? Prosecutors said that “Taylor was motivated in these gruesome actions not by any ideology but rather by ‘pure avarice’ and a thirst for power,” according to media reports.

Taylor left Liberia a few months after his indictment – when that nation’s rebel troops began to approach the capital – and went to Nigeria which had granted him asylum. In 2006, Nigeria withdrew his asylum and transferred him to Liberian authorities who, in turn, surrendered him to the SCSL. Rather than holding



## Will a new treaty address Europe's financial crisis?

the trial in Sierra Leone, the SCSL carried out the proceedings at The Hague in the Netherlands. The trial began in 2007 and ended in 2011.


In its unanimous decision (*Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-1-T) in April 2012, the trial chamber found Taylor guilty on all 11 counts of war crimes (including cruel treatment, murder, pillage, terrorism, and the recruiting child soldiers) and crimes against humanity (including enslavement, murder, mutilations and amputations, and sexual slavery). It did not say that Taylor had personally carried out these acts. One analyst said that “there was no paper trail showing orders. There was no record of Mr. Taylor ever going to Sierra Leone. He was not at the scene of the crimes, and they were not committed by the army of Liberia, which was under his command.”

Instead, the trial chamber concluded that, in his capacity as president of Liberia, Taylor had aided and abetted the RUF and AFRC in carrying out these crimes in Sierra Leone by “providing them with arms and ammunition, military personnel, operational support, and moral support.” Aiding and abetting, said the SCSL, “requires that the accused gave practical assistance, encouragement, or moral support which had a substantial effect on the perpetration of a crime.”

According to evidence presented by prosecutors, Taylor had received briefings from his national security advisor who reported that AFRC and RUF forces in Sierra Leone were carrying out various atrocities. It also noted that Taylor himself had said that someone who provided support to these forces “would be supporting a group engaged in a campaign of atrocities against the civilian population of Sierra Leone.” And according to media reports, “prosecutors used radio and telephone intercepts and brought in radio operators who had connected Mr. Taylor’s mansion . . . to rebels in the bush in Sierra Leone.”

Citing such evidence, the SCSL concluded that “the accused knew of atrocities being perpetrated against civilians in Sierra Leone and of propensity to commit crimes. Notwithstanding such knowledge, the accused continued to provide support to the RUF during the period crimes were committed.”

In May 2012, the SCSL sentenced Taylor to 50 years in a prison in the United Kingdom. (The SCSL cannot impose a life sentence or the death penalty under its statute.) Lawyers for Taylor said that they would appeal his sentence (a process which will take about one year), saying that it was “excessive” and “disproportionate to his circumstances.”

In addition to Charles Taylor, the SCSL had already convicted and sentenced many other individuals. In June 2007, it announced its first convictions, finding three AFRC commanders guilty of several counts of ordering and participating in crimes against humanity, war crimes, and “conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.” It sentenced them to prison terms ranging from 45 to 50 years. According to a press release issued by the prosecutor, the convictions for the crime of recruiting and using children in armed conflict were the first in history by a tribunal. 

Can international law compel nations with poor fiscal policies to get their finances in order? In 2008, the collapse of the U.S. housing market worsened the effects of unsustainable financial practices carried out by governments and the banking sector in the European Union (or EU), and led to a still unfolding economic crisis which not only threatens political stability, but also the viability of their common currency. How is the EU addressing this financial crisis? What measures has it taken so far? And will a new fiscal treaty compel EU member nations to take more disciplined measures in managing their economies?

The EU is an economic and political union of 27 independent and sovereign states bound together by a series of complex international treaties, many of which stretch back several decades. To increase the economic competitiveness of Europe and also to prevent future conflicts, these treaties created common institutions – such as the European Council (which is composed of the heads of EU member states, and sets the political agenda) and the European Commission (which proposes and writes EU-wide legislation) – to manage certain economic and political areas of mutual concern such as trade, finance, environmental protection, and agricultural policy.

One of foundational treaties is the 1992 *Treaty on European Union* (popularly known as the Maastricht Treaty). In addition to establishing the European Union, the Maastricht Treaty set the path for the adoption of the common currency called the euro. All EU member nations which adopt the euro must follow several rules established by the Maastricht Treaty to maintain the stability of that currency. For example, a nation’s annual budget deficit must not be greater than three percent of its gross domestic product (or GDP). In addition, its debt (i.e., the total of all of its annual deficits) must not be greater than 60 percent of GDP.

In 1997, the EU adopted a separate agreement called the *Stability and Growth Pact* (or SGP) to ensure that member states which had adopted the euro would actually comply with the budget rules of the Maastricht Treaty. The SGP pact consists of what the EU calls the preventative and corrective arms.

Under the preventative arm, EU member states must submit annual reports showing how they are maintaining sound fiscal policies. The European Council and the European Commission examine these reports to see, for example, if their economic assumptions are realistic and if their fiscal policies are consistent with the EU’s broader economic guidelines, according to officials. As the reasoning goes, this process is supposed to help prevent problems before they arise or get worse.

But if these preventive measures don’t maintain fiscal discipline, then a corrective arm tries to do so. A country’s deficit which exceeds the three percent threshold of its GDP automatically triggers what is called an excessive deficit procedure (or EDP) under which the European Council issues recommendations to a member nation on how to lower its deficit. If a nation does not correct its deficit for three consecutive years, a qualified majority

of EU member states can then vote to impose a fine of 0.5 percent of the country's GDP.

Even with these budget rules in place, critics say that the EU did not rigorously enforce them. For example, in 2003, the budget deficits for France and Germany had exceeded three percent of their respective GDPs. In 2005, the European Council changed the rules of the SGP so that EU governments would not have to include certain types of spending when calculating their deficits, including those for defense, education, and research, among others, according to London-based civil society group Civitas. Analysts say that doing so only masked budget problems and made them more difficult to address. Currently, "23 out of 27 member states are subject to monitoring and recommendations under the [EDP] because they are in breach of the [three percent] deficit limit," reported *RTE*, the public news broadcaster of Ireland.

The EU also did not vigorously enforce its 60 percent debt limit. By 2006, Germany's debt was 66.8 percent of its GDP, Greece's debt was over 100 percent, and, in 2010, France's debt reached 80.3 percent of its GDP.

**Analysts are questioning the effectiveness of a new fiscal treaty to address Europe's woes, saying that member states have usually ignored such agreements in the face of economic difficulties.**

Observers also criticized the EDP, pointing out that imposing fines on an EU member nation after it had broken the rules for several years was "useless" because "at that stage, the country would be on the verge of bankruptcy and unable to pay the fines anyway." These various shortcomings have led analysts to question the commitment of the EU member nations in maintaining the stability of the euro.

In 2008, the collapse of the housing market in the United States led to a financial crisis which spread across the world, and soon exposed the dangers of not enforcing the budget rules under the Maastricht Treaty. For example, analysts say that the Greek government had long paid generous benefits to its population but did not effectively collect the tax revenues needed to pay them. Instead, the government began to issue more debt. In Ireland, the collapse of the housing market in 2008 forced the government to buy stakes in several private banks to prevent them from failing. In Portugal, the government had relied heavily on foreign debt, and soon faced problems in paying it back, said analysts. To cope with their respective problems, each nation began to cut their budgets and lay off public sector employees, among other austerity measures. The private sector also began to shed millions of workers.

Within a few years, 23 million people in the EU had lost their jobs, according to the *Boston Globe*. In Spain, nearly 23 percent of the population is unemployed. In Ireland, economic activity decreased by 10 percent between 2008 and 2009, said the Council on Foreign Relations, while unemployment increased from 4.5 percent in 2007 to 12 percent in 2010. The European Commission notes that unemployment is still high in nations which use the euro (hovering around 11 percent), and it estimates

that the overall eurozone economy will contract 0.3 percent this year.

To address these crises, the European Commission, the European Central Bank, and the International Monetary Fund (or IMF) created a *temporary* financial rescue fund called the European Financial Stability Facility (or EFSF). In May 2010, the EFSF said it would provide Greece – whose debt had been downgraded to junk status by credit rating agencies – with a €10 billion (US\$145 billion) loan as long as it implemented austerity measures and tried to increase the collection of tax revenues. It extended an additional €9 billion (US\$140 billion) loan in July 2011. In November 2010, Ireland received an €5 billion (US\$113 billion) rescue package from a variety of funding sources, including the IMF and several EU nations. In return, Ireland promised to cut €0 billion from its budget over four years and also increase taxes, said the Council on Foreign Relations. In May 2011, Portugal received a bailout of €8 billion (US\$101 billion) from the EFSF.

Along with providing financial rescue packages, the EU member states implemented several legal measures. For example, in December 2011, the EU member nations adopted six European-wide regulations (dubbed the "Six Pack") which would strengthen the SGP. To strengthen the preventive arm, the Six Pack regulations called on EU nations to monitor and oversee their budgets much more closely. For the corrective arm, they would have to impose fines much earlier on a nation whose deficit crossed the three percent threshold of its GDP.

Under another Six Pack regulation, the *structural deficit* of nations using the euro must not exceed one percent of their GDP. A structural deficit occurs when a nation spends more than it collects in tax revenues even when its economy is not in a recession or experiencing other major problems. Why would this happen? A government may have, for example, implemented generous social programs whose costs are increasing faster than the collection of revenues needed to pay them.

The EU member states also agreed to amend existing EU treaties to allow the creation of a *permanent* rescue fund called the European Stability Mechanism (in contrast to the temporary EFSF) which would be funded by donations in the hundreds of billions of euros from them beginning in 2012.

