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Stopping the recruitment and use of child soldiers: The legal framework and status of debate

n traditional combat during the first half of the 20th-century, war-hardened soldiers (largely a mix of young and older adults) usually faced off on a battlefield. But as internal conflicts – such as civil wars and insurgencies – became much more prevalent in the latter half of that century and even up to today, many non-state armed groups and even nations began to recruit and use much younger soldiers. Many of them were and are, in fact, children.

But as images of these young fighters carrying guns and other weapons of war (some as large and as heavy as the combatants themselves) quickly spread around the world, so has opposition to the recruitment and use of child soldiers.

What exactly are child soldiers? Do they all fight on the front lines of combat? Are there certain areas of the world where the use of child soldiers are prevalent? What are nations doing to curb this practice? Are there international treaties which address this issue? And how much progress has the world made in stopping the recruitment and use of children in war?

Child soldiers: Willing participants in battle?

In the public imagination, the phrase "child soldiers" often conjures up images of heavily armed 10- and 11-year-old boys engaged in combat in a war-torn nation. "Recent conflicts have all too often shown the harrowing spectacle of boys, who have barely left childhood behind them, brandishing rifles and machine-guns and ready to shoot indiscriminately at anything that moves," said the International Committee of the Red Cross (or ICRC).

While child soldiers do, indeed, fight on the front lines, the majority of them – both boys and girls – work in support roles such as aides de camp, cooks, messengers, porters, and spies, according to the 2010 Report of the Special Representative of the Secretary-General for Children and Armed Conflict (or 2010 UN report), which is the most comprehensive annual review issued by the United Nations on efforts to protect children from armed conflict. Also, while armed groups have recruited and used child soldiers as young as six, the majority is between the ages of 14 and 18. And according to the London-based Coalition to Stop the Use of Child Soldiers (or Coalition), the majority of child soldiers is used not by governments, but by non-state armed groups such as guerilla forces and insurgencies.

The United Nations Children's Fund (or UNICEF) currently defines a child soldier as "any person below 18 years old who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who has taken a direct part in hostilities."

How do children end up as soldiers? Some believe that many voluntarily enlist to fight. But Radhika Coomaraswamy, the UN Special Representative of the Secretary-General for Children and Armed Conflict, said that such enlistment was not voluntary in the true sense of the word. For example, in impoverished and war-torn areas where education and job opportunities are very limited, children may view military life as a safer alternative than living on the streets or resorting to petty crime. "When people are poor, their children are very vulnerable," said Coomaraswamy in an interview. "Children go out and are voluntarily exploited because then they get a free meal, they have structure in their lives." Those who have lost their families are even more vulnerable to recruitment.

Still, others point out that some children actually decide to become soldiers to avenge the killings of their families and relatives who died at the hands of opposing combatants.

While some children enlist "voluntarily," many experts believe that non-state armed groups have abducted or kidnapped a majority of their child soldiers and then forced them to fight or help in combat. In places such as central Africa, decades of civil war began to deplete the availability of adult soldiers. So leaders of armed groups began to use children to replenish their ranks. For instance, experts estimate that the Lord's Resistance Army (or LRA), a rebel group in Uganda known for their violent tactics and brutality, had abducted 10,000 children between 2002 and 2003.



Armed groups may even favor the use of children as soldiers over adults. Analysts say that because children are impressionable, naïve, and often lack mature reasoning skills, they can be readily convinced to commit brutal acts of violence. "Child soldiers," said a military commander from the nation of Chad to Human Rights Watch, "are ideal because they don't complain, they don't expect to be paid, and if you tell them to kill, they kill."

The use of child soldiers: A global epidemic?

Because state and non-state armed groups either do not keep or refuse to share statistics on child soldiers in their ranks, experts cannot determine their exact numbers, though various estimates have ranged as high as 300,000 around the world. Around 40 percent (or 120,000 child soldiers) serve in Africa. Although Africa has a large proportion of child soldiers, experts say that the remaining number shows that the use of child soldiers is hardly limited to one geographic region. In fact, child soldiers are used in armed conflicts in various nations on almost every continent:

- Afghanistan: Experts estimate that thousands of child soldiers are currently involved in the conflict between the government and various terrorist and insurgent groups. For example, despite having a formal policy against the recruitment of individuals younger than 18 years of age, investigators have found children as young as 14 in the ranks of the Afghan armed forces. (Age verification is difficult due to low birth registration rates, say analysts.) But in early 2011, the Afghan government signed a pact with the United Nations where it committed to protect children affected by armed conflict and also prevent their recruitment into the national armed forces. Non-state groups such as the Taliban and Al-Qaeda kidnap and use children against Western troops, said that UN.
- Colombia: Tens of thousands of children are involved in a decades-long insurgency in that nation, said Human Rights Watch. While the government said that its armed forces no longer actively recruit children under the age of 18, a law does require compulsory military service starting at that age. But the 2010 UN report noted that Colombia continued to use captured rebel children to gather intelligence on opposition forces. On the other hand, the Revolutionary Armed Forces of Colombia (known by its Spanish acronym FARC) and the National Liberation Army – the largest guerilla groups in that country - continue to recruit and use children in hostilities against the government. In addition to participating in combat, child soldiers lay mines and other explosives, said the UN. Girl recruits face sexual violence. In one instance, according to the 2010 UN report, the FARC required a community to take a head count of the number of local children and said that those as young as 8 would be recruited into their ranks.
- Myanmar: International relief agencies and other groups believe that Myanmar has tens of thousands of child soldiers, more than any other nation in the world. Up to 20 percent of Myanmar's army, known as the Tatmadaw Kyi, may be under the age of 18, according to Human Rights Watch. Although Myanmar has laws which set the voluntary recruitment age at 18, the national army continues to forcibly recruit children as young as 11 from bus stops, train stations, and other public places, according to a 2008 report issued by the Coalition. Once in the Tatmadaw Kyi, child soldiers serve as guards at

- checkpoints, cleaners, clerks, servants, and spies.
- Somalia: According to the 2010 UN report, the recent escalation in Somalia's 20-year civil war has led to the widespread recruitment and use of thousands of children as soldiers by both the official Somali government (known as the Transitional Federal Government or TFN) and Al-Shabaab, an Islamist militant group which means "the youth" in Arabic. The TFN in a rush to form a standing army looked "for anyone who could carry a gun," one Somali official admitted, even though the government has claimed to have a policy against recruiting children. While the recruitment of girls for combat is rare and viewed as socially unacceptable, recent reports indicate that they are increasingly used as cooks and cleaners. One commentator from the Human Rights Center in Mogadishu has said children make up to 80 percent of Al-Shabaab.
- Yemen: Even though a national law prohibits the recruitment of children under the age of 18, the Yemeni government continues to enlist children to fight a rebel group called Al-Houthi which also recruits children to serve as combatants, said the 2010 UN report. It estimated that several thousand children (mostly boys) made up 20 percent of Al-Houthi and up to 15 percent of government-affiliated militias, and that they were involved in direct armed combat as well as logistical and security support. In one example, the 2010 UN report said that children (as young as 15) serving in the Yemeni government's First Armored Division had received no training before they were armed with AK-47 assault rifles and handguns and sent to the front lines.

International law and child soldiers

Currently, no single treaty deals comprehensively with the recruitment and use of child soldiers along with all of its complexities. Rather, several global agreements address this issue using varying standards and degrees of protection. Some, for instance, call on nations to adopt specific measures to prevent the recruitment of children. But others contain vaguer terms and don't address the issue beyond recruitment. Some of these treaties include:

Geneva Convention (IV) relative to the Protection of Civilian persons in Time of War: Agreed upon and signed by over 190 nations, the Geneva Conventions of 1949 consist of four separate treaties (negotiated shortly after World War II) which established the rules on how nations must treat and protect different classes of people who don't take part in armed combat such as wounded soldiers and prisoners-of-war. (All of the Geneva Conventions apply only during conflicts among actual nations and not to internal conflicts such as civil wars or insurgencies.)

Geneva Convention IV sets the rules on how an occupying power must treat civilian populations. Article 50 deals specifically with children in armed conflict, stating that an occupying power may not change the "personal status" of children, "nor enlist them in formations or organizations subordinate to it." But under an interpretation issued by the ICRC, Article 50 does not address the enlistment of children in the armed forces. Instead, it prohibits nations from forcing children to join various organizations and services "devoted largely to political aims" of

the occupying power, a practice which took place during World War II.

On the other hand, Article 51 of Geneva Convention IV does deal with the forced enlistment of protected persons. It states that an "Occupying Power may not compel protected persons to serve in its armed or auxiliary forces," and that "no pressure or propaganda which aims at securing voluntary enlistment is permitted." In its interpretation of Article 51, the ICRC said that this prohibition is "absolute and no derogation from it is permitted." Article 51 goes on to say that "protected persons may not be compelled to undertake any work which would involve

conflict among actual nations. It does not extend its protections to internal armed conflicts such as civil wars, and also does not apply to non-state groups such as rebel insurgencies.

Second, Article 77 does not outright prohibit the recruitment of children under 15 as soldiers. It simply says that parties "shall refrain" from doing so. Still, in its official interpretation, the ICRC said that those nations using soldiers under the age of 15 "should be conscious of the heavy responsibility they are assuming and should remember that they are dealing with persons who are not yet sufficiently mature . . ." The ICRC also said that nations should at least provide these young soldiers with "uniforms" and

The phrase "child soldiers" often conjures up images of heavily armed 10- and 11-year-old boys engaged in combat in a war-torn nation. While child soldiers do, indeed, fight on the front lines, the majority of them work in support roles such as messengers and spies. Also, while armed groups have recruited and used child soldiers as young as six, the majority is between the ages of 14 and 18.

them in the obligation of taking part in military operations."

Analysts point out that while Article 51 does not explicitly mention "children" as a class of protected persons which an occupying nation may not forcibly enlist into its armed forces, analysts believe that the phrase "protected persons" would implicitly include children. Article 51 also sets one of the first age requirements for recruitment. It says that an occupying power may not compel protected people to work "unless they are over eighteen years of age." Under the ICRC's interpretation, compulsory work would include the "forcible enlistment of children and adolescents."

Geneva Convention IV contains several shortcomings. First, as mentioned before, its provisions apply only during conflicts between actual nations, and not to internal conflicts where child soldiers are most likely to be found today. (In a related matter, it does not apply to non-state groups such as rebels because such groups cannot legally join the treaty.) Second, the actual text of Geneva Convention IV does not directly and unambiguously forbid nations from using children as soldiers. It only does so in an indirect manner by using the phrase "protected persons" and through various interpretations issued by the ICRC.

Protocols Additional to the Geneva Conventions of 12 August 1949: In 1977, as modern warfare evolved, the world community added two smaller treaties (known as protocols) to the Geneva Conventions of 1949.

Additional Protocol I: This treaty added more protections to the existing Geneva Conventions for victims of international armed conflicts (i.e., wars between actual nations). In the area of child soldiers, Protocol I became one of the first treaties to set an explicit age at which individuals may join and participate in direct hostilities. Article 77 says that the "Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into armed forces."

But Protocol I has several shortcomings. First, as in the case of Geneva Convention IV, it applies only during times of armed

also "identity tags indicating their status as minors."

Why didn't the drafters of Protocol I simply ban the use of children under the age of 15 as soldiers. The ICRC said that "sometimes, especially in occupied territories and in wars of national liberation, it would not be realistic to totally prohibit voluntary participation of children under fifteen."

Third, Protocol I does not completely forbid those under 15 from taking part in direct hostilities. It only says that nations must tale "all feasible measures" to do so. Protocol I also does not address whether those under 15 may take part in indirect hostilities such as serving as spies or delivering ammunition. But in an interpretation, the ICRC said that "the intention of the drafters [of Protocol I] was clearly to keep children under fifteen outside armed conflict, and, consequently, they should not be required to perform such services."

Fourth, it doesn't tell nations how exactly to prevent the use and recruitment of people under 15 into the armed forces.

Additional Protocol II: In contrast to Protocol I, the ICRC describes Additional Protocol II as the "first-ever international treaty devoted exclusively to protecting people affected by . . . civil wars." It noted that "about 80% of the victims of armed conflicts since 1945 have been victims of non-international conflicts," and that "non-international conflicts are often fought with more cruelty than international conflicts."

Protocol II provides many more protections (in its 28 articles) to victims of internal conflicts by prohibiting parties from carrying out acts such as murder and torture, among others, against civilians and sick and wounded soldiers. And unlike Protocol I which applies to state parties only, some experts believe that Protocol II applies to both state and non-state parties. (They say that non-state parties are expected to comply with Protocol II.)

In the specific area of child soldiers, Article 4(3)(c) of Protocol II states that "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities." Unlike the text of Protocol I, this protocol outright bans the recruitment and use of children

under 15 as soldiers. Under its official interpretation, the ICRC added that the "principle of non-recruitment also prohibits accepting voluntary enlistment" of those under 15. It also said that a nation may not allow those under 15 to take part in direct and even indirect hostilities such as gathering information, transmitting orders, transporting ammunition, or carrying out acts of sabotage. (But as in the case of Protocol I, this protocol does not say how exactly nations must prevent the use and recruitment of people under 15 into the armed forces.)

Together, the Geneva Conventions and Additional Protocols I and II set the initial foundation in international law to prohibit

Moreover, it doesn't address whether nations may allow people under 15 to participate in *indirect* hostilities such as delivering weapons.

African Charter on the Rights and Welfare of the Child: Adopted by a regional organization called the African Union in 1990, the African Charter says that children (which it defines as "every human being below the age of 18 years") have a wide range of rights and calls on its member nations to recognize and protect them, including the right to education, free expression, life, and protection from exploitation, among many others.

In the area of armed conflict, Article 22(2) says that signatory

Currently, no single treaty deals comprehensively with the recruitment and use of child soldiers along with all of its complexities. Rather, several global agreements address this issue using varying standards and degrees of protection. Some, for instance, call on nations to adopt specific measures to prevent the recruitment of children. But others contain vaguer terms and don't address the issue beyond recruitment.

the recruitment and use of children under the age of 15 involved in both international and internal armed conflicts.

Convention on the Rights of the Child (or CRC): Adopted by the UN General Assembly in 1989, the CRC calls on its signatory nations to recognize and protect the basic human rights – such as the right to life, health, education, and development, among many others – of children which it defines as "every human being below the age of eighteen years."

But the CRC has an exception specifically in the area of armed conflict. It sets the lower age of 15 as the minimum for both recruitment and participation in direct hostilities. Article 38(3) says that nations "shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces." For those who have reached 15 but are not yet 18, a nation should give recruiting priority to "those who are oldest."

Article 38(2) also says that nations "shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities."

The CRC also contains a provision (the first for an international treaty) addressing the recovery and reintegration of children harmed by armed conflict. Under Article 39, nations must take "all appropriate measures to promote physical and psychological recovery and social reintegration of a child that has been the victim of . . . armed conflict."

Even though the CRC is one of the most widely ratified treaties, several shortcomings have limited its effectiveness in combating the recruitment and use of child soldiers. For example, the CRC applies only to state governments and not to non-state groups who are the most likely to use children as soldiers. In addition, it doesn't tell nations how they should exactly limit the recruitment and use of child soldiers such as passing legislation. Furthermore, the CRC (as in the case of Protocol I) does not outright prohibit nations from recruiting people under the age of 15 and using them in direct hostilities. Rather, it says that nations must "refrain" from such recruiting and take "all feasible measures" to protect those under 15 from taking a direct part in hostilities.

nations must take "all necessary measures to ensure that no child shall take a direct part in hostilities and refrain, in particular, from recruiting any child." (Again, around 40 percent of all child soldiers are found in Africa.) Unlike the *Convention on the Rights of the Child* which defines a child as someone under 18, but sets a separate lower minimum age requirement (15) for recruitment and participation in direct hostilities, the African Charter applies the minimum age of 18 to all of its provisions.

In addition, Article 22(3) says that this minimum age restriction applies to both international conflicts (those between actual nations) and also to "internal armed conflicts, tension, and strife."

Still, the African Charter shares many shortcomings with other existing treaties. For example, it doesn't provide nations with more guidance in implementing and enforcing its provisions. Article 22 also doesn't call on nations to completely and unconditionally ban the recruitment and use of people under 18 as soldiers. (As in the case of other treaties, it simply calls on nations to take "all necessary measures" to do so.) Furthermore, the African Charter doesn't say whether those under 18 may participate in indirect hostilities such as serving messengers or delivering weapons. Moreover, it applies only to its signatory nations, all of whom are in Africa.

Human rights groups say that despite these restrictions on the use of children as soldiers, many signatory nations, including Chad, Somalia, and Sudan, have continued to enlist and use children.

ILO Convention 182: Worst Forms of Child Labour Convention: Under this global convention adopted by the International Labor Organization (or ILO) in 1999, signatory nations must take immediate and effective measures to prohibit and eliminate the worst forms of child labor, including all forms of slavery, compulsory labor, prostitution, and illicit activities such as producing and trafficking drugs, among other acts. (The convention defines the term child as "all persons under the age of 18.")

The ILO convention also makes a limited reference to child soldiers. Article 3(a) says that compulsory labor includes the "forced or compulsory recruitment of children for use in armed conflict." (One analyst said that the convention had indirectly set 18 as the minimum age for compulsory recruitment.) Unlike some other existing treaties, the ILO convention says that each member nation must, under Article 7, take "all necessary measures to ensure the effective implementation and enforcement" of its provisions, and includes suggestions such as adopting "penal sanctions." Nations also must provide children removed from the worst forms of labor with necessary assistance to rehabilitate and reintegrate them into society.

But the convention has many shortcomings. For example, it neither addresses whether people under the age of 18 may voluntarily join the armed forces nor whether they can get involved in either direct or indirect hostilities.

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (or OP): The UN General Assembly added the OP to the existing Convention on the Rights of the Child in 2000 as a way to curb even further the recruitment and use of children as soldiers primarily by raising the minimum age requirement. Under Article 1, state parties must take "all feasible measures" to ensure that only soldiers who are at least 18 years old are involved in direct hostilities. (It doesn't outright prohibit those under 18 to participate in direct hostilities, and also doesn't address whether those under 18 may participate in indirect hostilities.) Article 2 says that nations which require compulsory military service may not recruit those also under the age of 18.

For voluntary recruitment, nations must (under Article 3) raise the minimum age to 18. For those nations which permit voluntary recruitment under the age of 18 must, they must submit a statement which declares the minimum age of recruitment and also create safeguards to ensure that such recruitment is "genuinely voluntary," and is carried out with the "informed consent of the person's parents," among other measures. They must also recognize that "persons under 18 are entitled to special protection."

The OP also sends a warning to non-state armed groups. Under Article 4, such groups should not "under any circumstances, recruit or use in hostilities persons under the age of 18 years." To prevent them from doing so, the OP says that nations should adopt legal measures "to prohibit and criminalize such practices."

In contrast to the *Convention on the Rights of the Child*, the OP says that a nation must take "all necessary legal, administrative, and other measures" to implement and enforce these various provisions.

Once a nation signs and ratifies the OP, it "accepts an obligation to respect, protect, promote, and fulfill the enumerated rights — including by adopting or changing laws and policies that implement the provisions of the Convention or Protocol," says UNICEF. A nation must also submit a periodic report to the Committee on the Rights of the Child (an independent body of experts at the UN which monitors the implementation of the OP) describing how it is carrying out its obligations under the OP.

How effective is international law in addressing child soldiers?

Even with an extensive framework of treaties in place, the

recruitment and use of child soldiers still occur around the world. Why?

First, treaties primarily apply only to the governments which negotiated their terms, and not to the non-state groups which are largely responsible for the recruitment and use of child soldiers.

Second, analysts believe that many nations which have joined these treaties lack the resources to investigate and punish those responsible for recruiting and using child soldiers, especially developing nations mired in civil conflict. The former Special Representative of the UN Secretary-General for Children and Armed Conflict, Olara Otunnu, noted that while the international community had established many standards against the use of child soldiers, their "application on the ground" has not been effective. "Words on paper," he said, "do not save a child in war."

Third, observers believe that the existing patchwork of international standards has complicated efforts to stop the recruitment and use of children as soldiers. While treaties such as Additional Protocol II (which, again, was the first ever to regulate internal conflicts) set a minimum age of 15 for both recruitment and use of soldiers in hostilities, others such as the Optional Protocol set a minimum age of 18. Nations have used these discrepancies to address child soldiers in ways which meet their needs and priorities. Today, over 50 countries recruit people under the age of 18 into their armed force, according to the UN.

The lack of a uniform international standard has not only contributed to the recruitment and use of child soldiers in developing nations, but even in developed ones. Examples include:

Australia: The Australian government ratified the Optional Protocol in 2006, and is largely in compliance with its provisions, according to the Child Soldiers Global Report 2008. Under domestic regulations called the Defense Instructions of 2005, Australia set a minimum age of 17 for voluntary recruitment into the armed forced. Because this age is below the one set in the Optional Protocol, the Defense Instructions created several safeguards to prevent the recruitment of underage people. Applicants must, for example, present an original birth certificate and receive the written approved consent of their parents or guardians. Australia also said that it would take "all feasible measures" to ensure that those under 18 were not involved in active hostilities.

But some have expressed concern that certain practices in Australia may violate the spirit of the Optional Protocol. For instance, recruiters encourage children "from the age of 10" to provide their personal information through an online service. Australia also has a youth military program — called the Australian Defence Force Cadets, which is funded by the government — where the minimum recruitment age is either 12 or 13. Children receive training, including weapon handling, through a "safe and fun military-like experience," according to recruiters.

The United Kingdom: According to the Coalition to Stop the Use of Child Soldiers, the United Kingdom (which ratified the Optional Protocol in 2003) has the lowest recruitment age in Europe, noting that people as young as 16 may voluntarily enlist in the British armed forces. While a minimum recruitment age of 16 does not violate the Optional Protocol, the UN Committee on the Rights of the Child (in a 2008 report) encouraged the United Kingdom to raise this minimum age to 18 as a way "to

promote the protection of children through an overall higher legal standard."

The UN committee also expressed concern in its 2008 report that recruiters in the United Kingdom were actively recruiting individuals under the age of 18. Citing government figures, it noted, for example, that "recruits under the age of 18 represent[ed] approximately 32 percent of the total intake" of troops. The UN committee also believed that people under the age of 18 most likely to join were ethnic minorities from low-income families. In fact, a government study published later in 2010 found that the Army Recruitment Division had visited schools in economically deprived areas in Wales (where children were more likely to drop out of school or underperform academically) "50 percent more often than more affluent areas." As a result, the committee called on Britain to ensure that it did not specifically target ethnic minorities from low-income families.

The UN committee expressed further concern over the United Kingdom's interpretation of Article 1 of the Optional Protocol which again calls on nations to ensure that only soldiers who are at least 18 years old are involved in direct hostilities. The government had argued that it would not deploy those under 18 to take direct part in hostilities unless, in the words of the committee, "the exclusion of children before deployment [was] not practicable or would undermine the operational effectiveness of the operation." But the committee said that the United Kingdom should have interpreted Article 1 in a way which would not have allowed those under 18 to participate in direct hostilities. Later, a debate in the House of Commons revealed that Britain had "inadvertently deployed 15 underage soldiers to Iraq (which then was considered an active war zone) between 2003 and 2005, reported the Coalition to Stop the Use of Child Soldiers.

United States: While the United States did not sign the Convention on the Rights of the Child, it did ratify the Optional Protocol in 2002. Under the US Code (Title 10, Section 505(a)), the United States has set 17 years as the minimum age for

voluntary recruitment, and requires parental consent for those under 18 who want to join the armed forces. Various branches of the armed forces have also amended their policies to comply with the various requirements under the Optional Protocol such as Article 1 which says that nations must ensure that only soldiers who are at least 18 years old are involved in direct hostilities. As of 2011, every branch of the armed forces had implemented policies to prevent the deployment of soldiers under the age of 18, according to the *Child Soldiers Global Report 2008*.

Still, even with these policies in place, Human Rights Watch reported that the United States had deployed nearly 60 17-year-olds to Afghanistan and Iraq in 2003 and 2004 (both of which are considered war zones) where soldiers would face active hostilities from enemy forces. The Department of Defense later said that it had "immediately rectified" these situations, reported the *Child Soldiers Global Report 2008*.

What is the United States doing in the area of child soldiers?

According to the *Child Soldiers Global Report 2008*, various U.S. government agencies such as the Agency for International Development provides tens of millions of dollars a year to other nations trying to prevent the recruitment and use of child soldiers, and also to demobilize currently enlisted child soldiers.

Along with these efforts, President George W. Bush signed in January 2009 the *Child Soldiers Prevention Act* into law, which came into effect in 2010. Under the act, the United States may not provide various forms of military assistance – ranging from military training to weapons sales to financing – to governments which have been identified by the U.S. Department of State as recruiting and using child soldiers in their armed forces or militias in violation of international standards. (The act defines a child soldier as any person under the age of 16 who are voluntarily recruited or those under 18 who take direct part in hostilities.) Instead, these nations would only receive military assistance to professionalize their armed forces and to disarm, demobilize, and rehabilitate child soldiers in their ranks.



"U.S. military assistance should not go to finance the use and exploitation of children in armed conflict," said the main sponsors of the act, Senators Richard Durbin (D-IL) and Sam Brownback (R-KS). According to an analysis by the Center for Defense Analysis, the United States supplied eight nations – Burundi, Chad, Colombia, the Ivory Coast, the Democratic Republic of Congo, Sri Lanka, Sudan, and Uganda – with military assistance since 2001 even though they recruited and used child soldiers in their government security forces.

The act does not automatically cut off military assistance to nations recruiting or using child soldiers. Instead, they will have five years to demobilize their child soldiers, and any military financing provided by the United States will go to "programs that will directly support professionalization of the military." The act also allows the President to waive these various restrictions if he determines "that such waiver is in the national interest of the United States."

Since the passage of the act, many have questioned its effectiveness in addressing the problem of child soldiers. In June 2010, the U.S. Department of State (in its 2010 *Trafficking in Persons Report*) identified six nations – Chad, the Democratic Republic of the Congo, Myanmar, Somalia, Sudan, and Yemen – which recruited and used child soldiers. (Every country except Myanmar received U.S. military assistance.)

But of these six nations, President Barack Obama in October 2010 had issued a waiver to four of them (Chad, the Democratic Republic of the Congo, Sudan, and Yemen), saying that doing so was "in the national interest of the United States," though he didn't provide any more information. As a way of explanation, experts point out that the terrorist network Al-Qaeda is active in both Chad and Yemen, and that cutting off certain military aid could harm U.S. national security. Still, a spokesperson for Human Rights Watch told the *New York Times* that "everyone's gotten a pass, and Obama has really completely undercut the law and its intent."

The 2011 State Department list of nations recruiting and using child soldiers remained the same as the 2010 list. And in October 2011, President Obama issued a waiver to the Democratic Republic of the Congo and Yemen, saying that it was in the country's "national interest to do so." The administration also said that the government of Chad had undertaken what it believed to be credible efforts to prevent the recruitment and use of child soldiers.

The United Nations and child soldiers

In addition to guiding negotiations on several treaties addressing child soldiers, the UN has undertaken many other efforts to address this issue. In 1994, the UN Secretary-General appointed a humanitarian expert, Graça Machel from Mozambique, to study the impact of armed conflict on children. She issued a comprehensive report in August 1996 called *Impact of armed conflict on children* (A/51/306) – also popularly known as the Machel Report – which described how armed conflict exposed children to violence, malnutrition, and diseases, among other dangers.

Part of the report described how different armed groups recruited and used children as soldiers. The report also contained "many practical ways" and recommendations on how nations

can protect children in conflict situations. According to the Secretary-General, the Machel Report "laid the foundation for the 'children and armed conflict' agenda and constituted a seminal call to action."

Following the release of this report, the UN General Assembly created the position of "Special Representative of the Secretary-General for Children and Armed Conflict" to "develop and transform the children and armed conflict agenda into concrete actions and initiatives." Among many other duties, the Special Representative prepares an annual report (known as Report of the Special Representative of the Secretary-General for Children and Armed Conflict, described earlier in this article) describing the situation of children in armed conflict and also any progress made by nations to prevent the recruitment of children as soldiers.

On top of these efforts, the UN Security Council has issued many resolutions which pushed nations to take progressively stricter measures against the recruitment and use of child soldiers. (But even with the passage of these resolutions, several nations still recruit and use child soldiers today.) They include:

- Resolution 1261 (1999): This resolution broadly called on nations to protect children from the effects of armed conflict, including their recruitment and use as soldiers. For example, it said that nations must "comply strictly with their obligations under international law," in particular under the Geneva Conventions of 1949, the Additional Protocols of 1977, and the Convention on the Rights of the Child. The Security Council also announced in Resolution 1261 that the impact of armed conflict on children can have long-term consequences for "durable peace, security, and development." Analysts said that this statement was significant because, under the United Nations Charter, the Security Council addresses only those issues which can threaten international peace and security. Under Resolution 1261, "the impact of armed conflict on children," including their use as soldiers, became such an issue.
- Resolution 1314 (2000): In addition to taking broad measures
 to protect children from armed conflict, this resolution called
 on nations to include provisions in peace agreements which
 disarm, demobilize, and reintegrate child soldiers into society.
 It also said that nations should consider regional initiatives to
 prohibit the use of child soldiers in violation of international
 law.
- Resolution 1379 (2001): While this resolution (as in the case of others) called on nations to undertake broad efforts to protect children from the effects of war, it also included specific measures. For example, the resolution urged nations to prosecute individuals responsible for carrying out crimes against children, which implicitly includes recruiting and using them as soldiers in violation of international law. The resolution also said that nations should consider measures which will "discourage corporate actors . . . from maintaining commercial relations with parties to armed conflicts" if those parties violated international standards in protecting children during armed conflict (such as those creating minimum age requirements for recruitment). It also requested the Secretary-General to include a list of parties (a so-called "name-andshame list") which recruited and used children in armed conflict in violation of international standards.
- Resolution 1460 (2003): Among other measures to protect

children from armed conflict, the resolution specifically called on parties identified on the "name-and-shame list" to provide information on the steps they had taken to stop the recruitment and use of children in violation of international law. The Security Council also threatened to take "appropriate steps" if it determined that these parties did not make sufficient progress in addressing this issue.

• Resolution 1539 (2004): After first condemning the use of child soldiers by various parties to an armed conflict, the resolution called on them to prepare "concrete time-bound action plans" to stop this practice. If they failed to produce such a plan or even failed to engage in a dialogue to do so, the Security Council threatened "targeted and graduated measures" against them, including "a ban on the export of small arms and light weapons," among other military equipment. The resolution also requested the Secretary-General to create a "systematic and comprehensive monitoring and reporting mechanism" to provide up-to-date information on the unlawful recruitment and use of child soldiers. In 2005, the Security Council passed a subsequent resolution (1612) which called the Secretary-General to implement the monitoring and reporting mechanism.

Paris Commitments/Principles: More efforts on child soldiers

As many civil conflicts began to draw to a close at the turn of the century, almost 60 governments (along with many groups and organizations) began an effort under the direction of UNICEF to develop a much more comprehensive and detailed set of guidelines to protect children from becoming soldiers and also address issues that went beyond their recruitment. The UN said that these guidelines would "complement the political and legal mechanisms already in place," much of which provide only vague guidance. One analyst added that this effort would try to create more uniform standards and expectations on how nations should deal with child soldiers.

In 2007, they finished negotiations on a voluntary agreement called the *Paris Commitments to protect children from unlawful recruitment or use by armed forces or armed groups* (or the "Paris Commitments" for short). This agreement, which is not considered an international treaty, set 20 broad principles on how nations should address a wide range of issues concerning child soldiers.

For example, it calls on nations to establish "conscription and enlistment procedures for recruitment into armed forces," and to ensure that such procedures "comply with applicable international law." In addition, the agreement says that nations must unconditionally release "all children recruited or used unlawfully by armed forces or groups." To deter armed groups from unlawfully recruiting children, the Paris Commitments says that nations should "effectively investigate and prosecute" individuals who have done so.

Furthermore, for those child soldiers under 18 who have been recruited and used unlawfully, and have also been accused of violating the laws of war, nations must consider them "primarily as victims of violations against international law and not only as alleged perpetrators." Moreover, to help child soldiers recover from and deal with any possible trauma, nations must ensure that "any funding for child protection is made available as early

as possible, including in the absence of any formal peace process."

UNICEF announced in September 2011 that 100 nations have joined the Paris Commitments. During the previous year, the agreement also "contributed to the release and reintegration of some 10,000 children associated with various armed forces of groups," added UNICEF

Along with the Paris Commitments, the delegates completed another voluntary agreement called the *Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* (known as the "Paris Principles").

In contrast to the Paris Commitments (which again established broad principles in dealing with various aspects of child soldiers), the Paris Principles set out detailed and highly specific guidelines "for protecting children from recruitment and for providing assistance to those already involved with armed groups or forces." (UNICEF described the Paris Commitments as a "short and concise document" while saying that the Principles provided "more detailed guidance.")

For example, the Paris Principles provides more detailed guidance on how nations should carry out justice in the case of violence carried out by child soldiers. Section 3.7 says that nations should use "alternatives to judicial proceedings" and also "other international standards for juvenile justice" when dealing with child soldiers accused of violations of international law committed during hostilities. Section 8.6 adds that "children should not be prosecuted by an international court or tribunal." The following section says that nations should not prosecute, threaten to prosecute, or punish children "solely for their membership" in armed groups. And, under Section 3.9, even those children convicted of violations must never face capital punishment or life in prison without possibility of release.

To prevent the recruitment of children in the first place, nations (under Section 6.6) must implement recruitment procedures such as requiring proof of age and imposing legal sanctions against those who ignore such age requirements. They should also disseminate proper recruitment information by starting a national awareness campaign, providing training to military personnel on laws which establish minimum age requirements, and implementing a "national birth registration system for all children."

When children are released from armed service, Section 7.69 says that they should undergo a health assessment and nutritional screening. Nations should also make health care facilities and health education available to children, among other measures.

Using criminal tribunals to stop the use and recruitment of child soldiers

Even with an extensive legal framework in place to address the recruitment and use of child soldiers, nations have not regularly investigated (let alone prosecute) individuals who are or have engaged in this practice, say observers. But at the turn of the century, two criminal tribunals took action against the use of child soldiers.

The Special Court for Sierra Leone: In 1991, the African nation of 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.

Human rights groups have accused all sides to the conflict of committing various atrocities, crimes against humanity, and war crimes. They also say that the three armed groups had forcibly recruited children to become soldiers, with UN estimates ranging from 5,000 to 10,000. According to the 2008 *Child Soldiers Global Report*, "over 50 percent of people who suffered forced recruitment were abducted at the age of 15 or younger, and over 28 percent at the age of 12 or younger." By 1998, "about 25 percent of the fighting forces [in the civil war] were under 18," said the report, adding that girls had made up about one-third of all child soldiers. It also noted that "the RUF had been the first to enlist children and were responsible for the highest number of child recruitments recorded."

In 1999, the armed combatants signed the Lomé Peace Agreement which called on them to disarm and demobilize their forces. The civil 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.

Specifically, the agreement (known as the *Statute of the Special Court for Sierra Leone*, or simply the Statute) gave authority to the SCSL to prosecute people who ordered or committed crimes against humanity, violated treaties such as *Additional Protocol II*, violated Sierra Leonean law, or carried out other serious violations of international humanitarian law, which include "conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities." (In contrast, other international agreements called on nations to prohibit the recruitment and use of people under the age of 18 as soldiers.)