In January 2012, the EU implemented another legal measure by adopting the *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union* (or simply the Fiscal Treaty), which "imposes tighter budget discipline on euro members," said the *Wall Street Journal*. The Fiscal Treaty would, in time, add several new provisions to existing treaties governing the operation of the EU. It also formally incorporated rules which EU member nations had recently adopted to address their continuing economic problems. According to *RTE News*, the treaty "largely gathers up existing commitments and locks them into a binding treaty to give them greater effect."

What are some of the new provisions? First, under Article 3 (informally known as the "Balanced Budget Rule"), a nation's structural deficit must be less than 0.5 percent of its GDP. This requirement is stricter than the one percent limit set by the Six Pack regulations. Second, nations may delay plans in lowering their structural deficits only in "exceptional circumstances,"

which Article 3 defines as “an unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government or to periods of severe economic downturn . . .” (One analyst, Tony Connelly of *RTE News*, added: “What we are talking about here are events like earthquakes or major disasters, or things which are completely unforeseen and not normally part of an economic cycle.”) Nations must specifically incorporate the first two provisions into their national laws, preferably their constitutions.

Third, each nation must create a “corrective mechanism” which is triggered automatically when it does not lower its structural deficit. While the Fiscal Treaty does not specifically describe this corrective mechanism, it does say that the mechanism should be created “on the basis of common principles to be proposed by the European Commission, concerning in particular the nature, the size, and the time-frame of the corrective action to be undertaken.”

Fourth, if an EU member state does not carry out its various obligations under Article 3, the European Commission or another member state may (under Article 8) ask the International Court of Justice to issue a binding decision on the matter. If the EU member nation does not comply with the ruling, that court may impose a fine which does not exceed 0.1 percent of its GDP. For a nations such as Italy, this could mean fines as high as US\$2 billion, calculated the *Wall Street Journal*.

Fifth, Article 5 reaffirms that a nation’s annual budget deficit (as opposed to its structural deficit) must not be greater than three percent of its GDP as required under the SGP. But it adds more details on what a nation must do when its deficit triggers the excessive deficit procedure of the SGP. Specifically, a nation must “put in place a budgetary and economic partnership programme, including a detailed description of the structural reforms which must be put in place and implemented.” But observers point out that Article 5 does not define these budgetary and economic programs.

Along with these new provisions, the preamble of the Fiscal Treaty says that an EU member state may ask for assistance from the European Stability Mechanism only if it ratifies the Fiscal Treaty.


Some existing requirements which the EU had incorporated into the Fiscal Treaty include one from the Six Pack regulations where a government must reduce only the portion of debt which exceeds 60 percent of its GDP “at an average rate of one-twentieth per year.”

In March 2012, 25 EU member states signed the Fiscal Treaty, including 17 nations using the euro and 8 other EU countries. (Only the United Kingdom and the Czech Republic did not sign the treaty. The United Kingdom, for example, objected to certain regulations which it said could harm its financial services sector.) The Treaty will apply to the 17 nations using the euro starting on January 1, 2013. EU member states must also incorporate the Fiscal Treaty’s provisions into their own national laws within one year after the treaty enters into force.

Some analysts have questioned the effectiveness of the Fiscal Treaty, pointing out that the EU had passed several previous budget rules which its member nations quickly ignored. In addition, critics say that the Fiscal Treaty does not address

problems caused by private debt, which caused financial crises in Ireland and Spain. Furthermore, observers question whether the treaty’s emphasis on balancing a structural deficit along with imposing large fines on governments will help them strengthen their economies. For example, the *Wall Street Journal* said: “Not only does [the Fiscal Treaty] limit governments’ ability to use budgetary policy to avert an economic downturn, but the long-term requirement to lower government debt would make it harder for nations with high debts, such as Italy, to grow their way out of their problems.”

Other analysts question the legality of the Fiscal Treaty. Again, the Fiscal Treaty makes changes to existing EU treaties. But under various procedures, EU member nations must agree *unanimously* to these changes, say officials. Because not all EU member states had agreed to the Fiscal Treaty, experts say that it is not considered an official EU treaty. As a result, the EU is referring to the Fiscal Treaty as an “intergovernmental treaty,” which applies only to those nations which had signed it and have agreed to carry out their obligations under that agreement.

But observers point out that Article 16 of the Fiscal Treaty calls on EU member states to take the “necessary steps” of incorporating the provisions of that agreement “into the legal framework of the European Union” (that is to say, into existing EU treaties which founded the European Union). So while critics may question the legality of the Fiscal Treaty itself, its provisions will be binding if they are incorporated into other existing treaties. 

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#### INTERNATIONAL ENVIRONMENTAL LAW

### On the road to a new global climate change agreement?

In December 2011, delegates from 194 nations gathered in Durban, South Africa, for an annual UN-sponsored global climate conference where they reached an agreement to address global warming. While some praised the agreement – for example, describing it as a “landmark deal” which will usher in a “remarkable new phase in [the] climate regime” – others have dismissed these notions as “nonsense.” What is climate change? How are nations currently addressing this phenomenon? What agreement did the delegates reach in Durban? And will it effectively handle climate change in the coming decades?

Scientists say that emissions of industrial gases and pollutants – such as carbon dioxide and methane – trap heat in the atmosphere, and leads to rising temperatures around the world in a so-called greenhouse effect. Without a sustained and coordinated international effort to reduce the emissions of these gases, experts believe that temperatures could rise further in the coming decades, and lead to catastrophic natural disasters such as rising ocean levels and the expansion of deserts. But skeptics respond that no evidence conclusively proves that emissions from cars and factories, among other sources, cause climate change, and that temperatures may be rising on their own naturally.

Efforts to control the effects of global warming culminated in an international treaty called the *Kyoto Protocol* (or Protocol) in 1997, which calls on nations to stabilize the concentration of emissions already in the atmosphere by cutting their total



emissions – between the years 2008 and 2012 – to five percent below 1990 levels through a variety of measures. (They include burning less fossil fuel, using more fuel-efficient technologies, and promoting alternative energy sources, among other methods.) The more gases a country emits, the more it will have to reduce its emissions.

But many experts questioned the Protocol's effectiveness in reducing greenhouse gas emissions. For example, the Protocol's targets apply only to the 39 industrialized nations which had ratified the Protocol. (The United States, currently the second largest producer of greenhouse gases, signed but did not ratify that agreement). On the other hand, the Protocol does not require any of its 119 developing nations – including China, which produces the most greenhouse gases – to cut their emissions. These nations argued that, historically, they had released much lower emissions than their industrialized counterparts. But scientists say that to address climate change, even developing nations must now cut their emissions. One expert noted that total worldwide emissions have increased since 1997, in part, because developing nations have been exempt from reducing their own emissions.

Other developments have also limited the Protocol's effectiveness. Many note that it came into force so late (in 2005) that nations did not have enough time to reduce their emissions before its expiration in 2012. Furthermore, many even failed to meet their emission reduction targets.

Beginning in 2008, both industrial and developing countries began to announce *voluntary* measures (separate from the Protocol) to cut their greenhouse gas emissions by 2020 (rather than 2012). The European Union, for instance, said that it would reduce its emissions by 20 percent below 1990 levels. The United States agreed to the same target, though it would use 2005 as a baseline for its emission reductions. Japan said it would reduce its emissions by 25 percent below 1990 levels. China said it would pursue 40 percent cuts below 2005 levels while India proposed reductions by 25 percent below 2005 levels.

At a conference held in Copenhagen in December 2009 under the auspices of the United Nations Framework Convention on Climate Change, 193 nations failed to reach a new climate agreement to succeed the Protocol in 2012. Instead, delegates issued a political statement calling on nations to continue their individual plans to reduce greenhouse gas emissions by 2020. It also broadly called on developed nations to provide their developing counterparts with up to \$100 billion in funding every year by 2020 to help them adapt to the effects of climate change and also undertake measures to reduce their own emissions. Future negotiations would determine how developed countries would provide such funding (for example, through a combination of public, private, bilateral, or multilateral sources) and how they would distribute it to individual nations.

Government delegates in December 2011 made another attempt on how they would address climate change (upon the expiration of the Protocol) at a conference in Durban, South Africa. At the conclusion of the conference, they issued an agreement called the "Durban Platform for Enhanced Action" under which an ad hoc working group would "develop a protocol, another legal instrument, or an agreed outcome with legal force" to address

climate change. Unlike the Kyoto Protocol, this new agreement would call on *all* nations, including developing ones, to reduce their greenhouse gas emissions. This ad hoc working group – composed of officials from various nations – must complete the text of a new agreement by 2015 so that it can "come into effect and be implemented from 2020."

Analysts note that the Durban Platform does not give preference to any of the three choices of agreements which nations may negotiate. As a result, critics worry that nations may decide to pursue the third option ("an agreed outcome with legal force"), which, according to diplomatic reports, would actually be a non-legal agreement, even though it contains the words "with legal force." Nations such as China and India – which have long opposed strict and legally-binding emission reductions – pushed for this third option, according to reporting from the *Wall Street Journal*.

The Durban Platform also gives nations wide latitude on when to implement and enforce any new agreement. It simply says that they must do so "from 2020," which conceivably includes *any* year after 2020. (The Durban Platform does not say that a new agreement must begin exactly in 2020.)

Along with the Durban Platform, the delegates reached several other agreements. For example, they decided to extend the current Protocol until the last day of 2017 or 2020 so that its requirements would still be in force while nations negotiated a replacement agreement. But observers said that while this extension was "sufficient to keep the [climate change] negotiating process alive," it would not have "a significant impact on climate change" itself. They point out that several nations – including India, Japan, and Russia – announced that they don't have "any intention" of participating in the extension, also referred to as a commitment period. One nation, Canada, even decided to withdraw from the Protocol (the first to do so) shortly after the Durban conference ended, saying that it would be unable to meet its emission reduction targets and would, as a result, face "crippling fines" of around \$1,600 for each Canadian family.