Under the Statute, the SCSL cannot prosecute people under the age of 15 who have been accused of carrying out an alleged crime. While this implies that the court may prosecute those child soldiers over the age of 15, the Statute also says that the SCSL will treat those accused of committing a crime between the ages of 15 and 18 "with dignity and a sense of worth," and will take into account "the desirability of promoting his or her rehabilitation . . ."

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 Security Council 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 – based in the capital of Freetown – is a hybrid court which has jurisdiction to prosecute both international and domestic crimes, said the International Committee of the Red Cross.

During the course of its work, the SCSL indicted over 20 people. In June 2007, the SCSL announced its first convictions, saying it had found three commanders of the AFRC – Alex Tamba

Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu – guilty on 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. (Under the Statute, the SCSL cannot impose the death penalty.) 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.

In August 2007, the SCSL convicted a CDF commander (Allieu Kondewa) on several counts of ordering war crimes and also of conscripting or enlisting children under the age of 15 years into armed forces. It sentenced him to eight years in prison. An appeals court in 2008 overturned his conviction for conscripting children, but later convicted him on several counts of crimes against humanity and sentenced him to 20 years in prison.

In February 2009, the SCSL found two RUF commanders – Issa Hassan Sesay and Morris Kallon – guilty of "conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities," among other acts. It sentenced them to 52 years and 39 years in prison, respectively.

International Criminal Court: In July 2002, the International Criminal Court (or ICC) came into operation for the very first time, and began to investigate and prosecute major human rights abuses, including the recruitment and use of child soldiers. (The SCSL discussed in the previous section began its operations earlier in 2002.)

Based in The Hague (in the Netherlands), the ICC – the world's first *permanent* international criminal tribunal – has the authority to prosecute individuals, including high-level government leaders, accused of carrying out or ordering acts of genocide, crimes against humanity, and crimes of aggression which occurred after July 2002. Unlike other criminal tribunals formed on a temporary basis to try alleged crimes committed only in specific countries such as the former Yugoslavia, Rwanda, and Sierra Leone, the ICC has much wider jurisdiction to try individuals from those countries which have ratified the *Rome Statute of the International Criminal Court* (or Rome Statute), the international agreement creating that tribunal.



Some legal experts refer to the ICC as the "court of last resort" because it will exercise its jurisdiction only in instances where a signatory nation is unable or unwilling to prosecute alleged violations of international human rights. As of February 2012, 120 nations – including 33 of 54 nations in Africa – have ratified the Rome Statute and are legally bound to abide by its provisions.

In addition to the previous list of offenses, the ICC has the authority to prosecute individuals for a wide range of war crimes. Under Article 8, war crimes include conscripting or enlisting children under the age of 15 into national armed forces or non-state armed groups or having them participate actively in hostilities during wars between nations and also during internal conflicts such as civil wars.

Does the ICC also have the authority to prosecute child combatants who had allegedly carried out various acts which are prohibited by the Rome Statute during the course of their involvement in armed conflict? Under Article 26 of the Rome Statute, the ICC cannot prosecute any person "who was under the age of 18 at the time of the alleged commission of a crime." (In contrast, the SCSL discussed in the previous section cannot

called the Union des Patriotes Congolais (or UPC) during that country's five-year civil war, which ended in 2003. Congolese authorities arrested Thomas Lubanga Dyilo (the alleged founder and former president of the UPC) and, in March 2006, transferred him to the ICC. Political commentators say that the DRC – which ratified the Rome Statute in 2002 – had referred the alleged crimes to the ICC because the country's judicial institutions were still weak, and officials feared that having a trial in the DRC soon after the signing of a peace agreement could create domestic instability.

In January 2009, the ICC began its first trial. In the case of *The Prosecutor v. Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06), prosecutors charged Lubanga with the war crime of "enlisting and conscripting of children under the age of 15 years" into the UPC and "using them to participate actively in hostilities," acts which are punishable under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute.

Prosecutors alleged that, as part of its military recruitment, the UPC army (from August 2002 to June 2003) had forcibly recruited children as young as seven years old, including boys and girls, into military service – all under the direction of Lubanga.

Even with an extensive legal framework in place to address the recruitment and use of child soldiers, nations have not regularly investigated (let alone prosecute) individuals who are or have engaged in this practice, say observers. But at the turn of the century, two criminal tribunals took action against the use of child soldiers.

prosecute those under the lower age of 15.)

Unlike the American criminal justice system, an ICC does not use juries to decide the guilt or innocence of the defendant. Instead, a "Trial Chamber" (which is a panel of three judges) oversees and rules on 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.

To hold a person criminally responsible for recruiting and using children as soldiers, the ICC prosecutor must – under a document called "Elements of Crimes" (ICC-ASP/1/3(part II-B)) – satisfy many factors. For example, he must show that perpetrator had conscripted or enlisted people under the age of 15 into an armed group or had them participate actively in hostilities. The prosecutor must also show that the perpetrator knew or should have known that such persons were under 15, and that the act itself took place in the context of a war between nations or during an internal conflict. As in the case of the American criminal justice system, the ICC prosecutors must prove the guilt of the accused beyond a reasonable doubt.

In a development which has given hope to human rights groups, the ICC has focused its attention on the issue of child soldiers in two nations:

The Democratic Republic of the Congo: The ICC – in its first case ever – decided to prosecute a former leader from the Democratic Republic of the Congo (or DRC) accused of conscripting and using children in an armed conflict.

In June 2004, after receiving a formal request from the government in the DRC, the ICC began an investigation into alleged war crimes committed by the military wing of a group

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

Prosecutors argued that Lubanga should be held responsible for the UPC's forcible recruitment of children because, as the leader of the UPC, he had "de facto ultimate control over the adoption and implementation of plans to forcibly recruit children." Article 25(3)(b) of the Rome Statute says that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person orders, solicits, or induces the commission of such a crime, which in fact occurs or is attempted."

On the other hand, Lubanga denied the charges, arguing that many children had volunteered to fight. During the trial, defense witnesses also questioned whether several individuals had even served as child soldiers.

The ICC's first trial faced many problems and delays. The Trial Chamber had, for example, halted proceedings because the defense accused prosecutors of improperly withholding evidence which they say could have proved the innocence or mitigated the guilt of Lubanga. Also, a former child soldier serving as a prosecution witness had, during the trial, recanted his testimony of attending a military training camp.

More than two years later, in August 2011, the ICC concluded its trial, and, in a press release, said that the judges would "deliberate on the proceedings and, within a reasonable

period, will pronounce its decision." Experts say that if the Trial Chamber convicts Lubanga, he can face a maximum of life in prison. (Under the Rome Statute, the ICC cannot impose the death penalty.)

Uganda: In 2005, the ICC issued warrants for the arrest of the leader of the Lord's Resistance Army (or LRA), along with four of his commanders, saying that there were "reasonable grounds to believe" that these individuals had "ordered the commission of crimes within the jurisdiction of the Court."

In the late 1980s, Uganda plunged into a civil war where various rebel groups fought against the government. Analysts say that one of the rebel groups, the LRA, had "morphed into a fearsome cult-like group of fighters." Its leader, Joseph Kony, had even proclaimed himself to be a prophet. Over a period of 20 years, the LRA had "terrorized villagers in at least four countries in central Africa," according to one observer. Human Rights Watch said that the LRA had killed up to 65,000 civilians in northern Uganda, southern Sudan and eastern Congo.

Since the beginning of the civil war, the LRA had also abducted about 25,000 children and forced them to "participate in combat and to carry out raids, kill and mutilate other child soldiers and civilians, and loot and burn houses," according to the 2008 *Child Soldiers Global Report*. The report added that "in some regions [of Uganda], an estimated 24 percent of LRA child soldiers were girls." For these alleged deeds and others, one reporter for the *New York Times* described Kony as "one of the most vilified rebel leaders on the planet."

In December 2003, the government of Uganda – which ratified the Rome Statute in 2002 – sent a request to the ICC to investigate the LRA and its alleged atrocities. After carrying out a preliminary investigation, the ICC issued arrest warrants for Kony and four of his commanders, charging them with alleged acts of crimes against humanity and war crimes carried out between 2002 through 2003. (The arrest warrant does not cover any alleged acts before 2002 because the Rome Statute did not come into force until then.)

The warrant against Kony specifically charged him with 12 counts of crimes against humanity (such as murder, enslavement, and rape), and also 21 counts of war crimes, including murder, cruel treatment of civilians, intentionally directing an attack against a civilian population, pillaging, rape, and forced enlistment of children (using them as "fighters, porters, and sex slaves"). The warrants against two other commanders (one of whom is now deceased) also charged them with the war crime of enlisting children as soldiers.

In 2006, the LRA and the government of Uganda signed a peace treaty where Kony would have to demobilize his forces. Media reports say that Kony had backed out of the agreement in 2008, citing the outstanding ICC arrest warrant against him, among other reasons. (During a meeting in 2006 with a UN representative, Kony denied that the LRA had forcibly recruited children as soldiers.)

As of November 2011, Kony and the other LRA commanders remain at large. According to one news source, Kony has been "living in a remote corner of Congo, near the borders of Sudan and Uganda, surrounded by a harem of child brides and protected by a battalion of child soldiers."



C.V. Starr Lecture
August 25, 2011

Islamic Law and Finance: Past Developments, Present Controversies, Future Prospects



Frank Vogel
Founder and former
director, Islamic Legal
Studies Program, Harvard
Law School

Islamic finance is a highly successful niche market within the global finance industry, growing at double-digit annual rates and increasingly seizing the attention of global financial players. This lecture introduces the practical legal arrangements making finance in accord with Islamic teachings possible. As the industry continues to mature, controversies long in the background increasingly break out in the open. In all, Islamic finance offers a useful case-study in the application of Shari`a today, offering lessons about Muslim religious, political, and social prospects even beyond finance and law.

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Cigarettes meet international law: Will tobacco use go up in smoke?

he decades-long fight against tobacco use continues today. Public health groups, for example, are waging various campaigns to warn people of the health risks of using tobacco products such as cigarettes. Governments, for their part, are passing laws which ban smoking in many public places and are also trying to hold tobacco companies legally responsible for the financial costs of treating ailing tobacco users. Still, officials say that millions of people become smokers every year, and millions continue to die of smoking-related diseases such as emphysema and lung cancer.

Along with passing domestic laws, many nations took their campaign to the international level at the turn of the century by negotiating a tobacco treaty which calls on their signatories to undertake a wide range of measures to curb tobacco use. But tobacco companies are challenging what are considered to be the most effective ones, including laws which require the plain packaging of cigarette products, place limits on tobacco advertisements, and require the use of graphic warning labels.

Why has it been difficult to stop people from using tobacco? What domestic measures are in place to stop tobacco use, and what obligations do nations have under the tobacco treaty? Have these measures been effective? How have tobacco companies challenged plain packaging laws, limits on advertisements, and regulations requiring the use of graphic health warnings? Where do these disputes stand today?

The health consequences of using tobacco products

Smoking can cause various cancers (including those afflicting the bladder, esophagus, lungs, and stomach), and also lead to chronic diseases and ailments such as asthma, blindness, heart problems, reduced fertility, and strokes, according to a 2011 report from the World Health Organization (or WHO) on the dangers of tobacco use. Even leading tobacco companies such as Philip Morris USA agree with these statements.

Currently, more than one billion people are smokers, and half of them will eventually "die of a smoke-related disease," said the WHO. According to its estimates, around six million people worldwide die every year due to illnesses caused by tobacco use (with half of the deaths occurring

in developed nations and the other half in developing nations), making it the "leading global cause of preventable death." The number of deaths could increase to eight million annually by the year 2030 with 80 percent of them occurring in developing nations.

Studies have also shown that regular exposure to secondhand smoke – which is classified as a "known human carcinogen" by the U.S. Environmental Protection Agency – in workplaces and at home, among other places, can increase the risk of "heart disease, lung cancer, chronic respiratory ailments, birth defects, SIDS and a host of other ailments." Around 600,000 non-smokers will die from these illnesses caused by exposure to second-hand smoke.

Officials say that society must spend hundreds of *billions* of dollars annually to address the consequences of using tobacco products. For instance, they say that treating ailing tobacco users – who can no longer work productively and need constant medical care – increases health care costs.

Tobacco, said the WHO, "is the only legal consumer product that kills when used exactly as intended by the manufacturer."

Tobacco use: A continuing problem around the world

Despite the risks of using tobacco, millions of people still become smokers every year and continue to use tobacco products for much of their lives. Why?

First, public health officials and civil society groups say that tobacco companies have, in recent decades, aggressively marketed their products (especially in developing nations) to make up for declining rates of tobacco use. "To sell a product that kills up to half of all its users requires extraordinary marketing savvy," argued the WHO.

"Tobacco manufacturers are some of the best marketers in the world." So how do tobacco companies market their products?

The WHO said that tobacco companies have packaged and labeled their products in ways which mislead or even deceive the public about the dangers of using tobacco products. For example, many tobacco advertisements across the world regularly feature attractive and physically fit people along with their products. Many also use terms such as "low tar" and "ultra light" to give the



impression that their cigarettes are less harmful than regular ones. But, according to the National Cancer Institute, "light cigarettes are no safer than regular cigarettes." In fact, both health experts and even tobacco company executives agree that "there is no safe cigarette."

The tobacco industry also continues to market their products through advertisements, promotions, and sponsorships. According to the Framework Convention Alliance (an antismoking organization of over 350 groups), tobacco companies spend *billions* of dollars every year to place advertisements in magazines, newspapers, Web pages on the Internet, and on billboards. They also produce commercials for television and make arrangements for their products to appear in movies and videos. Companies also have promotions where they give out free samples, sell discounted items, and pay retailers to push the sale of their certain products.

Furthermore, the industry sponsors sporting and cultural events (where they prominently display their corporate logos on awnings and other fixtures), and also give contributions directly to charitable organizations, political groups, and individuals such as sports and entertainment figures. These various tactics, say studies such as those published in the *Journal of Health Economics*, help to increase new demand for tobacco products.

Second, many believe that governments around the world are not actively and consistently promoting efforts to educate the public about the dangers of tobacco use. As a result, smokers "vastly underestimate the extent and severity of the risks of tobacco-related disease," and are "unable to name more than a handful of smoking-related diseases, and few are able to accurately estimate their chances of dying in middle age due to smoking," said critics of the tobacco industry. The 2008 WHO Report on the Global Tobacco Epidemic concluded that "despite overwhelming evidence of the dangers of tobacco, relatively few tobacco users worldwide fully understand the risks to their health."

Third, experts say that tobacco companies "use a wide range of tactics to interfere with tobacco control" such as "direct and indirect political lobbying and campaign contributions, financing of research [favorable to the tobacco industry]," and "attempts to affect the course of regulatory and policy machinery."

Fourth, anti-smoking groups note that tobacco companies add certain ingredients to their products – including sweeteners (such as molasses and honey), flavorings (including menthol and vanillin), and even vitamin C and vitamin E – to make them more pleasing (and less harsh and irritating) to the senses and to give the impression that they have health benefits. "Tobacco industry documents have shown that significant effort has been put into mitigating . . . unfavorable characteristics" of using tobacco products, said the WHO.

Fifth, the WHO said that "most people [continue to] smoke because they are addicted to nicotine," a chemical compound found in tobacco, and which many accuse the tobacco industry of manipulating to maintain dependence. In fact, the WHO – in its 2007 *International Statistical Classification of Diseases* – classifies tobacco dependence as a "substance use disorder" (and not as a "bad habit" as many people incorrectly believe) which "often requires repeated interventions and multiple attempts to quit," say analysts. A report issued by the Royal College of Physicians in 2000 described cigarettes as "highly efficient nicotine delivery

devices and are as addictive as drugs such as heroin and cocaine." Given the addictive nature of nicotine, experts point out that smokers who try to quit are usually unsuccessful.

Sixth, groups such as Framework Convention Alliance said that the "smuggling, illicit manufacturing, and counterfeiting" of tobacco products around the world undercut government efforts to discourage tobacco use. They note, for instance, that smuggled cigarettes – which are illegally diverted from a regulated distribution chain to evade the payment of any taxes, according to the Campaign for Tobacco-Free Kids, an antitobacco advocacy group – are generally less expensive which, in turn, encourage people to buy them. According to estimates by the Framework Convention Alliance, the "illicit trade in cigarettes represents approximately 10.7 percent of global sales, or 600 billion cigarettes annually."

Seventh, many countries don't allow people and other parties to hold tobacco companies legally responsible for the adverse health effects caused by tobacco use.

The world's first tobacco control treaty

To counter what the WHO described as a "rapid globalization of the tobacco epidemic," delegates from around the world in 2003 concluded negotiations on the *Framework Convention on Tobacco Control* (or the Tobacco Convention), which is the only international treaty calling on its signatory nations to implement a wide range of measures to discourage tobacco use and also to protect people from exposure to tobacco smoke. Many legal analysts say that the Tobacco Convention – which is administered by the WHO – is the world's first public health treaty.

Delegates refer to the agreement as a "framework convention" because it provides a framework (i.e., a broad outline) of measures which nations must undertake to discourage tobacco use. Following the passage of the agreement, delegates continued to meet over the years to develop specific guidelines which nations must follow when carrying out their various obligations. Explains Professor David Fidler of Indiana University School of Law: "... the strategy in the FCTC [contemplated] progressive development of the international law on tobacco control."

The Tobacco Convention came into force in 2005. As of December 2011, of the 174 nations which have signed the agreement, 10 did not yet ratify it. The United States signed the Tobacco Convention in 2004 (meaning that it supports the agreement's provisions, in principle), but did not yet ratify it. Some critics point out that some of the world's largest tobacco companies are based in the United States.

While the Tobacco Convention (and its separate guidelines) provides nations with a comprehensive overview of their duties and responsibilities in discouraging tobacco use and protecting public health, it does not have an enforcement mechanism to ensure compliance. Instead, Article 21 of the Tobacco Convention requires states to submit periodic reports to the WHO which describe how they are implementing its various provisions.

What kinds of measures do nations have to implement under the Tobacco Convention to discourage tobacco use and to protect people from tobacco smoke? Some include the following:

Implementing price and tax policies: Under Article 6 of the Convention, nations agree to adopt measures, including tax policies, which increase the price of tobacco products as a way to

discourage tobacco consumption. "Tobacco tax increases are the most effective way to discourage tobacco use," said the WHO, noting in its 2011 report that "each 10% increase in retail price reduces consumption . . . up to 8% in low- and middle-income countries. At the same time, the Convention does not require all nations to adopt the exact same tax policies and rates on tobacco products, saying that they have the sovereign right "to determine and establish their taxation policies."

In a survey of 194 nations and territories (which include those which did not sign the Tobacco Convention), the WHO reported that the vast majority (93 percent or 181 nations) imposed various taxes on the most popular brands of cigarettes. The average total tax rate on cigarettes was 50 percent. The survey also revealed

strategies and activities of the tobacco industry" through, for example, "publicly accessible databases," among other sources.

Implementing tobacco cessation programs: To reduce demand among existing users, Article 14 of the Tobacco Convention broadly says that nations must implement programs which "promote cessation of tobacco use and adequate treatment for tobacco dependence." According to a report released by the Centers for Disease Control and Prevention (or CDC) in November 2011, "of the nearly 69% of adult smokers who wanted to quit in 2010, more than half tried, but only 6.2% succeeded."

Specific guidelines issued by the WHO in November 2010 said that nations should train all health care workers to give

Delegates from around the world in 2003 concluded negotiations on the Framework Convention on Tobacco Control (or the Tobacco Convention), which is the only international treaty calling on its signatory nations to implement a wide range of measures to discourage tobacco use and also to protect people from exposure to tobacco smoke.

that a higher proportion of prosperous nations imposed taxes which made up more than 50 percent of the retail prices of cigarettes.

Furthermore, in wealthier nations, the average price of (and tax imposed on) a pack of the most popular brands of cigarettes was higher (\$4.93 of which 66 percent, or \$3.23, was for taxes) than in low-income nations (\$1.95 of which \$0.81, or 42 percent, was for taxes).

But the survey also noted that as developing nations become more prosperous, "cigarettes are becoming relatively more affordable." As a result, the WHO recommended that "increasing taxes [on tobacco products] in all countries [was] essential" in reducing tobacco use.

Regulating tobacco contents: Article 9 of the Tobacco Convention broadly calls on nations to prevent tobacco companies from inserting ingredients into their products to make them more palatable. Specific guidelines adopted by the WHO in November 2010 recommend that States Parties should, for example, prohibit or restrict the use of ingredients in tobacco products such as "vitamin C and vitamin E, [and] fruit and vegetables." "From the perspective of public health, there is no justification for permitting the use of ingredients . . . which help make tobacco products attractive," say the guidelines.

Promoting public awareness: To prevent the tobacco industry from undercutting tobacco-control campaigns, Article 12 broadly calls on States Parties to promote public awareness of tobacco-control issues. WHO guidelines released in November 2010 say that nations must, for instance, promote access to comprehensive public awareness programs which target certain groups, including young people, and those who are "illiterate, uneducated or undereducated." They also recommend "seed grants" to civil society groups to implement tobacco-control programs. Nations should also "ensure that the public has free and universal access to accurate and truthful information on the

"brief advice" on how to stop smoking, direct tobacco users "to the most appropriate and effective treatment available locally," offer free and widely-publicized telephone "quitlines," and provide "intensive specialized support" where specially trained practitioners offer behavioral programs along with medications (such as nicotine patches "provided free or at an affordable cost") to help smokers quit.

Currently, "only nine out of 173 Member States of the WHO offer the full range of treatment and at least partial financial subsidies," said the Framework Convention Alliance. These programs, it said, covered approximately "5% of the world's population, leaving 95% without effective treatment of tobacco dependence."

Stopping the illicit tobacco trade: To combat illicit trade in tobacco products, including smuggling, Article 15 of the Tobacco Convention says that nations must, among other measures, ensure that tobacco companies place a mark on all of their products to help authorities determine their origins, destroy counterfeit and contraband tobacco products along with the machinery used to make them, and adopt measures to allow authorities to confiscate the proceeds made from the illicit trade in tobacco products.

Still, legal observers point out that the language in Article 15 is broad, and doesn't provide specific guidance on how exactly to implement its provisions. In February 2008, a select group of signatory nations to the Tobacco Convention began negotiations on a supplemental treaty called the *Protocol to Eliminate Illicit Trade in Tobacco Products* (or Protocol) whose main purpose is to provide specific guidelines and details on combating illicit trade in tobacco. The WHO estimates that it will conclude negotiations on the Protocol in March 2012.

Holding tobacco companies liable: Article 19 of the Tobacco Convention says that nations must consider passing laws which will allow people and other parties to file civil and criminal

lawsuits against tobacco companies for the adverse health effects (and costs) of tobacco use.

Holding tobacco companies liable for the health effects caused by tobacco use, say groups such as the Framework Convention Alliance, will raise the prices of tobacco products, which, in turn, could discourage new users from buying them in the first place. In the United States, for instance, individuals had filed (and continue to file) lawsuits against tobacco companies to hold them responsible for the negative health effects caused by cigarettes.

Have signatories to the Tobacco Convention made progress in implementing Article 19? A report issued by the WHO in September 2010 concluded that "Article 19 is one of the few articles of the Convention for which no notable progress can be traced across the two reporting cycles."

Protecting people from secondhand smoke: Article 8 calls on nations to adopt "effective" measures to protect people from secondhand tobacco smoke in "indoor workplaces, public transport, indoor public places, and . . . other public places." (They measures are broadly known as "smoke-free laws.") In 2007, the WHO released specific guidelines and principles for nations to follow when implementing Article 8. *Paragraph 6*, for example, says that for a measure to be considered "effective," it must create a "100% smoke free environment" simply because "there is no safe level of exposure to tobacco smoke."

Under *Paragraph 8*, nations must specifically use legislation to protect people from tobacco smoke, noting that "voluntary smoke-free policies have repeatedly been shown to be ineffective and do not provide adequate protection." Such legislation (according to *Paragraph 31*) should call on individual smokers and workplaces to comply with laws prohibiting exposure to secondhand smoke. It suggests that a business should, for example, post signs indicating a smoke-free area and also remove ashtrays from its premises.

Paragraph 24 says that nations may not pick and choose which indoor workplaces to ban secondhand smoke. Rather, they have an obligation to protect people from secondhand smoke in "all indoor public places, all indoor workplaces, all public transport and possibly other (outdoor or quasi-outdoor) public places," including enclosed workplaces such as "taxis, ambulances, or delivery vehicles."

Of the 194 nations surveyed in the WHO's 2011 report, 31 nations have implemented smoke-free laws at either a nationwide or subnational level (i.e., state and local areas covering at least 90 percent of a country's population) in eight categories of public places, including bars; health care, educational, and government facilities; indoor offices; public transportation; and restaurants. Some of these nations include Australia, Burkina Faso, Canada, Chad, Colombia, Iran, Ireland, Pakistan, Panama, Spain, Thailand, Turkey, and the United Kingdom. (The United States did not appear on the list.) These laws cover "739 million people, representing almost 11% of the world's population," according to the WHO. Up until 2010, only 15 nations had passed such comprehensive smoke-free laws.

But the WHO survey also revealed that the largest percentage of nations at all income levels had passed smoke-free laws covering only up *two* public places. They include 40 percent of high-income nations, 47 percent of medium-income nations, and 55 percent of low-income nations.

In the case of the United States, its federal government has not passed a nationwide smoke-free law. Instead, different states and even municipalities (such as cities and towns) have passed their own smoke-free laws whose restrictions vary considerably from one jurisdiction to the next. According to a 2011 report issued by the CDC, half of all states and the District of Columbia have passed comprehensive smoke-free laws, meaning that they prohibit smoking in private-sector work sites, restaurant, and bars. (The



CDC noted that these venues are "a major source of secondhand smoke exposure for nonsmoking employees and the public.")

In comparison, no state had passed smoke-free laws before the year 2000. But "in the span of 10 years," said the CDC, "smoke-free workplaces, restaurants, and bars went from being relatively rare to being the norm in half of the states and DC." Analysts don't believe that the Tobacco Convention had played any direct role in this development. In fact, many jurisdictions began to pass such laws even before delegates began to negotiate the text of that agreement.

According to estimates by the American Nonsmokers' Rights Foundation – or ANRF, a group which lobbies for nonsmokers' rights – these comprehensive smoke-free laws cover almost 150 million people (nearly half the population) in the United States.

ANRF also points out that 468 municipalities across the United States have passed comprehensive smoke-free laws even in states which have not done so on a state-wide level. It further says that while many municipalities have not passed comprehensive smoke-free laws, over 3,300 of them have passed laws which ban smoking in certain areas.

Many nations are also going beyond protecting indoor public places from secondhand smoke. They are also prohibiting smokers from certain outdoor public places. For instance, *BBC News* reported that Spain and the state of Western Australia have banned smoking near playgrounds. In May 2011, New York City implemented a law which prohibits smoking on beaches and boardwalks, pedestrian plazas such as those in Herald Square and Times Square, and public parks. While the Department of Parks and Recreation said that "the new law will be enforced mostly by New Yorkers themselves" in its initial stages, the police will be able to fine people up to \$50.

defines the phrase "advertising, promotion, and sponsorship" as "any form of commercial communication, recommendation, or action with the aim, effect, or likely effect of promoting a tobacco product or tobacco use, either directly or indirectly.")

In 2008, the WHO adopted detailed guidelines on which types of tobacco advertising, promotions, and sponsorships to ban. They include:

- "Traditional media" (including print newspapers and magazines, billboards, television, and radio); "all media platforms," such as films, DVDs, video games, the Internet, mobile phones; and theater and other live performances;
- Tobacco vending machines;
- Any display or visibility of tobacco products at retail stores and by street vendors. Instead, vendors should provide only a "textual listing of products and their prices" under the guidelines;
- Brand stretching, which is a practice where tobacco companies place a distinctive feature of their products (such as a "brand name, emblem, logo, or trade insignia") on non-tobacco products, including "clothing, jewelry, food," according to the Framework Convention Alliance;
- Prohibiting tobacco companies from making financial contributions to "community, health, welfare, or environmental organizations" for "socially responsible causes;"
- Giving people free gifts (such as T-shirts, key rings, and cigarette lighters) when they purchase tobacco products;
- Giving free samples of tobacco products or giving them incentives to buy tobacco through the use of coupons;
- Selling toys and sweets resembling tobacco products; and
- Any kind of contribution to any event, activity, group, or individual "whether or not in exchange for publicity."

The Tobacco Convention calls on nations to ban all tobacco advertising and promotion within their respective jurisdictions, including those that appear in printed materials, billboards, television, and radio, and "all media platforms," such as films, DVDs, video games, the Internet, and mobile phones. Nations should also ban any display or visibility of tobacco products at retail stores and by street vendors.

Still, many question the effectiveness of these measures, saying that lax government enforcement could undermine them. For instance, in May 2011, China (where 60 percent of all people are smokers) implemented a law issued by the Ministry of Health banning smoking in *all* indoor places. But reporting by *Xinhua News Agency* – which has been described as the Chinese government's official press agency – noted that "it's still unclear who will enforce the ban, what actions trigger a fine, and, most importantly, what the penalty should be for individuals who light up." It added that the government won't have an incentive to enforce the indoor smoking ban because it owns China's largest tobacco company.

Limiting advertising and promotions: Article 13 calls on nations to ban all tobacco advertising, promotion, and sponsorship not only within their respective jurisdictions, but also in cases where domestic tobacco companies undertake such activities in other nations. (The Tobacco Convention broadly

If a nation cannot carry out these bans due to constitutional constraints (such as those which protect certain forms of speech), it must apply certain *restrictions* (i.e., measures which fall short of a complete ban) on both domestic and cross-border tobacco advertising, promotion, and sponsorship. For example, a nation must prohibit advertising and sponsorships which promote tobacco use through false, misleading, or deceptive means, and must also require health warnings on all tobacco advertising, promotion, and sponsorship, among several other measures.

Article 13 also says that a nation has a sovereign right to ban cross-border tobacco advertising, promotion, and sponsorship from entering its territory.

To enforce these measures, the guidelines say that nations should apply a spectrum of proportionate penalties (ranging from fines to "possible imprisonment") to those who violate them. Nations should also designate an independent government agency with powers to "investigate complaints," "seize unlawful

advertising or promotion," and "initiate appropriate legal proceedings" under the guidelines.

In its 2011 report on the dangers of tobacco use, the WHO surveyed whether 194 nations implemented direct and/or indirect bans on tobacco advertising, promotion, and sponsorships. In its survey, direct bans included four categories such as advertisements carried out on national television, radio, and print media, while

tried cigarettes and 3 percent are regular smokers." Currently, 62 percent of all people in Indonesia are smokers, making it the second largest smoking population in the world, says the World Lung Foundation. (Russia, where 70 percent of the population smokes, is the largest.)

In the case of the United States, President Barack Obama in June 2009 signed the Family Smoking Prevention and Tobacco Control

Currently, more than one billion people around the world are smokers, and half of them will eventually "die of a smoke-related disease," said the WHO. According to its estimates, around six million people worldwide die every year due to illnesses caused by tobacco use (with half of the deaths in developed nations and the other half in developing nations), making it the "leading global cause of preventable death."

indirect bans included six categories such as free distribution of tobacco products, brand extension, placements, and sponsored events, among others.

The survey revealed that only 19 nations currently "ban all forms of direct and indirect advertising," which include four high-income nations (such as Kuwait and the United Arab Emirates), 9 middle-income nations (Colombia, Kenya, Thailand, among others), and 6 low-income nations (such as Chad, Myanmar, and Sudan). In Europe, only Norway banned all forms of tobacco advertising. No country in North America or East Asia has done so. Still, these 19 countries have "425 million people, representing 6% of the world's population who are now fully protected against tobacco industry marketing tactics, 80 million more than in 2008," said the WHO report.

The WHO survey also revealed that a large percentage of nations at all income levels allowed some forms of direct and indirect tobacco advertising – 66 percent of high-income nations, 50 percent of middle-income nations, and 40 percent of low-income nations. But the WHO said that these "partial bans have little or no effect" on tobacco use. The survey further showed that a large number of nations (a total of 71) at all income levels either had no bans or bans which didn't cover all forms of direct advertising – 26 percent of high-income nations, 40 percent of middle-income nations, and 40 percent of low-income nations. To address these shortcomings, the WHO said that "well-drafted and well-enforced legislation is required."

The difference between nations that ban all forms of direct and indirect tobacco advertising and those which don't can be stark. For example, a correspondent for *NBC News*, Mara Schiavocampo, who was reporting on a toddler (a 2-year-old) in Indonesia who chain-smoked, said a contact had described that nation as "the 'Wild West' of tobacco regulation" where there are "virtually no restrictions on cigarette advertising." According to the *New York Times*, "in Indonesia, cigarette ads run on TV and before movies; billboards dot the highways; companies appeal to children through concerts and sports events; cartoon adorn packages; and stores sell to children."

As a result, Indonesia (which has not signed the Tobacco Convention) currently has "one of the worst problems with child smokers in the world," reported Schiavocampo. And government figures show that "25 percent of kids over the age of 3 have

Act (or Act) into law. The Act neither bans tobacco products nor the use of nicotine in them. Instead, its primary purpose is to prevent adolescent tobacco use by giving – for the very first time – legal authority to the Food and Drug Administration (or FDA) to regulate tobacco products.

For example, under the Act, tobacco companies may not use flavorings in their products, which critics say appeal to first-time smokers. They may also not use terms such as "light," "mild," or "low," which may give the impression that some products are less harmful than others. Furthermore, the Act bans all outdoor advertising of cigarettes within 1,000 feet of a public playground, park, or elementary and secondary school. Moreover, tobacco



companies may not promote their brands by sponsoring "any athletic, musical, artistic, or other social or cultural event," distributing brand-name promotional items, or distributing free samples of their cigarettes.

In the specific area of tobacco advertising, companies may use "only black text on a white background" with no graphics or colors (or even trademarks) supplied by the companies themselves, though the Act does make exceptions for advertisements placed in magazines whose readers are mainly adults and also for advertisements displayed in "adult-only facilities." (In contrast, the Tobacco Convention calls for a complete ban on advertising, though it allows nations (including the United States) to take measures which fall short of a ban if they have to do so for constitutional reasons.)

In August 2009, several tobacco companies challenged the Act (in Commonwealth Brands, Inc., et al. v. United States of America, et al.), arguing that several provisions violated their right to commercial speech under the First Amendment of the Constitution, among many other objections. Under a U.S. Supreme Court decision called Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York (1980), the government may regulate commercial speech only if it has "a substantial interest in regulating the speech; the regulation directly advances the government's interest; and the regulation is not more extensive than is necessary to serve that interest."

During legal proceedings, the government defended the advertising restriction which requires tobacco companies to use only black text on a white background (without any of their own colors, graphics, and trademarks), arguing that the restriction satisfied the requirements in Central Hudson. For example, the government said that the restriction advanced its interest in "reducing tobacco use by minors." The government also argued that the First Amendment's right to commercial speech did not extend to the colors and graphics (both a form of commercial speech) used in tobacco advertisements because such speech (in its opinion) did not communicate anything meaningful about the tobacco products themselves. Rather, a company's colors and graphics created "meaningless associations between tobacco products and attractive lifestyles" meant solely to lure adolescents to smoke. But rather than banning tobacco advertising outright, the government tailored its advertising restriction to target only the colors and graphics used in such advertising.

The tobacco companies, on the other hand, argued that restrictions on its commercial speech (i.e., the ban on the use of its colors and graphics in advertising) would not advance the government's interest in reducing tobacco use among adolescents because the government did not present any evidence that those restrictions would actually do so. They also said that the ban on the use of all of their colors and graphics on tobacco advertising was overly broad (covering even "color and graphic communications that [in its opinion] have no special appeal to youth"), and that the government could instead have used "literally dozens of widely accepted non-speech-restrictive alternatives that would reduce youth tobacco use."