The extension of the Protocol would still not apply to any nation which did not ratify it, including China and the United States, which are the world's largest emitters of greenhouse gases.

**Some of the world's largest emitters of greenhouse gases such as China, India, and the United States agreed to help craft a new climate change agreement which will apply to all nations, including them.**

While nations continue to slowly address climate change, environmental groups pointed to an analysis conducted by scientists at the Global Carbon Project which showed that greenhouse gas emissions in 2010 rose by nearly six percent, the largest on record.

Given the uncertainty surrounding the exact form of a new climate change agreement and when exactly it would come into force, one analyst, Michael Levi at the Council on Foreign Relations, described praises given to the agreement as "nonsense." Despite these criticisms, Christiana Figueres, the executive

secretary who heads the annual UN climate conference, said: “I actually think Durban will be proven by history to be the most encompassing and farthest reaching agreements that any climate conference has ever reached.”

Delegates also agreed to “operationalize,” by 2020, the \$100 billion-a-year fund (now called the Green Climate Fund) created at the 2009 Copenhagen conference to help developing nations pay for measures in addressing and adapting to climate change. In other words, “delegates can act [starting this year] to select a board, construct an administrative framework, and identify sources of funding,” according to reporting from the *International Trade Reporter*. 

#### INTERNATIONAL HUMAN RIGHTS LAW

### Does using solitary confinement violate international law?

Nations should ban the use of solitary confinement unless it is carried out in “exceptional circumstances,” according to a recent report issued by an independent UN expert. Noting that more and more nations are using solitary confinement, the UN report said that placing prisoners into isolation may constitute cruel and unusual punishment (or even torture) if doing so leads to serious mental and physical problems. What exactly is solitary confinement? Why do nations use this particular practice? How extensive is its use? And are there international treaties or agreements which address the use of solitary confinement?

In September 2010, the United Nations Human Rights Council appointed Juan E. Méndez – a native of Argentina who is now a law professor at the Washington College of Law at American University – to serve as the Special Rapporteur on Torture (i.e., an independent expert) whose mandate is to investigate and report on the use of torture around the world. Argentina’s military dictatorship had tortured Méndez during the 1970s and placed him in administrative detention and solitary confinement for a year and a half because, as a lawyer, he had represented political prisoners, noted the UN. In August 2011, Méndez submitted a report (A/66/268) specifically on solitary confinement and how different nations may be abusing its use.

According to Méndez, a universal definition of solitary confinement does not exist. Still, the report defined that term as any practice where authorities place a prisoner in isolation from others (except guards) for at least 22 hours a day. Nations use different terms to describe solitary confinement, said the report, including segregation, isolation, lockdown, the Hole, or secure housing unit.

While the actual cells used for solitary confinement differ among states, they still share many physical features, said Méndez. For example, they are typically located in remote parts of a prison; contain small or partially covered windows; have sealed air quality; and have a stark appearance or dull colors. While each cell should contain a bed, desk, toilet, and washing facilities, the special rapporteur noted that many nations haven’t complied with such requirements.

Why do nations place prisoners into solitary confinement?

According to the report, they include the following reasons:

- To punish individuals as part a judicially imposed sentence. For example, in Mongolia, courts may commute death sentences into life sentences spent in solitary confinement.
- To discipline individuals. Authorities use solitary confinement to punish inmates who have assaulted other prisoners and correction officers, reported *The Washington Post*. Being placed in solitary confinement just one time usually makes prisoners more cooperative in the future, said many officials. Méndez also reported that prisons place dangerous individuals (such as gang members) or those at high risk of escaping into indefinite solitary confinement.
- To protect vulnerable individuals such as juveniles, persons with disabilities, lesbian, gay, bisexual, and transgendered persons.
- To facilitate pre-charge or pre-trial investigations. Some states place individuals into solitary confinement prior to a hearing as a way of applying pressure to elicit further cooperation, said Méndez. They have also used solitary confinement as a coercive interrogation technique on suspected terrorist detainees.

While many officials justify the use of solitary confinement, many experts contend that extensive isolation can, for instance, lead to permanent mental and long-term emotional problems, including “psychotic disturbances syndrome” where symptoms include self-harm, paranoia, perceptual distortions, anger, depression, and anxiety. Sandra Schank, a staff psychiatrist at Mule Creek State Prison in California, stated: “It’s a standard psychiatric concept, if you put people in isolation, they will go insane, and most people in isolation fall apart.”

Dr. Sharon Shalev – a research fellow at the Mannheim Centre for Criminology at the London School of Economics, and the author of *Sourcebook on Solitary Confinement* – reported that prisoners in solitary confinement find it difficult to distinguish between reality and their own thoughts. In the absence of external stimuli, argued Shalev, a person’s brain will begin to “create its own stimulation, manifesting in fantasy and hallucinations.” Said one ex-prisoner placed in isolation: “The cell walls start wavering . . . Everything in the cell starts moving; you feel that you are losing your vision.” Elizabeth Vasiliades, a law professor at Belarus State Economic University, noted that a review of solitary confinement in Texas prisons revealed one prisoner scrubbing his body to remove imaginary bugs while other inmates babbled, shrieked, and banged their hands on the wall.

Along with psychological effects, solitary confinement (with its long periods of inactivity) can lead to physical ailments, including poor appetite, heart palpitations, sudden excessive sweating, shaking, lethargy, and aggravation of pre-existing medical problems, said Shalev. She added that self-harm and suicides are also more common in solitary confinement units than in the general prison population. California, for example, reported that 69 percent of prison suicides in 2005 had occurred in the solitary confinement housing units.

The use of solitary confinement dates back to at least the 1820s in the United States, reports *Wired* magazine. According to Méndez’s report, by the 1830s, South American and European countries began to adopt solitary confinement. In contrast to executions or amputating limbs, prison wardens and others had

viewed solitary confinement as an enlightened and progressive substitute of meting out punishment, said the UN report.

Today, the United States holds roughly 20,000 to 25,000 prisoners in solitary confinement, a figure unmatched by any other democracy, claimed the American Civil Liberties Union (or ACLU). According to Craig Haney – a professor at the University of California, Santa Cruz, who is an expert on long-term solitary confinement – officials began to place more and more prisoners into solitary confinement as a way to address the overcrowding of the prison system. Courts do not place inmates in solitary confinement. Instead, prison wardens or state officials decide on this matter depending on their behavior of prisoners, said National Public Radio.

Groups such as the ACLU have criticized the conditions of solitary confinement cells in the United States. For example, it reported that the Tamms Correctional Center, a Supermax prison in Illinois, had held 54 of its prisoners in continuous solitary confinement for over 10 years. New York correctional facilities currently have over 4,000 prisoners in highly “restrictive lockdown units for 23 to 24 hours a day,” reported the New York City Bar Association’s Committee on International Human Rights and the ACLU. In Louisiana, the ACLU filed a brief on behalf of prisoners held in solitary confinement cells in St. Tammy Parrish Jail. “After a jail determines a prisoner is suicidal, the prisoner is stripped half-naked and placed in a 3’x 3’ metal cage with no shoes, bed, blanket, or toilet . . . Prisoners report they must curl up on the floor to sleep because the cages are too small to let them lie down,” it said.

Recent controversies in the United States concerning the use of solitary confinement include Bradley Manning, an American soldier currently in military custody for allegedly leaking thousands of pages of classified government documents to anti-secrecy group Wikileaks. In a separate report (A/HRC/19/61/Add.4 released in February 2012) describing alleged torture practices in 66 countries, Méndez criticized U.S. officials for placed Manning in solitary confinement (for 23 out of 24 hours) for 11 months in a military prison. He concluded that “imposing seriously punitive conditions of detention on someone who has not been found guilty of any crime is a violation of his right to physical and psychological integrity as well as of his presumption of innocence.”

In an interview with *The Guardian*, a British daily, Méndez added that Manning’s “11 months under conditions of solitary confinement (regardless of the name given to his regime by the prison authorities) constitutes at a minimum cruel, inhuman and degrading treatment” in violation of a treaty called the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. On the other hand, the United States denied that it had placed Manning in solitary confinement. Instead, it described his detention as “prevention of harm watch,” implying that Manning was at risk of committing suicide.

The United States is not the only nation in the world which places many prisoners into solitary confinement. In fact, experts say that most nations use this practice. Méndez even said that the use of solitary confinement was “growing and diversifying in its use and severity.” In Argentina, for instance, a program to prevent violent behavior places prisoners in isolation for at

least nine months and is frequently extended beyond this period, according to the Méndez report. In Japan, death row prisoners are held in strict solitary confinement from the time of their sentence until their execution. The average time ranges anywhere from six to 20 years, reports *World Politics Review*.

In recent years, the use of solitary confinement had even made headlines. For example, in 2009, China sentenced human rights activist Liu Xiaobo to an 11-year prison sentence of which he must six months in strict solitary confinement, reported *Reporters without Borders* and the Pittsburgh Human Rights Network. Xiaobo – who was charged with “inciting subversion of state power” for helping to draft *Charter 08*, a call for democratic reform in China – was awarded the 2010 Nobel Peace Prize while in prison. In 2009, Iran detained three Americans – Shane Bauer, Joshua Fattal, and Sarah Shourd – who were hiking along the Iraq-Iran border. The *Washington Post* reported that Shourd spent 14 months in solitary confinement while Bauer and Fattal spent two years in solitary confinement. In an op-ed published in *The New York Times* describing her experience in complete isolation, Shourd wrote: “It’s impossible to exaggerate how much the company of another human being means when you’ve been cut off from the world and stripped of your rights and freedom.”