In a decision issued in January 2010, Judge Joseph McKinley, Jr., of U.S. District Court (Western District of Kentucky) struck down the Act's provision which banned tobacco companies

from using all colors and graphics on their advertisements, concluding that such a restriction was overly broad, and would therefore violate the plaintiffs' right to commercial speech. It disagreed with the government's contention that "all use of images" in tobacco advertising would encourage minors to use tobacco products, calling it "plainly wrong." It said that tobacco companies currently use many images and colors in their advertising which "merely identified products" or communicated "information about the nature of a product" without appealing to youth.

By banning the use of these kinds of images and colors, the government had regulated speech that "poses no danger to the asserted state interest," which would, in turn, violate the tobacco companies' First Amendment right to commercial speech.

Regulating the packaging and labeling of tobacco products: Article 11 of the Tobacco Convention generally prohibits companies from using packaging and also labeling their products in ways which are false, misleading, or deceptive. Nations must, for example, forbid companies from using terms and descriptions (such as "low tar," "mild" or "ultra-lite") on their packaging which could give the impression that smoking certain kinds of cigarettes will be less harmful than others.

Article 11 also says nations must ensure that tobacco products carry large and visible health warnings (using words, pictures, or both) which describe the dangers of tobacco use, and that these warnings should cover 50 percent or more (but no less than 30 percent) of the packaging. "Warning labels on tobacco packs," argued the WHO, "are a cost-effective method of advertising about the dangers of tobacco use," adding that they can be "implemented at virtually no cost to the government." Article 11 further calls on nations to ensure that tobacco companies vary and update these warnings to keep a person's attention.

In 2008, the WHO issued specific guidelines on how exactly to implement Article 11. These guidelines say, for instance, that health warnings should be positioned "on both the front and back" of each tobacco product, and that such warnings should combine both text and *color* pictures because doing so, according to evidence cited by the WHO, is "far more effective that those that are text-only."

To reduce the ability of tobacco packaging to mislead consumers about the health effects of tobacco use (among other goals), the guidelines recommend that nations restrict or prohibit the use of specific trademarks such as brand logos, images, and colors on tobacco products. Instead, these products should be put into "plain packaging" which shows only the brand names and product names "displayed in a standard colour and font style."

Recent plans by Australia, Uruguay, and the United States to implement Article 11's provisions on plain packaging and the use of graphic warning labels have garnered the most controversy and also widespread media attention. The separate sections below describe these specific measures in more detail.

Australia: The world's first plain packaging law

In December 2011, Australia became the first nation in the world to enact a bill – the *Tobacco Plain Packaging Bill 2011* – which requires all tobacco products packaged, manufactured, or sold in Australia to be in plain packaging. (See pages 24 and 25 for examples of the plain packaging of cigarettes.)

The purposes of the law, said the government, are to reduce the attractiveness and appeal of tobacco products (particularly among young people), increase the noticeability of required health warnings already on tobacco packaging, and reduce the ability of tobacco packaging to mislead consumers about the harms of using tobacco products, among other rationales – all of which will hopefully reduce the use of tobacco. "Tobacco smoking," said the government, "remains one of the leading causes of preventable death and disease among Australians, killing over 15,000 Australians every year," and the costs of which can reach AU\$31.5 billion annually.

Specifically, the plain packaging law will require tobacco companies to adhere to the following requirements and restrictions by December 2012:

- The outer surface of all tobacco packaging must be a "drab dark brown." According to a memorandum describing the law, the government said that "market research found that a particular shade of drab dark brown was optimal in terms of decreasing the appeal and attractiveness of tobacco packaging."
- Tobacco companies may not print any "marks" on tobacco packaging, including "lines, letters, numbers, symbols, graphics, and images..." (although barcodes will be permitted along with some other marks). Tobacco packaging may also not have any "decorative ridges, embossing, bulges, irregularities of shape or texture, or other embellishments."
- No trademark "may appear anywhere on the retail packaging of tobacco products."
- With few exceptions, companies may not include marks or trademarks anywhere on the tobacco products themselves, including cigarettes. In its explanatory memorandum, the government said, for example, that "cigarette sticks currently have a range of decorative elements printed on them, including brand names," and that, according to research, "the inclusion of brand names and other design embellishments on cigarettes are strongly associated with the level of appeal."
- So what can tobacco companies include on product packaging?
 Only their company and brand names in specified locations on
 the package. And every company must print these names using
 the same exact font color, size, and typeface, all of which will
 be determined in 2012.
- While companies may not print most of their trademarks directly on retail tobacco packaging and on the products themselves, they may use their trademarks on, for example, business correspondence. Despite these strict requirements, the law still "preserves a trademark owner's ability to protect a trademark, and to register and maintain registration of a trademark" (though it cannot print that trademark on tobacco products). The proposed law will also not allow other parties to claim a tobacco company's trademark by arguing that the tobacco company has not been using it due to the proposed law. (To ensure this protection, the Australian government had amended its existing trademark laws.)

The law will apply only to tobacco "manufacturers, packagers, wholesalers, distributors, and retailers" in Australia, and not to individuals who buy "non-compliant [products] for personal use." Violators of these requirements could face either civil or criminal penalties.

A primer on trademarks and other intellectual property rights

Every year, people and businesses around the world create new and groundbreaking inventions, write books and songs which become wildly popular, render beautiful works of art, or create memorable brand names, logos, and even slogans, among many other "creations of the mind."

To encourage such creativity and innovation (and to protect the ability to profit from them), governments around the world give their creators the exclusive legal right to use and control their creations for a limited period of time. Others who want to use them must receive permission from the inventor in the form of, say, a licensing or other kind of agreement, which usually involves the payment of monetary compensation.

The legal right to use and control these creations is generally described as an "intellectual property right," and, depending on the type of creation seeking protection, comes in many different forms. A copyright, for instance, gives authors the exclusive right to use and control their "published and unpublished works," including the contents of books, software programs, films, musical and other sound recordings, and pictorial works, according to the United States Copyright Office. A patent, on the other hand, gives people and businesses the exclusive right to use their inventions and prevent others from doing so. Pharmaceutical companies, for example, file and obtain patents to prevent other companies from copying and then selling their medicines.

Another type of intellectual property right is a trademark right, which prevents others from using a person's or a company's trademark. A trademark is a combination of words, names, symbols, sounds, or colors used by a company to distinguish its products from similar goods.

Many businesses sell, for example, hamburgers, which is a generic name for a beef patty sandwich. The appearance of one company's hamburgers is largely similar to those made by others. To distinguish its own hamburgers and make them stand out, a company such as the McDonald's Corporation sells them using various trademarks on its packaging, including a brand name (the "Big Mac" sandwich), a distinctive logo (the golden arches), and even a slogan ("I'm lovin' it"). No other person or company may use these registered trademarks on their own hamburger packaging without permission from that company.

Australia's plain packaging law: Violating World Trade Organization rules?

Critics of Australia's plain packaging law, including tobacco companies and business groups from around the world, oppose the law for several reasons. For example, they say that the plain packaging requirements will not only violate domestic intellectual property rights (which include the use of trademarks on their products), but also international trade rules set by the World Trade Organization (or WTO).

In 1995, the newly-formed WTO began to administer a series of treaties which regulate the trade in goods and also trade in services. The WTO also regulates intellectual property matters through

its Agreement on Trade-Related Aspects of Intellectual Property Rights (known by the acronym TRIPS), which requires all WTO member governments to establish minimum levels of intellectual property rights and protections (through the use of copyrights and patents, for instance) in their domestic legal systems. In the area of trademarks, Article 15(1) says that any signs (such as "personal names, letters, numerals, figurative elements, and combinations of colors") which are "capable of distinguishing the goods or services of one undertaking from those of other undertakings" must be "eligible for registration as trademarks."

To resolve a trade dispute where one member nation believes that another member's polices are violating treaty obligations, the WTO administers a legally-binding process where a panel of judges examines a dispute and then issues a ruling. Only a WTO member may initiate dispute settlement proceedings against another member. (Private parties such as tobacco companies may not directly challenge the laws and policies of WTO member nations.)

Many legal observers believe that WTO member nations with large tobacco industries could challenge Australia's plain packaging laws. But as of December 2011, no WTO member nation has done so. But if a WTO member nation did challenge Australia's plain packaging law, what arguments could it make?

not registering them), such laws technically don't violate Article 15(4).

In response, the memo claimed that, in its reading of the history of this article, "most countries recognize their obligations . . . not only to register all marks regardless of the nature of the product, but also to refrain from 'suppressing or limiting' the exclusive right of the trademark owner to *use* a mark as long as the sale of the product is legal." It added: "Registration without use is a hollow formal right which is economically meaningless."

Article 17: This article says that a trademark owner does not have an absolute right to stop third parties from using a trademark under any and all circumstances. Governments may set "limited exceptions" to these rights (including "fair use of descriptive terms" where, for example, a news program simply broadcasts a trademark as part of its reporting) as long as these exceptions "take account of the legitimate interests" of the trademark owner.

The memo said that, under its interpretation, plain packaging laws cannot "constitute a 'limited' exception" on a trademark owner's rights because they virtually prohibit him from using his trademarks in the first place. "Plain packaging," it declared, "annihilates the rights conferred by trademarks."

In addition, the memo argued that plain packaging laws do not "take account of the legitimate interests" of the trademark owner.

In December 2011, Australia became the first nation in the world to pass a law requiring the plain packaging of all cigarette packages. The outer face of all packaging must be a "drab dark brown." And only the company and brand names (appearing in the same exact font color, size, and typeface) may appear on cigarette packages.

Analysts point to a July 2009 legal memo – written by Swiss-based law firm Lalive for Philip Morris International Management SA – which laid out possible objections to plain packaging laws, though it did not specifically address Australia's law (which did not even exist). The Lalive memo argued that plain packaging laws would violate the following provisions in the TRIPS agreement.

Article 15(4): Under this article, a government must "in no case" prevent a person or company from registering a trademark based on the very nature of that good or service to which that trademark will apply. In other words, a government generally may not decide in advance which goods and services should receive a trademark and which ones may not.

Plain packaging laws, said the memo, specifically target and prevent people from using trademarks only on tobacco products while allowing their use on all other products. "Such discriminatory treatment of trademarks," argued the memo, "is expressly prohibited by the TRIPS agreement, which provides that all trademark rights are entitled to protection regardless of the product to which they apply."

The memo also responded to an interpretation of Article 15(4) made by supporters of plain packaging laws who agree that a government may not prevent people from *registering* a trademark based on the nature of a certain good. At the same time, it doesn't explicitly forbid a government from preventing people in actually *using* a trademark on certain goods, they argue. Because plain packaging laws only prevent people from *using* trademarks (and

It said that a WTO dispute settlement panel had, in March 2005, issued a decision where it seemed to define these legitimate interests. "Every trademark owner has a legitimate interest in preserving the distinctiveness, or capacity to distinguish, of its trademark so that it can perform that function," said the ruling. "This includes its interests in *using* its own trademark in connection with the relevant goods and services of its own and authorized undertakings." But plain packaging laws, argued the memo," entirely prohibits the use of trademarks, and therefore entirely deprives the owner of the trademark's basic function, which is its 'capacity to distinguish."

In response to the memo's arguments, analyst Benn McGrady – who is the project director of the Initiative on Trade, Investment, and Health, at the O'Neill Institute for National and Global Health Law at Georgetown University – cited Article 16 which says that a trademark owner must have the exclusive right to stop all third parties from using identical or similar signs on identical or similar goods and services if they do so without obtaining permission from the trademark owner.

So Article 16 gives a trademark holder only the right only to prevent third parties from using its trademarks without permission. On the other hand, it does not explicitly say that "a trademark owner [himself has] the right to actually use the trademark," claimed McGrady.

Using this line of reasoning, when Article 17 mentions an exception to a trademark owner's rights, that exception would refer only to his right to stop third parties from using

his trademark, and not to any right to actually use his own trademarks since Article 16 does not even establish that right. Therefore, Article 17 would not even apply to plain packaging laws since those laws only affect the right of a trademark holder to use his own trademarks.

Article 20: Plain packaging laws would violate Article 20, which says that governments may not "unjustifiably [encumber]" the use of a trademark by issuing special requirements. They include calling on the trademark owner to use the trademark "in a special form" (i.e., a specified format) or "in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings."

The memo argued that various provisions found in plain packaging laws do impose "special requirements" when using a trademark specifically on tobacco products. For instance, they usually require tobacco companies to print their trademarks using a specified format, including a "specific typeface, colour, and size of the letters." In addition, because plain packaging laws would prohibit the use of any trademark on a tobacco product (except the brand name), they would prevent a tobacco company from distinguishing its products from those made by others.

These special requirements also constitute an "unjustifiable encumbrance" on the use of trademarks, argued the memo. Because the WTO has not defined the term "unjustifiable," the memo instead used a standard set by various academics - a government measure limiting the use of trademarks is unjustifiable when the results are disproportionate compared to a trademark's loss of distinctiveness. Under this standard, plain packaging laws are "out of all proportion" in several respects, said the memo. For example, these laws "[prohibit] the use of most tobacco trademarks altogether, and therefore causes a complete loss of the trademark's distinctiveness." In addition, the memo said that these laws would not even reduce the incidence of smoking, claiming that no scientific study had shown that they would definitely work. Furthermore, it argued that the government could have implemented "less intrusive measures" (such as educational campaigns) which have been shown to reduce smoking while still protecting intellectual property rights.

Article 8(1): Supporters of plain packaging laws cite Article 8(1) – which says that WTO nations may "adopt measures necessary to protect public health . . . provided that such measures are consistent with the provisions of this [TRIPS] Agreement" – to justify plain packaging laws. Restricting the use of most trademarks on tobacco products, they say, is necessary to protect public health.

But to show that a measure is "necessary," supporters must prove that no other measure would help reduce smoking, but they had failed to so do, in the memo's opinion.

First, the memo claimed that no study has shown that plain packaging laws had actually caused and led to a decline in smoking. Because no such studies exist, it would be difficult for a government to claim that such laws are necessary to protect public health.

Second, while Article 8(1) does, indeed, allow WTO member governments to adopt measures to protect public health, it also says that these measures must be consistent with the TRIPS agreement, and that their effects – according to scholars – must have the least effect on the protection of intellectual property

rights. The memo argued that many governments already had in place effective measures which not only reduced tobacco use, but which also had "no impact on intellectual property rights at all," including educational campaigns and warning labels on tobacco products. Plain packaging laws, on the other hand, would violate (and would, therefore, be inconsistent with) several provisions in the TRIPS agreement, and would also have the most detrimental effect on trademark rights since they prohibited the use of virtually all trademarks on tobacco packaging, argued the memo.

After making these arguments, the memo concluded that "WTO Member States are under a legal obligation *not* to impose plain packaging [requirements] on cigarette producers."

What's going on now at the WTO? Despite various arguments made by the Lalive memo on how Australia's plain packaging law will violate WTO rules, Australia in April 2011 sent a formal notification (G/TBT/N/AUS/67) to the WTO concerning its plans to introduce and implement that law. In response, several nations with tobacco industries, including the Dominican Republic, Ecuador, Honduras, Mexico, Nicaragua, the Philippines, and Ukraine (along with many influential business organizations), expressed their opposition. For example:

- The Dominican Republic said that it had "serious and grave" concerns about the legality of Australia's proposed laws under the TRIPS agreement, citing many of the objections made by the legal memo from Lalive. A statement issued in June 2011 by a group of influential business associations, including the U.S. Chamber of Commerce and the U.S. Council for International Business, among others, stated: "Plain packaging [laws] risk establishing a precedent of IP destruction for an entire industry through government mandate that would be very damaging to the legitimate interests of trademark owners to associate their brands with their products . . ."
- Tobacco companies, including British American Tobacco Australia Ltd. (or BATA), argued that a plain packaging law would compel it to lower prices for its products. Because all cigarette packaging would look identical except for the name brand, it would have to lower its prices to compete with other brands. Doing this, in turn, would only encourage more people to smoke, it claimed. To prevent this development, the Australian government noted that it had the power to implement a range of measures such as raising excise taxes.
- Several nations and companies argued that plain packaged tobacco products "would be easy to counterfeit, and lead to a flood of illegal Asian tobacco on the Australian market on which tax isn't paid." BATA said that its own studies showed illegal tobacco products made up more than 15 percent of the Australian tobacco market, and that Australia had lost over AU\$1 billion in tax revenues from these counterfeit goods. In response, the government noted its own survey which revealed that only 0.3 percent of Australians had used illegal tobacco products half the time or more when smoking, and said it would continue to enforce its laws against the illicit trade of tobacco.

In November 2011, Pascal Lamy, the Director-General of the WTO, met with his counterpart of the WHO's *Framework Convention on Tobacco Control* to discuss whether WTO rules and provisions in the Tobacco Convention conflicted with each other. He later announced that "after proper review by our staffs

[we found] there is not a single problem between the Tobacco Convention and WTO rules." He added: "When sovereign nations agree on an important health issue like tobacco, on areas which have trade consequences, if they agree in substance on what they will do together multilaterally, then the WTO is not a problem."

The first legal challenge to Australia's plain packaging law

Rather than waiting for a WTO member government to challenge Australia's plain packaging law, one tobacco company, Philip Morris Ltd. – which is "the world's largest tobacco company by revenue," according to the *Wall Street Journal* – announced in June 2011 that it would do so directly through a separate bilateral treaty signed between Australia and Hong Kong in 1993. It pointed out that Philip Morris Asia Limited (or PM Asia, based in Hong Kong) currently owns its operations in Australia, and, therefore, could use that treaty to challenge the proposed law.

The treaty – formally called the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments – calls on those state parties to protect the investments made by private investors in each other's territory. (Legal analysts generally refer to these agreements as bilateral investment treaties or BITs.) The Hong Kong-Australia BIT defines investment as "every kind of asset owned or controlled by investors of one Contracting Party," including "intellectual property rights . . . with respect to copyright, patents, trademarks, [and] trade names."