While most nations use solitary confinement, legal experts say that several international, regional, and other agreements either implicitly or explicitly prohibit that practice under certain circumstances.

**International treaties:** The 1966 *International Covenant on Civil and Political Rights* (or ICCPR) calls on nations to recognize and protect fundamental civil and political rights, including the right to equality before the law, freedom of association, and the right to a fair trial, among many others. Article 7 of the ICCPR says, in part, that “no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment . . .” The ICCPR does not explicitly mention the term solitary confinement.

Still, the Méndez report said that, “given its severe adverse health effects,” the use of solitary confinement on prisoners can be considered an act of torture or cruel, inhuman, or degrading treatment, thus violating Article 7. Others point out that the UN Human Rights Committee – the body in charge of monitoring the implementation of the ICCPR – had issued an official interpretation of Article 7 in 1992 (called General Comment No. 20) where it noted that “prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Article 7.”

The use of solitary confinement can also violate Article 10 of the ICCPR, which states that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person,” and that “the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.” Depriving a person of contact and social interaction with others through solitary confinement violates Article 10’s requirement to treat prisoners with dignity and respect, say critics. In addition, long period of isolation (an inherent component of solitary confinement) will not rehabilitate prisoners, said Méndez, and could, therefore, violate Article 10.



The 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (or CAT) prohibits nations from inflicting torture on any person. Article 1 states, in part, that “the term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed . . .” Article 2 says that nations may not invoke any exceptional circumstances whatsoever to justify torture, including “a state of war or a threat of war, internal political instability, or other public emergency.” A body called the UN Committee Against Torture monitors the implementation of CAT and also issues official interpretations of its provisions.

**Many experts have concluded that the use of solitary confinement – which can lead to permanent mental and long-term emotional problems – is a form of torture which violates several international agreements.**

Even though the term solitary confinement does not appear in CAT, Méndez said that its use can be viewed as an act of torture. Specifically, the report said that “solitary confinement, when used for the purpose of punishment, cannot be justified for any reason, precisely because it imposes severe mental pain and suffering beyond any reasonable retribution for criminal behavior,” and thus constitutes an act prohibited by Article 1.

Méndez also noted that “the [UN] Committee against Torture has recognized the harmful physical and mental effects of prolonged solitary confinement and has expressed concern about its use, including as a preventive measure during pretrial detention, as well as a disciplinary measure.” For example, in a 2002 report, that committee expressed concerns about “the use of pre-trial solitary confinement” in Norway, and, in Denmark, “the lack of effective recourse procedures against decisions imposing solitary confinement upon persons servicing sentences.” In a 2007 report, the committee noted Japan’s “use of harsh punitive measures, including frequent resort to solitary confinement.”

Other groups have also argued that the use of solitary confinement can constitute torture. In a 2011 report, the New York City Bar Association’s Committee on International Human Rights said in a report (*Supermax Confinement in U.S. Prisons*) that “although supermax confinement does not produce visible scars or bruises, its impact on prisoners can be comparable to physical torture.” It concluded: “The policy of Supermax confinement, on the scale which it is currently being implemented in the United States, violates basic human rights . . . and in many cases . . . constitutes torture under international law.”

**Regional treaties:** Along with international agreements which apply to a broad spectrum of nations, several regional agreements address solitary confinement, say experts. For example, the *European Convention on Human Rights* (or ECHR) is a regional treaty adopted in 1950 which calls on its member states (all in Europe) to protect and enforce a wide variety of individual rights, including the right to association, expression, privacy, religion,

and a fair trial, among many others. Article 3 states that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.” As in the case of other treaties, even though the ECHR does not explicitly mention solitary confinement, legal experts say that various European courts have ruled that the use of solitary confinement under specific circumstances can constitute torture or inhuman treatment.

Another regional treaty, the *American Convention on Human Rights* (adopted in 1969), calls on nations – primarily those in the Western Hemisphere – to recognize and respect a wide range of human rights. Article 5 states, in part, that “no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.” As in the case of other agreements, the convention does not explicitly mention solitary confinement. But observers say that judicial bodies such as the Inter-American Court of Human Rights have ruled that carrying out solitary confinement can violate Article 5 if doing so becomes, say, an act of torture.

**Agreements setting minimum rules for the treatment of prisoners:** Over a series of decades, the United Nations adopted a variety of international agreements which set minimum rules for the treatment of prisoners. These agreements also implicitly and explicitly address the use of solitary confinement.

For example, in 1955, the UN Economic and Social Council adopted the *Standard Minimum Rules for the Treatment of Prisoners* which sets out “what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions,” according to its introduction. For example, paragraph 8 says that men and women should be held in separate institutions. Under paragraph 15, nations must provide prisoners with water and toilets.

Paragraph 31 implicitly addresses solitary confinement practices. It says that “punishment by placement in a dark cell, and all cruel, inhuman, or degrading punishments shall be completely prohibited as punishments for disciplinary offenses.” Still, the 1955 agreement says that its rules are voluntary, and that “not all of the rules are capable of application in all places and at all times,” though nations should endeavor to apply them.


In 1988, the UN General Assembly adopted the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, which (as its title suggests) calls on nations to apply a wide range of principles for the treatment of people it detains or imprisons. For example, authorities who arrest people must inform them of the reason for their arrest, explain their rights, and provide them with legal assistance, among other measures.

The 1988 agreement also says that “no person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Authorities must interpret the term “cruel, inhuman, or degrading treatment or punishment” in a way which extends “the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time,” states the agreement. Analysts say that this description seems to prohibit the use of solitary confinement.

In 1990, the UN General Assembly adopted the *Basic Principles for the Treatment of Prisoners*. Paragraph 7 says that “efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.”

Given this growing consensus that the use of solitary confinement not only harms prisoners, but may also violate a wide range of international and regional treaties and agreements, the Méndez report urged nations to ban the use of that practice in pre-trial detention, and also its use for prolonged or indefinite periods of time. It also urged nations not to place juveniles or people with mental disabilities into solitary confinement.

The report also advised states that solitary confinement should be used only “in exceptional circumstances in which its use is legitimate” such as protecting inmates who are threatened by prison gangs, or those prisoners who are gay, lesbian, or bisexual. He added that there was “no justification for using it as a penalty, because that’s an inhumane penalty.” Furthermore, detained persons in solitary confinement must have an opportunity to challenge the nature of their confinement in a court, said Méndez.

To prevent states from using solitary confinement as a means of torture, Méndez recommended that they conduct regular reviews of their domestic laws, identify problems, and apply strong measures to prevent the excessive use of solitary confinement. 

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#### INTERNATIONAL HUMAN RIGHTS LAW

### Medical waste: A growing human rights hazard?

**M**any garbage dumps around the world contain more than just discarded household items. They also contain disease-infected blood, used needles, amputated human body parts, and other medical wastes. As more nations expand medical services to their populations, health care professionals are carrying out more procedures using an expanding list of supplies. This, in turn, has led to a growing accumulation of medical waste which some believe threatens several human rights. How are nations currently disposing of their medical wastes? In what ways can these disposal methods threaten human health and even violate certain human rights? And does international law currently play a role in addressing medical waste?

Contrary to popular belief, medical waste comes not only from hospitals. Experts point out that blood banks, clinics, dentist offices, labs, pharmacies, veterinary hospitals, and even mortuaries all produce their own kinds of medical waste. Sharps, for example, are wastes that can pierce the skin and include needles and scalpels. Anatomical or pathological waste includes blood, mucus, tissue, and even amputated human body parts such as arms and fingers. Chemical wastes come from disinfecting chemicals, unused drugs, and vaccines along with their containers. Medical waste can even be radioactive. Examples include discarded radiological devices and body parts treated with radiation.

According to current estimates, high-income nations generate up to 12 pounds of hazardous medical waste per person every year

while low-income countries, in the same time period, produce between one to seven pounds of medical waste per person.

Because medical wastes come directly from patient diagnosis, treatment, and immunization, they pose obvious risks to human health and the environment. Almost one-fifth of all medical waste is contaminated with blood or bodily fluid, according to one expert. And the World Health Organization (or WHO) estimates that 20 to 25 percent of medical waste is hazardous to human health.

But as nations (especially developing ones) generate more and more medical waste, they continue to dispose of it improperly. This development, in turn, has only increased the dangers posed by medical waste.

For instance, many people improperly dispose of medical waste by first mixing it with household waste and then dumping everything into municipal garbage facilities. But doing so, say experts at the WHO and the United Nations, directly exposes a much wider population of people to various diseases and other dangers. Sharps dumped in sites with public access can infect garbage pickers, scavengers, or children who collect or play with them. According to the WHO, six children in Vladivostok, Russia, were diagnosed with a mild form of smallpox in June 2000 after playing with glass containers with expired vaccines. Anatomical and pathological waste could transmit diseases including AIDS and also hepatitis C through skin absorption, inhalation, or ingestion.

Improperly disposing of medical wastes also affects human health indirectly by contaminating the environment. For example, mercury from blood pressure devices, light tubes, thermometers, and even batteries can leach into the soil and contaminate groundwater used for farming and drinking. Ingesting the mercury can severely damage an adult’s central nervous system, cause kidney problems, and even lead to respiratory failure. Medical waste also gets flushed down toilets or dumped directly into rivers and streams, which can then contaminate fish stocks and those who eat them.

In what other ways do people improperly dispose of their medical wastes? Experts say that many developing nations simply burn them. While some facilities do so in open areas, others use incinerators. But these methods release harmful pollutants, including dioxins and furans, into the air which can then contaminate food and water supplies and possibly lead to the development of cancer in people.

Critics add that incinerators in the developing world lack the technology to capture and minimize harmful emissions. The WHO notes that only modern incinerators which burn medical waste at temperatures higher than 800-1000 Celsius (and include special emission-cleaning equipment) can prevent the release of harmful substances into the environment.

On the other hand, “due to the absence of expertise to maintain and service [incinerators in developing nations, their] facilities do not meet recommended operating practices that are already unacceptably low,” according to the United Nations Development Programme (or UNDP). It added that “the use of medical waste incinerators appears to be rapidly expanding in developing countries at the same time as it is being phased out in many industrialized countries for health and environmental reasons.” In its place, many industrialized nations now use

“autoclaving” where steam pressure sterilizes waste to the point just before combustion.

Nations also dispose of their medical wastes by recycling them without proper sterilization. *BBC News* reported in 2009 that clinics in India using discarded and dirty needles had caused a hepatitis B outbreak in the city of Gujarat which killed more than 70 people. Scavengers also collect and sell medical waste. “Dangerous medical waste that had been left out for incineration was collected by cleaners and porters and then sold on to gangs,” it said. The police discovered 75 tons of neatly packaged waste – “including needles, paediatric droppers, and syringes” – ready to be resold to medical clinics.

**Although the amount of medical waste is increasing dramatically in the developing world as more people receive health care, governments are not passing or enforcing laws to oversee its proper disposal.**

A 2000 WHO report added that “worldwide, up to 40 per cent of injections are given with syringes and needles reused without sterilization and, in some countries, this proportion is as high as 70 percent.” And injections using contaminated syringes have caused “21 million cases of hepatitis B infection (32% of all new infections), 2 million cases of hepatitis C infection (40% of all new infections), and 260,000 cases of HIV infection (5% of new infections),” added the report.

Although the amount of medical waste is increasing dramatically in the developing world as more people receive health care, governments have not passed (or may not be enforcing) laws and regulations to oversee its proper disposal, according to the WHO. Many also lack awareness about the hazards of medical waste and have insufficient financial and human resources to dispose of it properly.

Compared to their developing counterparts, analysts say that industrialized nations have stronger legal systems to regulate the disposal of medical waste. The United States, for example, regulates the disposal of medical waste at different levels of government. The *United States Code* addresses medical waste at the federal level in 42 U.S.C.A. § 6992 by defining medical waste, creating enforcement mechanisms, requiring inspections, tracking medical waste, and reporting the health impacts of disease caused by medical waste. Title 33 (Navigation and Navigable Waters) governs the dumping of medical waste from public vessels. The *Code of Federal Regulations* also regulates the storage of medical waste.

While industrialized nations apparently have the regulatory framework which require the proper disposal of medical waste, many still don't follow it. In fact, the media have reported many scandals where companies in recent years have illegally dumped medical waste in developing countries. For example, in 2009, the United Kingdom and Northern Ireland shipped 1,400 tons of used condoms and syringes mixed with household waste to Brazil, according to *BBC News*.

The improper disposal of medical waste has become such a big concern that the United Nations appointed a special rapporteur, Calin Georgescu, to examine this issue. In his July 2011 report

(A/HRC/18/31), Georgescu argued that the improper disposal of medical waste violates several human rights.

First, it violates the right to life and also the right to health. Georgescu notes that Article 6 of the *International Covenant on Civil and Political Rights* (or ICCPR) – a treaty calling on nations to pass domestic measures protecting many civil and political rights – says that “every human being has the inherent right to life.” He also points out that Article 12 of the *International Covenant on Economic, Social, and Cultural Rights* (or ICESCR) – which calls on state parties to pass domestic measures recognizing and protecting rights such as the right to work and the right to education, among others – sets out “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

So how does the improper disposal of medical waste violate these rights? The report argued that the improper disposal of hazardous medical waste violates these fundamental rights by causing illness (which prevents a person from reaching the highest attainable standards of health) and possibly death (which would violate the right to life). Pathological waste can, for example, transmit AIDS, hepatitis, meningitis, rabies, and typhoid fever. Sharps can cause cuts and are often contaminated with blood. The report said that, in 1998, four people had died from acute radiation syndrome and 28 had suffered serious radiation burns from the improper disposal of radiotherapy treatment equipment. Similar accidents involving radiotherapy equipment occurred in Algeria in 1978, Morocco in 1983, and in Mexico in 1962 and 1983.

Second, improper medical waste disposal violates the right to safe and healthy working conditions under Article 7(b) of the *International Covenant on Economic, Social, and Cultural Rights*. In his report, the special rapporteur noted that “information on the hazards associated with the handling of hazardous medical waste, access to training opportunities on the safety procedures to minimize hazards, and proper personal protective equipment constitute essential preconditions for the enjoyment of the right to safe and healthy conditions of work . . .” But many nations are failing to meet these preconditions.

For example, they frequently fail to give medical staff and patients information on how to handle waste properly, instruction about emergency safety procedures and protective equipment, and proper vaccinations against infectious diseases. So the rights of waste workers and recyclers are violated when they do not receive training on the risks of handling hazardous materials or are not given protective clothing or vaccinations. And the rights of scavengers are also violated when they are exposed to hazardous medical waste on hospital grounds, municipal dumps, or illegal landfills.

Third, improper waste disposal violates the right to an adequate standard of living (as set out in Article 11.1 of the *International Covenant on Economic, Social and Cultural Rights*), though the Special Rapporteur makes this argument in a more roundabout manner. He notes that although it is not expressly included in the covenant, “the right to safe drinking water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.” But the improper disposal of medical




## Controversial U.S. tax law for Americans with foreign accounts

waste – such as dumping medical waste contaminated with chemicals, heavy metals, pathogens, and other toxins directly onto land and into streams – violates people’s right to safe drinking water by polluting it, which in turn violates people’s right to an adequate standard of living.

No existing international treaty deals specifically and comprehensively with the disposal of medical waste. Instead, a patchwork of several treaties and policy guidelines currently regulate individual aspects of hazardous waste disposal, said Georgescu. For instance, the *Basel Convention the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (adopted in 1989) includes medical waste in its list of hazardous forms of waste. It encourages states to reduce and treat hazardous waste at its source to avoid its movement across borders. However, the Rapporteur notes that, “in practice, the Basel Convention is rarely invoked to ensure the sound management and disposal of hazardous medical waste, since this type of waste is mostly treated within the country where it is generated.”

Under a 2001 treaty called the *Stockholm Convention on Persistent Organic Pollutants*, parties must reduce or eliminate the unintentional release of persistent organic pollutants that come from pesticides, industrial chemicals, and byproducts. (This would include dioxins and furans released from medical waste incinerators.) In 2007, the signatory parties adopted guidelines on best-techniques to reduce emissions from waste incineration plants by equipping them with air pollution control devices. However, many developing nations do not have the technology or the financial resources to comply with these guidelines.

The WHO, for its part, produced international guidelines on how countries should deal with medical waste. These include the 2007 *WHO Core Principles for Achieving Safe and Sustainable Management of Health-Care Waste*. Though these guidelines provide thorough recommendations, complying with them is voluntary. Also, states may have difficulty implementing them because they lack funding and resources. The International Atomic Energy Agency, for its part, specifically addresses safety standards for facilities generating radioactive waste only.

To build on the shortcomings of existing international treaties, the special rapporteur makes several recommendations in his report, including raising awareness among policy makers and in communities, expanding access to education, and increasing funding and technical support for developing nations. In addition, the report says that each state should adopt its own national policy on medical waste management by following WHO recommendations and by taking into account international and regional agreements, human rights standards, and environmental law principles. At a minimum, each national law must provide clear definitions of medical waste and clearly state the duties and responsibilities for each actor involved in the waste management process. Furthermore, states must identify a national authority to oversee and enforce the implementation of waste management and impose penalties for non-compliance. 

Many, if not most, Americans do not like to spend time preparing tax returns and other reporting requirements. During the 2012 tax filing season, a newly-implemented federal law meant to combat tax evasion caught many unknowing Americans off-guard (especially those living abroad), and raised loud complaints not only from them but also from major foreign banks. What is this new law? What are some of its features? Why are many Americans and foreign banks complaining about it? And what is the status of the debate today?

Contrary to popular belief, American citizens, dual American citizens, and even U.S. residents who live and earn their incomes outside of the United States must file a federal tax return if their gross incomes exceed a specific threshold. Unlike most countries, the United States taxes the earnings of its citizens and residents regardless of where they live, where they earn their income, or whether they have dual citizenship with another country. But the federal government does not tax the entire amount of their foreign earnings. Under the Foreign Earned Income Exclusion, an individual tax filer can exclude up to \$92,900 of their foreign earnings (or up to \$185,800 for couples filing jointly) from income when calculating taxes – but only if they meet certain criteria.

The United States also has specific reporting requirements for citizens and residents who have financial accounts in other nations. According to the IRS, a U.S. person must file a form called *Report of Foreign Bank and Financial Accounts* (or FBAR) – where he discloses information on his foreign accounts, including the name of the financial institution where the accounts are located, account numbers, and the value of the accounts – if the aggregate value of all foreign accounts exceeded \$10,000 at any time during the calendar year. The FBAR form (TD F 90-22.1) helps to identify people “who may be using foreign financial accounts to circumvent United States law,” said the U.S. government. Examples include deliberately hiding income and other assets in foreign accounts to avoid paying taxes on them.