Unlike forums such as the WTO where only governments may file claims against other governments, BITs – including the one between Australia and Hong Kong – allow private investors to sue a government directly for damages arising from what they believe are violations of the terms of the BIT. These private investors generally don't even have to file claims in the domestic courts in the host state.

Why would a nation decide to sign a BIT which allows private parties to bypass domestic courts? "Historically, capital-exporting

An example of the plain packaging of cigarettes in Australia.

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states have insisted on this strong form of dispute settlement to insulate their economic actors from the under-developed regulatory and judicial institutions of developing and transition economies," said Prof. Jürgen Kurtz, who is the Director of the International Investment Law Research Programme at Melbourne Law School.

How do private investors and governments resolve their disputes under a BIT? Depending on the BIT, parties which cannot reach a settlement usually resolve their claims through arbitration in a variety of settings such as the International Chamber of Commerce in Paris and the International Centre for Settlement of Investment Disputes at the World Bank. Arbitration allows the parties themselves to choose a panel of experts to resolve their dispute using a process which is quicker (and has more flexible rules) than litigation and can be carried out of public view, according to the Conflict Research Consortium at the University of Colorado. It also notes that arbitration decisions are binding and cannot be appealed to another body.

In the case of Australia's plain packaging law, PM Asia in June 2011 filed a "notice of claim" against Australia where it laid out its objections to the law.

First, it argued that Australia will violate Article 6 of the Hong Kong-Australia BIT. Under that article, if the parties expropriate (i.e., seize) the other party's investments (or implement other measures which have a similar effect), the expropriation must be carried out "under due process of law" and also "for a public purpose related to the internal needs of that Party." And under PM Asia's interpretation, even when parties legitimately expropriate another party's investments, they must still provide compensation equivalent to the "real value of the investment immediately before the deprivation" had occurred.

Passing a plain packaging law, argued the claim, would be the equivalent of expropriating PM Asia's investment in that nation without providing compensation. How so?

The claim said that PM Asia's intellectual property (i.e., its trademarks) is considered investments under the 1993 BIT. These trademarks play "a critical part in distinguishing Philip Morris' products from competitors' products" in the Australian market, argued the claim, adding that PM Asia's "business in Australia and elsewhere is built on the recognition of its brands and the consequent commercial advantage that recognition brings." By prohibiting the use of trademarks under a plain packaging law, PM Asia's products "will not be readily distinguishable to the consumer from the products of its competitors," and, as a result, "Philip Morris's business in Australia will be severely affected," and could cause "significant financial loss, potentially amounting to billions of dollars."

So passing the plain packaging law would have the same effect as directly expropriating PM Asia's trademarks – both actions would supposedly lead to significant financial losses. Under Article 6, Australia cannot pass the law without providing compensation, argued the claim.

In a response issued in December 2011, the Australian government argued that regulatory measures adopted to protect public health "do not amount to expropriation, are not equivalent to expropriation, and do not give rise to a duty of compensation."

Second, the claim argued that the passage of the plain packaging law will violate Article 2 of the 1993 BIT under which both

parties must treat the investments from the other party in a "fair and equitable" manner.

But the law is not fair, it argued. While the main purpose of the plain packaging law is to reduce the prevalence of smoking in Australia, the claim said that "there is no credible evidence that plain packaging will reduce smoking prevalence." It then questioned why the Australian government was pursuing a plain packaging law when it could use other methods shown to affect smoking rates (such as educational campaigns) without "severely" curtailing the intellectual property of tobacco companies.

In response, the Australian government said that its "plain packaging initiatives are based on a broad range of studies and reports, and supported by leading Australian and international public health experts." It added that plain packaging is "not an alternative to other tobacco control measures, but is an integral part of the comprehensive suite of measures by Australia to respond to the public health problems caused by tobacco."

The claim also said that the law is not equitable, arguing that the "benefits of the legislation (if any) are entirely disproportionate to the harm it will cause to PM Asia's investments," including harms to its intellectual property rights which allow it to differentiate is products from others. In response, the Australian government said that the law "does not prevent product differentiation or identification" because it still allows tobacco companies to use brand names on their packaging.

The government then questioned PM Asia's sincerity in arguing that it did not treat that company in a fair and equitable manner. PM Asia, pointed out the government, had in February 2011 bought shares (i.e., it made investments) in Australia's tobacco industry "in full knowledge and with the expectation that the Australian Government would implement [a] plain packaging measure." (The government had made its announcement in April 2010, nearly 10 months earlier). Investors, argued the government, cannot claim any breaches to the 1993 BIT if they decide to make their investments in another nation knowing that its government will enact certain public health measures which will affect the value of their investments.

After filing its claim, PM Asia said that it wanted the Australian government to "cease and discontinue all steps toward enacting plain packaging legislation." Under Article 10 of the 1993 BIT, if the two sides do not reach an agreement on how to resolve their differences, an international arbitration panel will decide the matter. A spokesperson for Philip Morris said that the company could seek "billions of dollars" in compensation if the Australian government passes the law.

Canada and plain packaging: A preview of what will happen in Australia?

Philip Morris's legal challenge to Australia's plain packaging law is similar to a previous one involving Canada. In June 1994, the Standing Committee on Health (of Canada's House of Commons) issued a report – *Towards Zero Consumption: Generic Packaging of Tobacco Products* – which recommended that the Canadian government pass legislation requiring the plain packaging of tobacco products, but only if a study by a designated expert panel showed that "such packaging will reduce consumption" of tobacco. (The standing committee did not describe the exact provisions of a possible plain packaging law. But it did mention

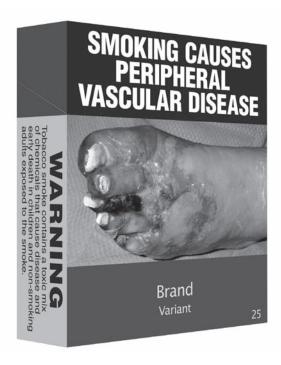
recommendations which would prohibit tobacco companies from using nearly all trademarks on their packages, and would also impose a standardized typeface and font size for name brands.)

In May 1994, U.S.-based R.J. Reynolds Tobacco Company (which is separate and unaffiliated with Philip Morris) argued that a plain packaging law would prevent its wholly-owned Canadian subsidiary from using its trademarks on products sold in Canada, and would, therefore, affect its investments in that nation – all in violation of several international treaties, including one with provisions similar to the 1993 Hong Kong-Australia BIT. How so?

In a letter dated in May 1994 to the Standing Committee on Health, the company said that "trademarks are the most valuable assets of Reynolds." Examples included the brand names *Camel, Vantage*, and *Winston* along with their distinctive combination of colors, illustrations, and typefaces, all of which allowed consumers to distinguish Reynolds' tobacco products from similar ones made by competitors. Developing the image and reputation of these trademarks in Canada took "many years of effort and investment," said Reynolds, which (according to its own estimates) valued the trademarks at over \$8 billion.

But a plain packaging law preventing the use of what Reynolds described as "world famous" trademarks would "severely impair consumers' ability to distinguish one product from another." So they might mistakenly buy another brand instead. Also, a plain packaging law would make it easier for unscrupulous businesses to counterfeit Reynolds products. Overall, these developments – which would come directly after the passage of a plain packaging law – will lead to large commercial losses for Reynolds in Canada, said the company. Therefore, such a law represents an "attack" on Reynolds' investments and trademarks in Canada.

Reynolds then argued that, under several international treaties, Canada has obligations (as a signatory nation) to protect the investments and intellectual property rights of foreign investors within its jurisdiction, and that a plain packaging law attacking these investments and trademarks would violate these obligations. According to a legal memo written by the law firm



Another example of the plain packaging of cigarettes in Australia.

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Mudge Rose Guthrie Alexander & Ferdon (which dissolved in 1995) on behalf of its client Reynolds, a plain packaging law would violate several provisions of the TRIPS agreement. It used arguments which largely mirrored those made by the 2009 Lalive memo of behalf of Philip Morris. (See the section "Australia's plain packaging law: Violating World Trade Organization rules?" on page 21.)

In addition, the Mudge Rose memo argued that a plain packaging law would violate several provisions in the North American Free Trade Agreement (or NAFTA), which Canada joined in 1994. NAFTA is a trade agreement designed to open up markets in NAFTA member nations (i.e., Canada, Mexico, and the United States) to more competition by progressively eliminating almost all barriers to trade. The actual NAFTA agreement itself is divided into many chapters which sets the rules of trade among these nations in specific areas such as financial services and telecommunications, among many others. The agreement also has a chapter which sets the rules for intellectual property matters. While the NAFTA agreement allows parties to violate their obligations for health and safety reasons, these exceptions don't apply to the chapter concerning intellectual property.

In what ways will a plain packaging law violate NAFTA? First, the Mudge Rose memo said that it would violate Article 1701 of the NAFTA agreement, which calls on member nations to provide "to the nationals of another Party adequate and effective protection and enforcement of intellectual property rights." By preventing tobacco companies from using most of their trademarks, a plain packaging law would "substantially degrade the value of the distinctive packaging" of their products, hence denying companies adequate protection of their intellectual property rights under that article, argued the memo.

Second, such a law would violate Article 1708(10), which says that "no Party may encumber the use of a trademark in commerce by special requirements, such as a use that reduces the trademark's function . . ." By possibly requiring all tobacco companies to make their products using the very same packaging along with a standardized typeface and font size for their brand names, the plain packaging law would impose a special requirement which essentially eliminates the very function of a trademark, said the memo.

Third, it argued that enforcing a plain packaging law would expropriate the investments (largely embodied in Reynolds' trademarks) made by foreign tobacco companies, and that Canada would have to provide compensation to them. Under Article 1110(1), a nation may not directly nationalize or expropriate the investment of a foreign investor (or take measures which are tantamount to these actions) unless it is done for a public purpose and does not discriminate against foreign investors. If such measures are carried out, the government doing so must still provide compensation to the foreign investor.

But is a trademark considered an "investment" under NAFTA? Yes, answered the memo, which pointed out that Article 1139(g) defines investment as "real estate or other property, tangible or intangible." In its view, a trademark is an example of intangible property. Also, while NAFTA nations may implement health and safety measures (such as those whose aim is to reduce smoking) which violate their NAFTA obligations, these exceptions (as noted previously) don't apply to intellectual property matters.

Because a plain packaging law would prevent tobacco companies from using most trademarks on their products, Canada would, in effect, be expropriating them (which, again, the memo views as investments). And under Article 1110(1), when Canada expropriates a foreigner's investments, it must provide compensation. In the specific case of foreign tobacco companies and their trademarks, such compensation could amount to "hundreds of millions of dollars."

Who would decide whether a NAFTA host state had violated its treaty obligations and whether it would have to provide compensation? Similar to the 1993 Hong Kong-Australia BIT, the NAFTA agreement allows a private party (from a NAFTA member nation) to file an arbitration claim directly against a NAFTA government, but only in cases concerning investments. All other disputes arising under NAFTA (such as those involving, say, telecommunications and financial services, among other areas) can only be brought by one government against another.

Coming back to the Reynolds case in Canada, analysts said that the expert panel did not unequivocally conclude that plain packaging would reduce consumption of tobacco products. In December 1996, Canada's minister of health, David Dingwall, said to the Standing Committee on Health that he would not pursue a plain packaging law, citing constitutional concerns and potential violations of intellectual property rights.



Uruguay's graphic health warning requirements

Along with plain packaging laws, some tobacco companies say that they oppose – in specific instances – laws which require them not only to print written warnings on the dangers of smoking on their cigarette packages, but also color graphic images (also called pictograms) depicting the health effects of smoking.

According to the media, more than 40 countries require cigarette packages to include graphic warnings which have ranged from "gangrenous limbs" to "drooping cigarettes warning of erectile dysfunction," among other explicit images. The Framework Convention Alliance says that "a growing number of countries have adopted warnings larger than 50% as an average of the front and back of a package: these include Australia (60%), New Zealand (60%), Belgium (56%), Switzerland (56%) and Finland (52%)." And surveys have consistently found that "the majority of smokers . . . support large warnings that include pictures." Still, many tobacco companies oppose graphic warning requirements.

In a prominent and ongoing case, Switzerland-based FTR Holding S.A. (a subsidiary of Philip Morris International) requested arbitration proceedings against Uruguay in February 2010 – in a case called FTR Holdings S.A. (Switzerland) et al. v. Oriental Republic of Uruguay – to stop that nation from requiring tobacco companies to print government-supplied graphic images on their cigarette packaging which are supposed to show the "adverse health effects of smoking." It also wants Uruguay to stop

Government's sovereign right to promote and protect public health." But it did believe that both the pictogram and written health warning requirements violated the terms of the 1991 BIT. After failing to reach a settlement, FTR and Uruguay each appointed an arbitrator in September 2010 to argue their case (which is still ongoing) at the International Centre for Settlement of Investment Disputes at the World Bank on two primary issues.

Objections to Uruguay's pictograms: In August 2008, the Ministry of Public Health passed *Ordinance 514(1)*, which says that cigarette packages must include government-supplied pictograms warning the public about the health effects of smoking. They include images of smoke-stained teeth, a woman in a hospital bed, and what seems like a crying premature baby with a burned face.

FTR said while it had "no per se objection to regulations requiring pictograms," it argued that Uruguay's particular pictograms did not "warn of the actual health effects of smoking or otherwise promote legitimate public health policies." Rather, "they are highly shocking images that are designed to involve emotions of repulsion and disgust, even horror," said FTR. "It is difficult to understand what meaningful information can be drawn" from the image of the burned baby. Consumers will then begin to associate these pictograms with its products. In turn, such a development will "undermine and indeed destroy" the good will and reputation of its trademarks in Uruguay, "thereby

In a prominent and ongoing case, a subsidiary of Philip Morris International requested arbitration proceedings against Uruguay to stop that nation from requiring tobacco companies to print government-supplied graphic warnings on their cigarette packaging. It also wants Uruguay to stop requiring them from covering 80 percent of the front and back of their cigarette packaging with written health warnings.

requiring them from covering 80 percent of the front and back of their cigarette packaging with written health warnings. (Analysts say that Uruguay has taken progressively stricter measures since the late 1960s to discourage people from smoking.)

In 1991, Switzerland and Uruguay signed a bilateral investment treaty (or 1991 BIT) which calls on each nation to give certain protections and rights to the other nation's investors and investments, and also allow private parties to bring claims directly against a government. The 1991 BIT says that investments include "rights in the field of intellectual property" such as trade or service marks. (For more background on BITs, read the section "The first legal challenge to Australia's plain packaging law" on page 24.)

FTR currently owns Uruguay-based Abal Hermanos (or Abal, a domestic tobacco company), which manufactures cigarettes using the *Marlboro* brand name, among many others. These brand names are registered as trademarks (and receives trademark protection) in Uruguay. As a foreign investor, FTR said that it had made substantial investments in Uruguay, which include the construction of "significant manufacturing facilities" and heavy investments in promoting the goodwill and reputation of its trademarks in that nation for many years.

When filing its complaint, FTR (which is represented by law firm Lalive) said that it did not "challenge the Uruguayan

depriving them of their commercial value," claimed the company. Article 3(1) of the 1991 BIT, noted the company, prohibited Switzerland and Uruguay from imposing "unreasonable" measures on each other's foreign investments. In FTR's opinion, *Ordinance*

514(1) was unreasonable. "Pictograms specifically designed to associate the Claimants' products and their trademarks with offensive and repulsive imagery are neither necessary nor justified to warn consumers of the health risks associated with smoking – a goal that can be reached without denigrating the Claimants' products, and without destroying their legally protected trademarks," alleged the claim. But while FTR opposes the government-supplied pictograms, it did not say what kinds of images would be more appropriate in showing the health effects of smoking.

Uruguay has not publicly announced how it would defend its choice of pictograms. But a group called Physicians for a Smoke Free Canada had commissioned a Canadian lawyer and arbitrator (Todd Weiler) to publish a report which analyzed possible legal arguments which FTR could use in challenging Uruguay's antismoking regulations. (The group published the report – Philip Morris vs. Uruguay: An Analysis of Tobacco Control Measures in the Context of International Investment Law – before FTR had made its written claim available to the public.)

The report did not directly address the reasonableness of Uruguay's choice of pictograms. But it did say that when an investment tribunal decides whether a certain measure is reasonable or not, it would be "obliged to accord considerable deference to both legislative and regulatory authorities in undertaking its review." The report added that "it is generally not the place of an international tribunal to second-guess the policy choices of a Host State . . ."

FTR also noted in its complaint that Article 5(1) of the 1991 BIT prohibits measures which expropriate or have the effect of expropriating a foreign investment unless they are carried out under due process of law, are taken in the public interest, and provide adequate compensation. Destroying the good will and reputation of its trademarks in Uruguay by associating them with "shocking and sensational images" is effectively an indirect expropriation of its investment in Uruguay, said the company. Without providing compensation (as required under Article 5(1)), Uruguay would be in violation of the 1991 BIT.

But the report issued by Physicians for a Smoke Free Canada argued that the obligation to pay compensation for indirect expropriation does not apply in cases where a measure has been "adopted and applied in good faith for the protection of legitimate public welfare objectives such as health, safety, and the environment." It concluded that "Uruguay should succeed in arguing that even if [FTR's] intellectual property investments have been effectively taken as a result of its measures, no compensation is owned."

Objections to Uruguay's written health warnings: In June 2009, Uruguay issued Decree 287/009 which calls on tobacco companies to increase the size of written health warnings printed on cigarette packages from 50 percent on both the front and back of packages to 80 percent. Many nations have long had laws which require tobacco companies to print health warnings on their cigarette packages. But FTR claimed that the "80 percent health warning [on both sides of a cigarette package] is novel and has not been introduced by any other country."