FBAR rules define a U.S. person as a citizen, resident alien, domestic corporation, or a domestic estate or trust which has financial interest in or signature authority over foreign financial accounts, including brokerage, checking, savings, and securities accounts, among many others. A U.S. person may have to file an FBAR form regardless of where he resides – whether in Weehawken, New Jersey, or Wales in the United Kingdom – or whether he has dual citizenship with another country. The IRS adds that “a person who holds a foreign financial account may have a reporting obligation even though the account produces no taxable income.”

If a person willfully fails to file an FBAR form, the government can impose a penalty of “\$100,000 or 50 percent of the total balance of the foreign account at the time of the violation,” whichever is greater, under IRS regulations. Non-willful violations may lead to penalties of up to \$10,000 per violation.

Also, cumulative penalties for failing to file in past years can even exceed the value of the foreign financial account, and could go up to \$500,000. In 2009, 276,386 Americans had filed the FBAR form. Last year, over 600,000 had done so.

While an FBAR form calls on certain individuals to identify their foreign financial accounts under certain situations, it does not require foreign banks themselves to share information with the IRS about account holders who are American citizens. As a result, analysts believe that many U.S. citizens have opened but are deliberately not reporting certain foreign accounts to the U.S. government, knowing that a foreign bank is not under any legal obligation to report such accounts. (On the other hand, financial institutions operating in the United States must share certain financial information on their account holders with the federal government.) In a widely publicized scandal, the media noted that the Swiss bank UBS in 2009 admitted helping thousands of American citizens evade taxes by hiding their income in foreign accounts.

To help the United States combat tax evasion by U.S. persons holding financial assets in foreign accounts (and to address shortcomings in FBAR), Congress in 2009 introduced the *Foreign Account Tax Compliance Act* (or FATCA), which President Barack Obama signed into law in March 2010.

Under FATCA, U.S. citizens and residents must identify their foreign financial assets on Form 8938 (*Statement of Specified Foreign Financial Assets*) – such as foreign accounts maintained by a foreign financial institution; stocks issued by a foreign corporation; capital in a foreign partnership; notes, bonds, and other debt issued by a foreign person; and interest in a foreign trust or estate, among other examples – if the total value of those assets exceeds certain amounts.

An unmarried taxpayer living in the United States, for instance, must complete Form 8938 only if the value of his foreign assets is more than \$50,000 on the last day of the tax year or was more than \$75,000 at any time during the tax year. For married taxpayers filing jointly and living in the United States, the reporting threshold is over \$100,000 on the last day of the tax year or more than \$150,000 at any time during the tax year.

Individuals living abroad have must assets whose value exceeds higher thresholds. Those who live abroad and don't file jointly must have assets worth more than \$200,000 on the last day of the tax year or more than \$300,000 at any time during the tax year. A married couple who files jointly must have assets valued at more than \$400,000 at the end of the tax year or \$600,000 at any time during the tax year. How long must a taxpayer reside in another country to be viewed as someone who is living abroad? Under FATCA, a U.S. citizen must have been a bona fide resident of a foreign country for an entire tax year, or who was present in a foreign country at least 330 days for 12 consecutive months.

For specified individuals, the FATCA reporting requirements began with their 2011 tax returns filed during the 2012 tax filing season.

For individuals who fail to report their foreign assets on Form 8938 even after being notified by the IRS, the government will impose a penalty of \$10,000 or up to \$50,000. In addition, if individuals underpay taxes for non-disclosed foreign financial assets, the government will impose a penalty of 40 percent.

Under FACTA, specified individuals are not the only ones who must report information to the IRS. In contrast to FBAR, FACTA also requires foreign financial institutions (or FFIs, such as banks, hedge funds, pension funds, insurance companies, and trusts) to enter into a special agreement with the IRS by June 30, 2013, under which they must promise to (1) verify the identification of their account holders, (2) send financial information on their U.S. account holders to the IRS every year, and (3) withhold (and then give to the IRS) 30 percent of any payments from U.S. income sources made to non-participating FFIs or made to account holders who did not provide information to determine whether they are a U.S. person.

### Stricter reporting requirements on U.S. citizens who have foreign accounts could have unintended consequences such as reducing foreign investment and straining relations with other nations, say critics.

Experts estimate that these stricter reporting requirements under FATCA will compel more people to disclose their foreign financial accounts and produce about \$8 billion in additional tax revenues over the next 10 years.

But many critics have spoken out against FATCA. First, they say that banks will face high costs in identifying and reporting the account information on their U.S. clients. The costs of complying with the law, claim critics, will far outweigh any benefits that it may bring. “The European Banking Association estimates that its members would have to pay at least \$10 to vet each existing account plus overhaul data systems and procedures,” reported *The New York Times*. To avoid the cost of implementing the new regulations, the *Globe and Mail*, a Canadian news daily, reported that banks (such as Commerzbank, Credit Suisse, Deutsche Bank, and HSBC) operating in other nations were dropping U.S. customers.


Second, critics claim that the reporting requirement under FATCA will make it more expensive for foreign investors to invest in U.S. bonds, hedge funds, and even real estate, and may even decrease foreign investment in the long term. An editorial in the *Washington Times* warned that “as the U.S. environment becomes more hostile and rapacious, financial transactions will move to more open markets.”

Third, some argue that FATCA will further burden tax filers. American Citizens Abroad – a non-profit group which says that it represents Americans overseas – estimates that the new form (along with the FBAR form) will add an additional three hours to tax preparation time. FBAR and FATCA reporting requirements have particularly affected Canada, where there are close to a million dual citizens and American citizens. Canadian banks often don't know if their customers hold American citizenship, according to the *Globe and Mail*, and Canadian banking laws don't require them to ask for that information. In recent months, the media reported that many dual citizens were so upset about the consequences of failing to comply with U.S. tax requirements that they had renounced their American citizenship.

Fourth, some argue that the FATCA requirements may violate the laws of other nations. For example, *The New York Times* noted

that “enforcement of the law will be tricky, as many countries, including the 27 members of the European Union, forbid banks or companies to transfer such information directly to a foreign government.” Others ask whether the United States itself would comply with a similar law passed by other countries.

As complaints began to mount, the IRS in February 2012 issued new proposed guidelines for implementing various aspects of FATCA. For example, the IRS said that it was willing to work directly with foreign governments rather than FFIs to enforce FATCA. France, Germany, Italy, Spain, and the United Kingdom have all expressed their intent to support the goals of FATCA in collecting and sharing account information.

*Forbes* magazine reported that the IRS also proposed other regulations to help ease the burden of the FATCA reporting requirement. For example, they require FFIs to review manually only those individual accounts with over \$1 million in assets and while excluding those with less than \$50,000. Also, an FFI will be able to use its existing customer intake procedures and will not be held strictly responsible for failing to identify a U.S. account as long as it carries out its obligations under an FFI agreement. 

#### LAWS OF ARMED CONFLICT

### The death of Libyan dictator Muammar Qaddafi: A violation of international law?

**D**id you know that international law provides certain rights even to deposed dictators? In October 2011, after months of fighting between rebel and government forces in Libya, insurgents captured that nation’s long-standing leader, Col. Muammar el-Qaddafi, who was hiding in a drainpipe. But shortly being pulled out from his hiding place, someone had killed Qaddafi. What were the circumstances of his death? Was Qaddafi killed in a shootout? Was he executed? Which treaties governed the treatment of Qaddafi after his capture? And did his death violate international law?

People across Libya began protests in February 2011 against what observers have described as a corrupt and merciless government led by a mercurial leader. By August 2011, rebel fighters had captured the capital of Tripoli, forcing Qaddafi to flee to his birth town of Sirte. But anti-Qaddafi forces had steadily mounted operations to take over that city, according to the *Wall Street Journal*. In October 2011, Qaddafi and dozens of loyalist fighters departed Sirte in a heavily armed convey of around 35 to 75 vehicles. After the convoy had traveled two miles, NATO forces called in an airstrike – believing that the convoy was attacking civilians – and destroyed many vehicles, reported the *National Post*, a Canadian news daily. Eyewitnesses speaking to *The New York Times* had described the attack scene as one of mass destruction where bodies lay scattered everywhere.

According to accounts from rebel fighters and other eyewitnesses, Qaddafi (along with other passengers, including his son Mutassim and Libya’s former Defense Minister Abu Bakr Yunis) had crawled out of a vehicle hit by a NATO missile and then hid in a nearby drainpipe. Human Rights Watch reported that anti-Qaddafi forces discovered and pulled them out. They

immediately shot the defense minister, but took Qaddafi and his son into custody. Qaddafi was wounded and had blood on his face and shirt, said analysts, but did not seem seriously hurt. But shortly after his capture, video footage showed a slain Qaddafi lying on a road with a bullet wound on the side of his head. Under what circumstances did Qaddafi die?

Libya’s interim prime minister, Mahmoud Jibril of the National Transitional Council (or NTC), claimed that when rebel forces had removed Qaddafi from the drainpipe, a random crossfire bullet struck Qaddafi’s forehead, according to the *Wall Street Journal*. Qaddafi then died in an ambulance en route to a hospital, said a spokesman for the NTC.

In stark contrast to the NTC’s explanation, eyewitnesses interviewed by Human Rights Watch stated that all gun battles had ceased after Qaddafi’s capture from the drainpipe. Videos and photographs taken by onlookers seem to confirm this explanation. For example, one video aired on *Al-Jazeera Television* showed Qaddafi moments after his capture, alive yet bloody and dazed, and without a bullet wound. A later video showed Qaddafi – still alive – on the hood of a pickup truck, surrounded by a taunting mob. Final footage showed rebel fighters rolling over Qaddafi’s dead body on a road, which was stripped of clothing and has a bullet wound on the side the head.

Before burying Qaddafi in an undisclosed location, *The New York Times* reported that anti-Qaddafi fighters displayed his decomposing corpse for public viewing in a refrigerated meat locker in the city of Misra. A line of several hundred residents, along with observers from Human Rights Watch, viewed the corpse.

As in the case of his father, video and photographic evidence confirm that anti-Qaddafi fighters had also captured Mutassim Qaddafi alive. Several video clips showed him in a room, sitting on a floor cushion, calmly smoking a cigarette, and drinking bottled water. He also didn’t seem to have any serious injuries. Another video clip then showed Mutassim’s corpse with a large bullet wound on his upper torso.

**International law prohibits taunting mobs from throwing even a former dictator on the hood of a pickup truck and then executing him shortly afterwards outside of any judicial proceeding whatsoever.**

Given the murky circumstances surrounding the death of Qaddafi, many have called for an investigation to see whether his killing had violated international law, specifically the laws of war (which analysts use interchangeably with phrases such as the “laws of armed conflict” and also “international humanitarian law”). The laws of war are those treaties – close to 100 today, according to the International Committee of the Red Cross (or ICRC) – which regulate how nations carry out the *actual conduct* of warfare. They include, for example, treaties which ban the use of certain weapons, and agreements which tell nations how to protect cultural property during times of conflict.

The laws of war also include four treaties (collectively known as the Geneva Conventions of 1949) which establish specific



protections for those who can no longer fight or are not involved in combat such as sick and wounded soldiers, prisoners-of-war, and civilians, reports the ICRC. The four Geneva Conventions apply primarily to international armed conflicts where actual nations fight each other, and *not* to internal conflicts such as civil wars or rebel insurgencies.

Because the world community (at the time it passed the Geneva Conventions) did not adopt a stand-alone treaty regulating combat *within* a state, it created Common Article 3 – the third article in each of the 1949 Geneva Conventions is identical – which sets very limited protections for people who don't take part in active hostilities during internal conflicts. (It is about two paragraphs in length, and has been described by the ICRC as a “mini-Convention” within the Geneva Conventions.)

Common Article 3 states, in part, that “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ [i.e., outside of combat] by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . .” In addition, it prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.” Furthermore, Common Article 3 does not allow “outrages upon personal dignity, in particular humiliating and degrading treatment.” Moreover, it forbids “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court.”

To make up for these limited protections in Common Article 3, the world community in 1977 passed the *Protocol Additional to the Geneva Conventions of 12 August 1949* (known as Additional Protocol II) which the ICRC describes as “the first-ever international treaty devoted exclusively to protecting people affected by . . . civil wars.” Compared to Common Article 3, Additional Protocol II (in its 28 articles) provides many more protections and fundamental guarantees to people involved in internal conflicts. At the same time, it shares many protections with Common Article 3.

For example, Additional Protocol II prohibits (in Article 4) murder and other outrages upon personal dignity “at any time and in any place whatsoever,” and also “outrages upon personal dignity, in particular humiliating and degrading treatment.” In addition, Article 6 says that “no sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.” Furthermore, Article 7 says that, in all circumstances, the wounded must be treated humanely and “shall receive to the fullest extent practicable . . . the medical care and attention required by their condition.”

Violations of Common Article 3 and Additional Protocol II may be considered war crimes, say experts. They also point out that Libya had signed the Geneva Conventions of 1949 (all of which includes Common Article 3), and also Additional Protocol II.

Did the killing of Qaddafi violate international law? To answer this question, legal analysts first tried to determine whether his death took place during an international or an internal armed conflict. Observers have generally concluded that Qaddafi's death

took place during the tumult of what has been dubbed as the “Arab Spring” where people in nations across the Middle East began to rise up against long-standing despotic regimes. In the case of Libya, the protests eventually turned into a civil war (i.e., an internal conflict).

But others believe that the fighting in Libya was an international armed conflict because the North Atlantic Treaty Organization (or NATO, a military alliance of several nations) had attacked Libyan government forces starting in March of 2011. Some have argued, for instance, that NATO was serving as the de facto air force for rebel forces when it attacked Qaddafi's convoy in October 2011.

NATO defended the strike on the convoy as a legitimate part of its broad mission to protect the Libyan people. A spokesperson pointed out that Security Council resolution 1973 passed in March 2011 authorized NATO to protect civilians threatened by Qaddafi's regime. Speaking about the convoy, he said that “[Qaddafi's] armed vehicles were conducting military operations and presented a clear threat to civilians,” and also claimed that “it [was] not NATO policy to target specific individuals.”

Because Qaddafi's death had taken place during an internal conflict, those who had captured Gaddafi would have had to follow Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II, say various analysts. Because Qaddafi was wounded and already in custody, his captors should have considered him “hors de combat,” which would have then entitled him to certain protections under Common Article 3. But his treatment (being thrown on the hood of a pickup truck and then taunted by a mob) and his apparent execution shortly afterwards (outside of any judicial proceeding whatsoever) would seem to violate Common Article 3, said analysts such as Otilia Maunganidze, a researcher at South Africa-based Institute for Security Studies. Gaddafi's treatment and apparent execution would also seem to violate several provisions in Additional Protocol II described earlier. For instance, rather than giving medical treatment and other protections to Gaddafi, the videos revealed that rebel forces had taunted and later killed him.


The UN High Commissioner for Human Rights in October 2011 formally requested an investigation into Qaddafi's death. “We believe there is a need for investigation to see whether he was killed in fighting or some form of execution,” said UN spokesman Rupert Colville. “We really do need some clarity.” An independent body called the Commission of Inquiry for Libya will carry out the investigation. And in response to international pressure, the NTC said that it will also investigate Qaddafi's death, though political analysts doubt that it will do so whole-heartedly.

Along with killing Qaddafi, several human rights groups believe that rebel forces had carried out many other killings which probably violated Common Article 3 and Additional Protocol II, reported the *Wall Street Journal*. For example, in late October 2011, authorities found 53 decomposing bodies of apparent Qaddafi supporters outside of the Mahari Hotel in Sirte. Because “some [bodies] had their hands bound behind their backs when they were shot,” said Human Rights Watch (which investigated the killings), many believe that these prisoners had been executed without judgments from an established court, an action which

would violate both Common Article 3 and Additional Protocol II.

Volunteers working near the hotel also speculate that rebel forces had violated Article 11 of Additional Protocol II which says that “medical units and transports shall be respected and protected at all times and shall not be the object of attack.” Because many of the victims were wearing bandages at the time of their deaths, volunteers believed that rebel fighters had pulled them from a nearby hospital and had taken them to the hotel to be executed, according to reporting from *The New York Times*.

Along with potential violations carried out by rebel forces, human rights groups believe that Qaddafi loyalists had carried out many killings which probably violated Common Article 3 and Additional Protocol II. For instance, in mid-October 2011, medical workers discovered 10 corpses floating in a Sirte water reservoir. At least two of the corpses’ hands were bound, reported the *Wall Street Journal*. The state of the decomposing bodies suggests that the killings had occurred before anti-Qaddafi forces had seized control of the area.

In another example, Human Rights Watch said that Qaddafi loyalist forces had probably violated Article 11 of Additional Protocol II – which, again, says that nations shall protect medical units – when they occupied a hospital in the town of Yafran, prevented its staff of 30 people along with three patients from leaving, and then deployed military weapons around the hospital in what it believes was an effort to protect the hospital from military attacks by using the staff as human shields. 

#### WORLD TRADE ORGANIZATION

### China: Limits on raw material exports illegal

In what analysts have described as a major victory for the United States and other nations, the World Trade Organization (or WTO) ruled that China had violated global trade rules by restricting its own exports of several raw materials (such as zinc) which are used to make countless consumer goods in other markets. They add that this decision could now serve as a legal basis for nations to challenge China’s export restrictions on other important goods such as “rare earths” which industries use to make high-tech products, including those for consumers and the military.

The WTO, based in Geneva, Switzerland, is the premier international organization that sets the rules for international trade and the settlement of trade disputes. It administers three main agreements regulating trade in goods (the General Agreement on Tariffs and Trade or the “GATT”); services; and intellectual property, respectively. The trade activities of its 155 member nations encompass over 90 percent of world trade.

Under the agreements administered by the WTO, a member nation may not enact discriminatory trade policies against other member nations. (When nations enacted such policies during the 1930s, doing so had exacerbated already-existing political tensions and also contributed to a decline in economic activity around the world, according to historians.) For example, Article XI:1 of the GATT prohibits WTO members from restricting

their own exports using quotas, which are numerical caps on the export of certain products. Quotas, say analysts, generally raise the price of exports, making them more expensive for foreign consumers.

The United States and other nations may use a recent ruling by the WTO to challenge China’s export restrictions on important goods such as “rare earths,” which are used to make high-tech products.

But Article XI:1 does list exceptions. For example, a WTO member nation may restrict its exports using methods (such as quotas) which would ordinarily violate Article XI:1 if it does so temporarily to “prevent or relieve critical shortages of foodstuffs” or other essential products.

Article XX of the GATT lists other specific instances when a WTO member nation may implement trade policies which would ordinarily violate that agreement. For example, under section (b), it may implement policies “necessary to protect human, animal or plant life or health.” Section (c) allows a nation to undertake policies to conserve “exhaustible natural resources,” but only if they are also implemented “in conjunction with restrictions on domestic production or consumption.”