In its claim, why does FTR object to the size of the health warning requirement? First, it argued that *Decree 287/009* "severely and unfairly restricts" the use of its legally protected trademarks in Uruguay. How so? The size of the warning, argued the company, prevented it "from using the trademarks in their proper, legally protected form, and, therefore, effectively deprives the Claimants of their rights to use the trademarks." But the report issued by Physicians for a Smoke Free Canada said that it was "unrealistic" for Uruguay to believe that "it would enjoy the unfettered use of its [trademarks] in perpetuity" in a nation which had taken progressively stricter measures to discourage smoking. While the report acknowledged that the written health warnings did interfere "substantially" with FTR's use of its trademarks, it added that "there is a valid and overwhelming public policy basis for these measures."

Second, FTR argued that because the new 80 percent health warning requirement (in its own view) did not "bear any rational relationship to a legitimate governmental policy," it was unreasonable, and therefore violated Article 3(1), which, again, prohibits both nations from imposing "unreasonable measures" on each other's foreign investments. In the company's opinion, a 50 percent health warning requirement in other nations seemed to be "sufficient" in warning consumers about the dangers of smoking —

all without "destroying the ability to use established trademarks."

Third, as in the case of the pictograms, the company argued that because the 80 percent health warning requirement prevented the company from using its trademarks (which it says is a form of foreign investment) in Uruguay, the health warning requirement should, therefore, be considered an indirect expropriation of its investments under Article 5(1) for which it should receive compensation.

While FTR has not yet resolved its dispute with Uruguay, the Director-General of the WHO (Margaret Chan) criticized tobacco companies in November 2011 for filing arbitration claims against nations such as Australia and Uruguay in an effort to overturn some of their anti-smoking laws. "These countries," said Chan, "are now being targeted by Big Tobacco because these countries are doing their jobs to protect their people by imposing public health measures to stop tobacco from killing people."

U.S. lawsuits against graphic warning labels

The United States is also engaged in a legal battle which will determine whether the federal government may require tobacco companies to place graphic warning labels on cigarette packages under the 2009 Family Smoking Prevention and Tobacco Control Act which tries to prevent adolescent tobacco use. (For more background on the Act's specific provisions, read page 19.)

In the area of warning labels, the Act will revise regulations which currently require companies to print a brief health warning from the U.S. Surgeon General on the side panel of cigarette packages such as "Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy." Beginning in 2012, tobacco companies must print the word "WARNING" (in 17-point capital letters) on all cigarette packages followed immediately by one of nine messages, including "Cigarettes can cause fatal lung disease," "Smoking will kill you," and "Quitting smoking now greatly reduces serious risks to your health." They must also print nine government-selected "color graphics depicting the negative consequences of smoking."

Both the text and graphic warnings must appear together in labels which cover "the top 50 percent of the front and rear panels of the package." According to the *New York Times*, "studies suggest that pictorial warnings are better at getting the attention of adolescents than ones that feature only text."

The first lawsuit: In Commonwealth Brands, Inc., et al. v. United States of America, et al. (filed in August 2009), several tobacco companies argued that the provision requiring them to create labels displaying both text and graphic warnings of the health risks of smoking which cover 50 percent of the front and rear panels of cigarette packages would violate their right to commercial speech because these warnings were unjustifiable (i.e., they were unnecessary). How so?

First, because "the record demonstrates that the public – both adults and youth – is not only fully aware of those risks, but, in fact, substantially overestimates them," there is no need for these larger warnings. Second, the tobacco companies argued that the text warnings were not "purely factual and uncontroversial information," but, instead, subjective statements which will be forced upon and turn them into "mouthpieces for a Government marketing campaign." (Analysts note that the government had not yet even created its graphic warnings during the lawsuit.)

In addition to unjustifiably violating their right to commercial

speech, the tobacco companies said that the 50 percent space requirement for text and graphic warnings was too large, and, as a result, "completely drown[ed] out" its commercial speech on cigarette packaging.

Furthermore, the 50 percent requirement would make their branding "difficult, if not impossible, to see," and would essentially deprive them of their trademarks without just compensation.

In a decision issued in January 2010, Judge Joseph McKinley, Jr., of U.S. District Court (Western District of Kentucky) upheld the provision requiring tobacco companies to display both text and graphic warnings on the risks of smoking, saying that the government was justified in doing so. He disputed the

the First Amendment's protection against compelled commercial speech. (The lawsuit did not challenge the legality of the nine text warnings.)

According to several Supreme Court decisions, the First Amendment's right to free speech protects not only the right to speak, but also "the right to refrain from speaking at all." It added that "the choice to speak includes . . . the choice of what not to say." So a law compelling a speaker to say or express some form of speech he would not otherwise make would be "presumptively unconstitutional."

But the Court added that, to protect consumers from "confusion or deception," the government may require commercial speech

Beginning in 2012, tobacco companies in the United States must print the word "WARNING" (in 17-point capital letters) on all cigarette packages followed immediately by a written health warning, and also accompanied by one of nine government-selected "color graphics depicting the negative consequences of smoking." While one federal judge upheld these requirements, another struck them down.

plaintiffs' claim that the "public already appreciate[d] the health risks associated with using tobacco products" by highlighting several studies which showed that people gave "little attention or consideration" to current warnings on the side panels of cigarette packaging. The decision cited other studies showing that the use of graphic warnings would help communicate the dangers of tobacco use to people with "low levels of education."

The decision also said that government's text warnings were "objective" and have "not been controversial for many decades." (The judge did not address the objectivity of any graphic warnings only because the government has not yet released them.)

Furthermore, the judge dismissed the contention made by the tobacco companies that the new warnings were too large. It said that there seemed to be an international consensus (as embodied in the Tobacco Convention) that nations should require health warnings covering 50 percent of cigarette packages. It also cited studies from Canada where an overwhelming percentage of youth and adult smokers said that large graphic warnings "have been effective in providing them with important health information."

Finally, the Court decided that it did not have jurisdiction to determine whether the warning label requirement deprived tobacco companies from using their trademarks without just compensation.

The tobacco companies said that they would appeal the court's decision, and legal analysts believe that this case could one day reach the Supreme Court.

The second lawsuit: In June 2011, the FDA announced that it had selected its final nine graphic images which would be paired with the nine text warnings concerning the health risks of smoking cigarettes. They include a corpse on an autopsy table, a crying baby in an incubator, tobacco stained teeth along with a cancerous lip, and a man blowing tobacco smoke through a hole in his throat.

The following month, a lawsuit (Reynolds Tobacco Company, et al. v. United States Food and Drug Administration) filed by four tobacco companies in U.S. District Court for the District of Columbia argued that the Act's provision requiring them to place these nine graphic warnings on their cigarette packages violated

(such as printing written and graphic warning labels on certain products), but only in cases where the speech is "purely factual" and "uncontroversial," and also if they are "narrowly tailored to achieve a compelling government interest."

In November 2011, Judge Richard Leon ruled in favor of the plaintiffs, saying that the nine mandatory graphic images did not meet the criteria which allow compelled commercial speech under the First Amendment.

First, the decision concluded that the content of the nine graphic images did not convey speech which was purely factual and uncontroversial. It noted, for example, that the FDA (in its own words) had "technologically modified" some of the images to show the health risks of smoking, and that it had chosen the nine images not because they seemed to convey factual information in an effective manner, but primarily because they had evoked the most emotion from people who had viewed them during a study. Modifying photos to evoke the most emotion "would seem to contravene the very definition of 'purely factual,'" said Judge Leon.

Second, the decision concluded that the government did not demonstrate a compelling interest in forcing the plaintiffs to print the nine graphic warnings on their cigarette packages. In fact, the judge said that "an analysis of the Government's compelling interest . . . has been seriously clouded by the Government's own explanation of its goals, which are, to say the least, unclear." While the government said that the primary purpose of the graphic warnings was to inform people of the health risks of smoking (thus allowing them to make their own decision on whether to smoke or not), the judge believed that the government was, instead, advocating "a change in consumer behavior." The ruling added that "appropriating the top 50% of the front and back of all cigarette packages . . . is hardly a directive narrowly tailored to achieve the Government's purpose (whatever it might be)."

He ordered the FDA not to enforce its regulation requiring tobacco companies to include the nine chosen graphic images on their cigarette packaging until the district court had an opportunity to examine the issues further in later proceedings. Observers say that both the government will appeal the decision.

No place to call home: The status and rights of stateless people

any people strongly identify themselves as being a citizen of a certain state. Those from the United States would say, "I'm an American." A national of Brazil may stitch a patch of the Brazilian flag on his clothing. During sporting competitions, a person from England may paint the colors of the Union flag on his face. And when people travel abroad, they know that their embassy will provide them with certain protections simply for being a citizen of their respective nations.

But what if you are not a citizen of any state? What if no country in the world claims you as one of its nationals? Strange as it may sound, human rights groups say that millions of people around the world are actually stateless. How do people become stateless? What is the extent of statelessness in the world today? What are the dangers of not having a nationality? Are there international treaties which address statelessness? And where does this issue stand today?

Being a citizen and being stateless

Citizenship is a concept which people largely take for granted. But being a citizen of a certain nation gives them with a special status compared to non-citizens. When a government grants citizenship (also called nationality) to a person, it provides him with and promises to protect certain fundamental rights. Citizenship, according to the Human Rights Commissioner of the Council of Europe, is "the right to have rights."

Depending on a particular nation, some of these rights may include the right to public education, access to social security programs, the right to public health services and hospital care, the right to purchase property, the right to vote and participate in the political process, and the right to travel in and out of the country of citizenship. These rights also create a common sense of identity among the citizens of a nation, according to an agency called the United Nations High Commissioner on Refugees (or UNHCR).

Under the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Law, every government has the sovereign right to determine who may become a citizen of its nation. Specifically, Article 1 says: "It is for each State to determine under its own law who are its nationals." Although various other treaties prohibits nations from discriminating against people based on factors such as ethnicity and religion when granting certain rights or benefits (including citizenship), they still have the last word in determining who receives citizenship.

While most people are citizens of a particular nation, many others aren't citizens of any state whatsoever. They are, according to human rights groups, "stateless" and without any nationality. According to Refugees International (a non-profit humanitarian organization), stateless people are "essentially international orphans" who don't have the protection of any government.

Stateless persons are not synonymous with, for instance, internally displaced persons who are those fleeing from their homes to another part of their country because of civil war, violence, or natural disasters. Internally displaced persons "have not crossed an international border to find sanctuary but have remained inside their home countries," says UNHCR. And "...

as citizens [of their country], they retain all of their rights and protection under both human rights and international humanitarian law."

Stateless people are synonymous with refugees. Under the 1951 Convention relating to the Status of Refugees, refugees are people who flee their country of citizenship because of a "well-founded fear of persecution" based on factors such as political opinion, race, and religion, among others, which prevent them from returning to that country. Under the 1951 convention, refugees who flee to another country and receive asylum status are entitled to many benefits and protections.

On the other hand, stateless persons cannot claim persecution solely on the basis of being stateless. (But legal experts do point out that some refugees are, in fact, stateless yet face real persecution.) "Stateless people," says Dan Glickman, the president of Refugees International, "are perhaps even more vulnerable than refugees due to their near-total lack of ability to exercise their human rights."

The scope of statelessness in the world today

The population of stateless people around the world today stands at around 12 million, according to estimates from UNHCR and various human rights organizations. For various reasons, they say it has been difficult to determine a more accurate count.

Many governments may, for example, fear international embarrassment if they released more precise data on the number of stateless persons residing within their territories. In addition, some stateless people may not want to report their status to local authorities because they fear persecution and deportation, according to a 2005 report by Refugees International, which has

compiled some of the most comprehensive research on stateless people. Furthermore, as the world community gives much more media attention to groups such as refugees who sometimes face immediate persecution, it loses interest in the plight of others not facing imminent danger, including stateless people.

While citizens of specific nations receive many important benefits and protections, stateless people face real and, in many cases, life-threatening hardships, reports Refugees International. Many nations, for example, bar stateless people (who usually don't have any official identification) from finding employment. As a result, many must seek under-the-table work which pays much lower wages. Because human traffickers are aware of this situation, they prey upon young stateless women, pushing many into prostitution and forced marriages. Even when caught, traffickers often escape justice as courts struggle to prove the age of stateless children who lack documentation such as birth certificates.

Even if they are earning an income, stateless people often lose their money and other valuable assets because banks may prohibit them from opening accounts without proper identification. And those who do have bank accounts may lose access to their money if they cannot prove that it belongs to them by showing some form of identification.

Unlike citizens who receive passports from their governments so that they may travel around the world, stateless people cannot calling for an end to its military rule. In addition to the Burmese refugees, Thailand also has an indigenous hill tribe population of 400,000 people, including the Akna, Hmong, Karen, and Yao tribes. The Thai government has largely denied both groups from becoming citizens even though many were born in Thailand. Without the benefits and protection of Thai citizenship, analysts say that these two groups of stateless people cannot buy land, legally work, or vote. They also regularly face dangers such as exploitation and trafficking.

In another example, Refugees International says that in the Democratic Republic of Congo (or DRC, once known as Zaire), approximately 300,000 to 400,000 members of an ethnic group called the Banyamulenge remain stateless. The Banyamulenge – ethnic Tutsis who originally came from neighboring Rwanda – became stateless in 1981 when Zaire revoked a previous decree which had granted them citizenship. (Analysts say that Zaire had feared the growing economic and political power of this group.) Today, the Banyamulenge remain largely stateless in the DRC and have little economic or social benefits. Also, DRC authorities and their supporters have targeted this group for rape, pillaging, and torture, according to testimony gathered by the Equal Rights Trust, an international organization fighting against discrimination.

In the Middle East, millions of Palestinians remain stateless. At the creation of the state of Israel in 1948, armies from

While most people are citizens of a particular nation, many others aren't citizens of any state whatsoever. They are, according to human rights groups, "stateless" and without any nationality. According to Refugees International (a non-profit humanitarian organization), stateless people are "essentially international orphans" who don't have the protection of any government.

travel freely over international borders.

Stateless children also face difficulties. Because many public education systems ban non-citizens from enrolling and attending school, stateless children find themselves at a significant learning disadvantage. National welfare systems around the world block stateless persons of all ages (even infants) from receiving health services. Refugees International notes that stateless "infants bear the brunt of a lack of prenatal care for their mothers and . . . postnatal medical care, including immunizations."

Because many nations refuse to deal with statelessness within their borders, stateless people usually remain stateless for long periods of time, depending on where they currently reside and also on national circumstances and various laws. While some may remain stateless for a few years, others can remain stateless for decades or even a lifetime.

Despite the lack of more concrete data, statelessness affects every area of the world, say experts. Thailand, for example, has one of the largest concentrations of stateless people with government estimates ranging from two to 2.5 million, reports Refugees International. This stateless population includes hundreds of thousands of Burmese refugees who had fled to Thailand during the 1980s after Burma (now called Myanmar) suppressed protests

neighboring Arab nations invaded that new nation. During the fighting, hundreds of thousands of Palestinians residing in Israel fled to and settled in the West Bank. In 1950, Jordan annexed the West Bank and granted Jordanian citizenship to the Palestinians residing there. Israel then gained control of the West Bank from Jordan in 1967 during the Six-Day War. In 1988, Jordan revoked the Jordanian citizenship of Palestinians living in the West Bank, leaving hundreds of thousands stateless.

According to a report from Human Rights Watch, Jordan had also stripped the citizenship of over 2,700 Jordanians of Palestinian descent between 2004 and 2008. While the report said that this practice had "no clear basis in law," the Jordanian government defended its practice, saying that it was "a means to counter any future Israeli plans to transfer the Palestinian population of the Israeli-occupied West Bank to Jordan."

In Serbia, stateless Roma – a nomadic ethnic group which had been living across Eastern Europe for hundreds of years – number between 250,000 and 500,000 people, according to Amnesty International. Since their settlement in Serbia, its government has historically denied recognition or citizenship to the Roma, leaving them stateless even though several generations were born in that nation.

How do people become stateless?

The previous examples show just a few ways of how people become stateless. Nations and territories which undergo dramatic political upheaval — such as cases where collapsing governments are replaced by new ones or where former territories become newly independent states — often enact new citizenship laws which end up leaving many people stateless. For instance, after the collapse and break-up of the Soviet Union, the new Russian government set a two-year period where it granted citizenship to those living within its modern-day borders. But the thousands of people who had previously fled the former Soviet Union or who didn't reside in Russia during that two-year period did not receive citizenship.

Nations may also deny citizenship solely on the basis of a person's cultural identity, ethnicity, and religious affiliation, among many other factors. For example, experts say that many governments regularly deny citizenship to groups of minorities who refuse to assimilate into general society or because they fear that such groups may one day wield too much economic or political power. In some cases, governments have also passed discriminatory laws to prevent minorities from becoming citizens at birth, which the Dominican Republic had done to children of Haitian descent, according to a ruling released by Inter-American Court of Human Rights in 2005.

In another situation, different national laws concerning birth registration can leave newborn children stateless. A nation using *jus sanguinis* law grants citizenship to a newborn child if his parents are already citizens. On the other hand, a nation using *jus soli* law usually does not take the parents' citizenship status into consideration. It will simply grant nationality to a child born on its territory. Under certain circumstances, the confluence of these two legal systems can actually leave a child stateless. For example, a baby who is born in a nation with *jus sanguinis* law (and where the parents are non-citizens) will not receive the

husband, she may decide or have to give up her original citizenship, but would then apply for her husband's citizenship. However, if the couple decides to end their marriage, some nations have divorce laws which will strip a woman of that citizenship. But once she loses her husband's citizenship (and because she had already given up her original citizenship), a woman will become stateless.

People also become stateless when their governments forcibly expel them and then strip them of citizenship, especially in times of internal conflict such as civil wars. For instance, Refugees International said that after the Kurds – a non-Arabic Muslim group living in northern Iraq – had tried to gain autonomy from Iraq, Saddam Hussein's regime in 1980 forcibly expelled between 220,000 to 300,000 of them into neighboring Turkey and Iran, and also stripped them of their Iraqi citizenship.