According to a fact sheet issued the Office of the United States Trade Representative (or USTR), China is a “leading world source” of various raw materials, including bauxite, coke, fluor spar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc. Various industries use these raw materials to make batteries, beverage cans, building materials, cars, consumer electronics, medicines, and paints, among many other goods. For many years, China imposed ever rising export quotas and duties (i.e., taxes) specifically on these nine raw materials, which raised their prices and then made consumer goods in other nations (including the United States) more expensive, said USTR.

At the same time, USTR said that these export restrictions increased the availability of these raw materials in China and also lowered prices for them. Domestic Chinese industries using less expensive raw materials then charged lower prices for their goods to undercut foreign competitors making similar goods. As an example, USTR noted that after China had imposed export duties and quotas on coke (which is used to make steel), “China’s domestic price for coke was \$472 per [metric ton], while the world price for coke was \$740 per [metric ton].”

In 2009, the United States (along with the European Union and Mexico) requested that a WTO dispute settlement panel decide whether China’s export restrictions specifically on the nine raw materials violated WTO rules and distorted international trade. (China joined the WTO in 2001.)

If one WTO member nation believes that another member nation has enacted trade policies which violate WTO rules, it may request the WTO to create what is called a dispute settlement panel (composed of three policy and legal experts) to determine whether a violation had actually occurred. There are no standing (i.e. permanent) dispute settlement panels because the WTO always creates new panels to address disputes as they arise. After evaluating evidence from both

sides of a dispute, a panel issues its report (which is WTO-parlance for a ruling).

The losing party may appeal a panel's ruling to a permanent Appellate Body whose decisions are final. If a losing party does not comply with a final ruling, the WTO can authorize the prevailing nation to impose sanctions and other penalties. (The WTO itself does not impose sanctions.)

When China joined the WTO in 2001, it agreed not only to abide by the main WTO agreements such as GATT, but also an "accession protocol" which is a separate WTO agreement describing other specific obligations which it must carry out. For example, under Paragraph 11.3 of its accession protocol, China must eliminate all export duties (thus making exports less expensive for foreign consumers) except on a limited number of products appearing on a separate list.

In the view of the United States, how did China's export restrictions on its raw materials violate WTO rules? First, by charging export duties on some of these raw materials, China violated Paragraph 11.3 of its accession protocol where it essentially agreed to dismantle its export restrictions. Because the raw materials in dispute did not appear on the separate list of exempted products, China's policies of charging export duties on them violated its accession protocol, it argued. Second, by placing export quotas on some of these raw materials, the United States said that China violated Article XI:1 of the GATT agreement, which, again, prohibits nations from placing any restrictions (such as quotas) on their own exports.

In response, China claimed that it had to implement these export restrictions to protect the health of its citizens under Article XX(b) of the GATT. Limiting the export of these raw materials, it said, would decrease the amount of toxic byproducts and other pollutants created by Chinese industries which processed them, which will then lead to a cleaner environment and better health for its people. China also argued that, under GATT Article XX(g), it had to limit exports in order to conserve "exhaustible natural resources."

In July 2011, the dispute settlement panel publicly released its report (*China – Measures Related to the Exportation of Various Raw Materials*, DS394). It agreed with the United States that China's export duties on certain raw materials had violated Paragraph 11.3 of China's accession protocol, and that its export quotas on others had violated Article XI:1 of the GATT agreement.

In its decision, the panel rejected China's defense of using GATT Article XX to justify its violations. It determined that Paragraph 11.3 of its accession agreement did not allow China to use Article XX as a justification for its export policies. And even if the accession agreement did allow China to cite those exceptions under Article XX, the panel determined that China "had not complied with the requirements of those exceptions."

For example, it said that evidence had failed to show that China had restricted the export of certain raw materials to conserve exhaustible natural resources under GATT Article XX(g). The panel pointed out that while China had restricted the export of

its raw materials to other nations, it did not restrict domestic production and consumption at home. "Evidence does not support China's claim that it has put in place a comprehensive plan to conserve," said the panel. In fact, it noted that China had actually increased its domestic extraction of certain raw materials.


In addition, the panel said that China did not present evidence showing that it had to implement export restrictions on certain raw materials to protect human health under GATT Article XX(b). Rather than lowering demand, said the panel, the export restrictions actually increased domestic demand for certain raw materials (since more was available for domestic consumption), which could then lead to further pollution as industries processed more of them. It added that "export restrictions are not an efficient policy to address environmental externalities . . ."

The panel also said that China could not invoke exceptions under GATT Article XI:1 to justify its export quotas because China did not adequately demonstrate that it had temporarily used export quotas on certain raw materials to prevent or relieve critical shortages of essential goods. In fact, China had implemented its export quotas since at least the year 2000, undermining its claim that they were temporary in nature.

China appealed the ruling to the WTO's Appellate Body, which, in January 2012, largely upheld the dispute settlement panel's ruling. China and the United States in May 2012 reached an agreement where China would comply with the WTO's rulings – before January 1, 2013 – by changing its export restrictions on certain raw materials. They did not say how exactly China would change these restrictions.

The WTO's rulings in this case could help the United States and other nations challenge China's export restrictions on other products. In March 2012, the United States along with other nations began a process at the WTO to challenge China's export quotas and duties on certain "rare earths," which are described by some observers as "crucial" metals and minerals used to make high-tech goods. (China currently has a virtual monopoly on the extraction and production of many of these rare earths, say experts.) By imposing these duties and quotas, rare earth prices for other nations have increased since 2007 while domestic prices in China have stayed more stable.

As mentioned previously, China may (under its accession protocol) impose export duties only on a limited number of products – 84 to be exact. But in 2009, China imposed export duties on 373 products. None of the rare earths cited by the United States appears on China's accession list of products exempted from the export duty ban.

Analysts say that "China's [accession] agreement to join the WTO . . . bars it from imposing export restrictions on rare earths," but that China has "done so anyway for the last five years," arguing that it was trying to protect human health. According to the *International Trade Reporter*, in December 2011, China announced rare earth export quotas for 2012. 

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## C.V. STARR LECTURES in SPRING 2012



**JANUARY 26, 2012**  
**International Investment Law and Human Rights Treaties: A Sociological Perspective**

Moshe Hirsch, a professor of international law at the Hebrew University of Jerusalem (Law Faculty and the Department of International

Relations), described the general reluctance of investment tribunals to use provisions from international human rights laws when deciding investment disputes. He focused on the socio-cultural factors which have blocked the interaction between these branches of international law, and then discussed how to bridge the gap that separates them.



**FEBRUARY 8, 2012**  
**The Impact of European Court of Human Rights Judgments on Criminal Law Practice in Europe**

Willem Altes, a Senior Judge in the Criminal Law Division of The Rechtbank of Amsterdam, discussed how judgments issued by the European Court of Human Rights

(which resolves disputes concerning the *Convention for the Protection of Human Rights and Fundamental Freedoms*) can have an immediate impact on criminal law practice when they are enforced in individual EU member states.



**APRIL 11, 2012**  
**Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity**

Doron Teichman, the Joseph H. and Belle R. Braun Senior Lecturer in Law at the Hebrew University of Jerusalem, described the competitive dynamics

that drive legislation concerning global criminal activity (where crime control policies adopted by one country increasingly affect criminal behavior in others), and evaluated whether this competitive process should be regulated.



**APRIL 18, 2012**  
**Art in the Time of Chaos: A Panel Discussion on Policy, Appraisal, and International Law Surrounding Middle Eastern Art and Antiquities in the Context of the Arab Spring**

Presented by the Fine Arts & Culture Law Association of New York Law

School in association with the Center for International Law, panelists discussed the legal implications of the Arab Spring on the protection of Middle Eastern art and antiquities.

## LUNCHTIME LECTURES in SPRING 2012



**FEBRUARY 7, 2012**  
**Legislation by Stealth: Negotiating the Anti-Counterfeiting Trade Agreement**

Michael Blakeney, a law professor at the University of Western Australia, and also the University of London, discussed whether a perceived link

between the trade of counterfeit goods and organized crime/terrorist groups had contributed to the secrecy surrounding the negotiations of the Anti-Counterfeiting Trade Agreement which requires stronger domestic intellectual property rights.



**MARCH 6, 2012**  
**A Lunch Conversation with Peter Damiano, Senior Director, J.Crew**

Peter Damiano spoke about his work at J.Crew (which opened its first foreign retail store last year) and the issues which arise when American companies go abroad, including

those concerning tax, employment agreements, benefits and compensation, downsizings, and labor relations, among many other areas. He was previously Global Senior Counsel of the Target Corporation.



**MARCH 26, 2012**  
**A Lunch Conversation with Jordan Kanfer '97, Senior Vice President & General Counsel, T-Systems North America**

Jordan Kanfer spoke about his work at T-Systems (a division of Deutsche Telekom) which provides information

and communication technology solutions to corporations and industry sectors in over 20 countries. He manages the legal department for T-Systems North America and also runs its regulatory and compliance functions.



**APRIL 18, 2012**  
**A Lunch Conversation with Thomas Hickey, Assistant General Counsel, Hess Corporation**

Thomas Hickey discussed how Hess (a global energy company engaged in the exploration and production of crude oil and natural gas) develops

policies and procedures to eradicate bribery and corruption, and to ensure compliance with anti-corruption legislation, protocols, and conventions, among a wide array of other complex legal, compliance, and business issues.

**To see the streaming videos for some of these lectures and many others, visit [www.nyls.edu/EA](http://www.nyls.edu/EA).**

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