Finally, some nations have administrative laws whose provisions can lead to statelessness. For example, if a citizen of a nation who is living abroad fails to register with the proper authorities during a certain time period, the administrative law may automatically take away his citizenship.

The international legal framework on addressing statelessness

Legal experts say that a patchwork of international treaties and agreements address the issue of statelessness. The scope of protections varies widely from one agreement to the next. While some call on nations to provide stateless people with certain rights, others call for much more limited protections for specific classes of people. These treaties include the following:

The Universal Declaration of Human Rights: Adopted by the UN General Assembly in 1948, the declaration calls on nations to recognize and respect a wide variety of human rights for "all peoples" such as the right to life and liberty, equal protection of the laws, and freedom from slavery, discrimination,

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citizenship of that nation. At the same time, if the parents' home nation operates under a *jus soli* system, the baby will not receive that nation's citizenship, either, simply because he was not born on its territory. So at the moment of birth, the child is stateless.

Certain marriage laws may leave women stateless, according to the Inter-Parliamentary Union, an organization which brings together members of parliament to discuss and exchange ideas. Some nations will, for instance, strip a woman of her citizenship if she marries a non-citizen. In such a case, a woman will remain stateless until she gains the citizenship of her husband's country. (But the husband's country may, for certain reasons, deny citizenship to her, in which case she could remain stateless indefinitely). In a similar fashion, under certain divorce laws, a woman could become stateless. When a woman marries her

arbitrary arrest, and detention, among many others.

Although the declaration does not explicitly mention or define the term "statelessness," Article 15 does say that "everyone has the right to a nationality," and that "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Article 15, according to UNHCR, "says clearly that statelessness should be avoided," and that "governments must therefore work to make certain that everyone holds a nationality."

However, the declaration is not considered a legally-binding treaty – it is, as its name implies, a political statement – and also doesn't provide more specific guidance on how nations must implement its various rights, including a person's right to a nationality. Still, experts note that the declaration has served as

the foundation for many treaties passed by nations in subsequent decades, including ones which directly address statelessness.

Convention relating to the Status of Stateless Persons: Adopted in 1954, this convention remains the primary international calling on nations to recognize stateless people and grant them certain rights. (Article 1 of the 1954 convention defines a stateless person as "someone who is not considered a national by any State under operation of its law.") It also requires governments to fulfill certain obligations on behalf of stateless people.

Protecting certain rights: What kinds of rights must signatory nations grant to stateless people? And do very single stateless person within their respective jurisdictions receive the same exact rights? The 1954 Convention uses a "nuanced approach," says the UNHRC, where "some guarantees apply to all stateless people while others are reserved to stateless persons lawfully present or lawfully staying in the territory." Also, the convention sets a limit on the extent to which a nation must apply these rights. For example, when applying certain rights, a nation must treat stateless people in the same way it would treat its very own citizens. But for other rights, a government must treat them in the same way it would treat other non-citizens (such as legal residents) residing within its borders. (Legal observers point out that a government would naturally give more rights to its own citizens - and protect them more vigorously - than to foreigners such as legal residents and also stateless people.)

Which specific rights must a signatory nation grant to stateless people regardless of whether they are legally in its territory and then apply them in the same way it would for its very own citizens? Under Article 4, a nation must ensure that stateless persons enjoy the freedom to practice their religion and to set their religious education of their children. Under Article 16, a nation must give stateless persons free access to courts and legal assistance. Stateless people must also have access to elementary education under Article 22.

On the other hand, a nation must grant certain rights only to those stateless people who are in its territory *legally*, but still apply them in the same way it would for its own nationals. For example, Article 23 grants the right to public relief and assistance to stateless people. Under Article 24, a nation must give various labor protections and social security benefits to stateless persons, including limits on work hours, the payment of overtime, and social security regarding employment injury, maternity leave, and unemployment benefits.

Which specific rights must a nation give to stateless people regardless of their legal status and then apply them in the same way it would for other *non-citizens* residing within its borders? Under Article 13, nations must give stateless people the right to acquire both movable and immovable property.

For stateless people who are in a territory legally, a nation must under Article 15 give them the right of association (such as joining trade unions and non-political groups), the right to find employment (Article 17), the right to self-employment (Article 18), and the right to "choose their place of residence and to move freely within its territory" (Article 26).

Obligations on the part of governments: Along with granting certain rights to stateless people, what specific obligations do nations have under the 1954 convention? Under Article 27, a country must issue "identity papers" to all stateless persons

(regardless of their legal status) who do not have valid travel documents, though it does not define that term. It must also, according to Article 28, issue "travel documents" (which is also undefined) to stateless people who are legally in its territory (and also do not present a national security or public order threat) so that they may travel outside of their territory. Article 30 further obliges a contracting nation to allow stateless persons to transfer any assets to another nation for the purpose of resettling in that nation. Under Article 31, it may expel a stateless person who is lawfully in its territory because of national security reasons, but only "in accordance with due process of law."

Clarifications: While a stateless person has many rights under the 1954 convention, experts say that it does not give him the right to obtain the nationality of the state where he currently resides. "It is important to note that the enjoyment of the rights guaranteed under the 1954 convention does not equate to possession of a nationality," said UNHCR. Instead, Article 32 says that nations must "as far as possible facilitate the assimilation and naturalization of stateless persons," expedite naturalization proceedings, and reduce the monetary burden of this entire process. But it doesn't provide any more details.

In addition, the 1954 convention also does not require contracting nations to admit stateless people who want to enter their territory. Furthermore, its provisions neither apply to stateless people who are already receiving aid and protection from a UN agency (other than those given by UNHRC) nor to those stateless people who have committed war crimes and crimes against humanity. Moreover, the convention does not tell nations how to prevent future cases of statelessness.

Experts also point out that the 1954 convention applies only to what is called *de jure* stateless people who are those people who did not receive citizenship automatically upon birth or through a legal process under a certain nation's naturalization laws. (That is to say, they never had citizenship to being with.) In contrast, a *de facto* stateless person can claim citizenship to a certain nation, but is unable to prove it because he does not have any documentation, for instance.

As of November 2011, 68 (out of 195 nations) have ratified the convention, which led UNHCR to note that "very few States are parties to this instrument." (The United States did not sign the convention.) Why haven't more nations joined the convention? Some may fear that doing so may burden their social services budgets, say several analysts. During difficult economic times, governments may fear a political backlash if they use their already limited resources to meet the needs of thousands of stateless people. Nations may also fear that the convention could slowly erode its absolute control over matters of citizenship.

Others believe that the fear of terrorism (with the possibility that a nation may accidentally provide rights and benefits to an actual terrorist who is simply posing as a stateless person) has curbed interest in signing the 1954 convention.

Convention on the Reduction of Statelessness: Adopted in 1961, this convention requires nations to adopt many safeguards to prevent new cases of statelessness. (In contrast, the 1954 convention requires nations only to grant certain rights to stateless people, as mentioned in the previous section.)

Several provisions seek to prevent, for instance, statelessness among children. Under Article 1, a nation must grant citizenship

to a person born in its territory who would otherwise be stateless, though it may set conditions such as requiring a person to have lived on its territory for a certain number of years. Article 2 calls on nations to grant citizenship to foundlings, which experts say include orphaned and abandoned children.

The 1961 convention also calls on nations to prevent statelessness due to a change in a personal status of a person. Article 5, for example, says that a nation may not take away a person's nationality after, say, marriage or divorce until that person has secured the citizenship in another nation. Under Article 7, a nation may not take away the citizenship of a person who renounces his nationality or is seeking naturalization in a foreign country until he gains another nationality.

The convention also prohibits a nation from depriving a person of his nationality under certain situations. For example, under Article 8, a nation may not deprive a person of citizenship if it would leave him stateless. But it does list certain exceptions where a state can revoke citizenship (even if it leads to statelessness) such as a case where a person obtained nationality through misrepresentation or fraud or if that person had broken an oath of loyalty. Article 9 prohibits nations from depriving a person of national based on "racial, ethnic, religious, or political grounds."

The 1961 convention further calls on nations to prevent cases of statelessness which occurs "in the context of state succession," says UNHCR. Under Article 10, for example, if a state transfers part of its territory (along with its residents) to another state, the two governments must include provisions in a treaty which are "designed to secure that no person shall become stateless as a result of the transfer." In the absence of such provisions, the state which acquires the new territory must give its nationality to the residents in that territory.

Stateless people may, under Article 11, directly file claims of violations of the convention's provisions with UNHCR. Also, as in the case of the 1954 convention, the 1961 convention protects only de jure stateless persons while recommending that countries protect de facto stateless persons.

As of November 2011 only 40 states have joined the convention. This number does not include the United States. Observers say that this low ratification rate can be attributed to the same reasons for the low ratification rate of the 1954 convention.

In addition to these two main international conventions, a patchwork of other global and regional treaties have provisions which, in part, call on nations to protect people – and, in some instances, specific classes of people – from becoming stateless. Some of them include:

Convention on the Nationality of Married Women: Passed in 1957, this treaty calls on nations to protect the nationality of women in certain situations. For example, under Article 1, nations must agree that when one of its nationals marries (or divorces) a foreign woman, such a change will not "automatically affect the nationality of the wife." Article 2 says that when a male citizen either voluntarily acquires another nationality or even renounces his own, a nation must agree not to take away the nationality of his wife. Under Article 3, nations must agree that foreign wives of its nationals may acquire her husband's citizenship "through specially privileged naturalization procedures" as long as it doesn't pose a threat to national security. As of November 2011, the 1957

convention had 74 signatory nations.

While this treaty attempts to protect the nationality of married women, legal observers point out that it does not specifically tell nations how to do so. It does not, for instance, explicitly require nations to pass, say, legislation to prevent married women from losing their nationality. Instead, the convention simply calls on nations to "agree" that they shouldn't take away the nationality of a foreign wife in certain situations.

Convention on the Elimination of All Forms of Racial Discrimination: Adopted by the UN General Assembly in 1965, this convention requires signatory nations to take measures to prevent discrimination based on "race, color, descent, national, or ethnic origin," and also to guarantee a wide variety of rights, including (under Article 5) the "right to nationality" for everyone without taking into account these factors. But concerning this right to nationality, the convention doesn't go beyond the language found in the Universal Declaration of Human Rights. It doesn't, for example, exactly say what nations must do to protect this right.

But, in 2004, the Committee on the Elimination of Racial Discrimination – an independent body of experts at the UN in charge of monitoring the convention's implementation – issued an official interpretation (called General Recommendation XXX) where it addressed what nations must do to prevent racial discrimination against non-citizens. In the specific area of statelessness, the committee said in section IV(16) that nations had an obligation to "reduce statelessness, in particular statelessness among children, by, for example, encouraging their parents to apply for citizenship on their behalf and allowing both parents to transmit their citizenship to their children." In the area of state succession, it calls on nations, under section IV(17), to "regularize the status of former citizens of predecessor States who now reside within the jurisdiction of the State party." As of November 2011, over 170 nations have joined this convention.

International Covenant on Civil and Political Rights: Adopted in 1966, this convention 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 24 specifically says that "every child has the right to acquire a nationality," but doesn't provide nations with more details or further guidance. (The convention does not address whether adults have a right to nationality.)

In 1989, the UN Human Rights Committee – the body in charge of overseeing this convention – issued an official interpretation of Article 24 (called General Comment No. 17) which said, in part, that a child's right to acquire a nationality did not necessarily mean that nations had a strict obligation to "give their nationality to every child born in their territory." Rather, it vaguely explained that "States are required to adopt every appropriate measure . . . to ensure that every child has a nationality when he is born," but doesn't provide more details beyond this statement.

American Convention on Human Rights: This regional treaty passed in 1969 calls on its signatory nations (largely in the Western hemisphere) to protect a broad spectrum of civil, cultural, economic, political, and social rights. Under Article 20(1), the convention says that "every person has the right to a nationality." But unlike other international treaties which don't indicate

which nation's citizenship a person must receive, Article 20(2) specifically says that "every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality." As of November 2011, 25 nations have joined this convention. While the United States signed the convention in 1977, it has not ratified it.

Convention on the Elimination of All Forms of Discrimination Against Women: Adopted in 1969, this convention calls on nations to end discrimination against women in all aspects of society, including political and public life, economic and social benefits, education, employment, health, law, and marriage and family life.

In the specific area of nationality, Article 9 says that nations must give women the same rights as men to "acquire, change, or retain their nationality." So nations may not automatically change the nationality of a wife or leave her stateless simply because she marries a foreigner or if her husband decides to change his nationality. Legal observers say that this provision seeks to end the disadvantage which women face in the legal system of their respective nations simply because of their gender. As of November 2011, close to 190 nations have joined this convention.

Convention on the Rights of the Child: Adopted by the General Assembly in 1989, signatory nations must recognize and protect the basic human rights of children, including the right to development, education, health, and life, among others. Article 7 specifically says, in part, that a child has "the right to acquire a nationality." But as in the case of other treaties, this one does not indicate which nationality a child must receive (whether the one of his parents or of the territory where he was born).

European Convention on Nationality: This comprehensive regional treaty passed in 1997 sets the broad principles and rules which European nations must incorporate into their domestic laws concerning citizenship. Article 4 says that governments shall not, for instance, deprive people of their nationality in an arbitrary manner, must acknowledge that everyone has a right to nationality, and must generally avoid carrying out measures which could lead to statelessness, among many other rules.

In the area of statelessness, the convention says that a signatory nation must (under Article 6(1)) give citizenship to a child born on its territory if one of his parents is already a citizen. It must also grant nationality to abandoned and orphaned children (i.e., foundlings) on its territory who would otherwise be stateless. Article 6(4) says that a nation must pass laws which facilitate the acquisition of its nationality for people who were born on its territory and have lived there lawfully and habitually.

The convention also allows a nation to revoke nationality from a person in cases of fraud and acts which seriously affect the interests of the state. It also sets rules concerning nationality during state succession where a nation transfers territory (and possibly those residing on it) to another nation.

The continuing problem of statelessness

Analysts note that, in 2011, the 1961 convention on statelessness celebrated the 50th anniversary of its adoption, and that the world has seen — over the last several decades — the development of a legal framework to address various aspects of statelessness. While several nations have done more to help stateless people within

their respective borders, many groups point out that statelessness remains a persistent problem today.

For example, at the creation of the nation of Bangladesh in 1971, Refugees International said that the Bangladeshi government refused to grant citizenship to approximately 250,000 to 300,000 members of the Bihari minority because of that group's allegiance to what is now Pakistan. As a result, many Bihari remained stateless for decades.

After the government excluded the Biharis from voting registration, several stateless Bihari individuals filed petitions to gain rights and citizenship, which led to what is now considered a watershed High Court decision in 2008 (Sadagat Khan et al. v. The Chief Election Commissioner) which extended voting rights and citizenship specifically for those stateless Biharis "whose father or grandfather was born in Bangladesh, and who was a permanent resident in 1971 or who has permanently resided in Bangladesh since 1971." The Election Commission then began to enroll thousands of stateless Biharis for the 2008 general election and also provided them with national identity cards which allowed them to apply for 22 social services. But according to Refugees International, many stateless Bihari people still fear that authorities will persecute them and expel them from their camps if they tried to register to vote or applied for national ID cards.

In Kenya, the Nubian ethnic minority (who are originally from Sudan) has remained stateless since the 19th century, reports UNHCR. Many live in Kibera, which has been described as "one of the largest slums in Africa." Widespread discrimination on the part of administrative approval boards (which grant citizenship and benefits) has prevented most of the 100,000 stateless Nubians from gaining national ID cards.

In response, stateless Nubians have filed several class action complaints in Kenya's high court to gain citizenship. They also filed another class action complaint in 2006 with the regional



African Commission on Human and Peoples' Rights. While neither action have been fully resolved, the two lawsuits began to facilitate smoother administrative processes to ensure that Nubians gain ID cards and citizenship, according to Refugees International.

In 2001, Thailand, under international pressure, passed a law which granted temporary residency to stateless persons who were able to prove that at least one parent had been born in Thailand. But despite this positive step, millions still remain stateless because they do not possess required documents to gain citizenship.

In the case of the Roma in Serbia, that government, in 2002, passed the *Law on the Protection of Rights and Liberties of National Minorities*. It did not guarantee citizenship to stateless Roma, but sought to recognize them as a national minority and facilitate their integration into Serbian society. Still, it has given little practical help to them, reported Amnesty International. Local governments continue to discriminate against this group

How does the United States address statelessness?

Refugees International estimates that around 4,000 stateless people currently live on U.S. territory. According to the Department of Homeland Security (or DHS), the United States granted asylum status to 176,805 refugees from 1999 through 2008. People who receive asylum have the opportunity to gain travel documents, social security cards, employment authorization, access to health care and public education, and may eventually apply to become a citizen. On the other hand, of the total number of people who received refugee status, only 696 were stateless people. And the United States currently has no legal pathway for stateless people on its territory to gain permanent residency or lawful citizenship status.

Under 8 U.S.C.A.§1226(a), the Immigration and Citizenship Enforcement (or ICE) has the authority to detain a stateless person who does not have the legal authorization to stay in the United States and hold him (even for prolonged periods of time) if there

Because many nations refuse to deal with statelessness within their borders, stateless people (who number around 12 million worldwide) usually remain stateless for long periods of time, depending on where they currently reside and also on national circumstances and various laws. While some may remain stateless for a few years, others can remain stateless for decades or even a lifetime.

by evicting them from their homes and forcing them to resettle in unhygienic slums.

Other groups such as the Equal Rights Trust believe that the threats posed by terrorism have given nations, especially those in Europe and also the United States, a reason to implement stricter immigration and citizenship procedures, making it harder to prevent and resolve current cases of statelessness.

Advocates note that while the main UN agency addressing stateless people (UNHCR) has aided countries in reviewing and changing existing national legislation as well as enacting new ones to prevent statelessness, its resources to do so is extremely limited. Compared to the 7,190 employees who work on refugee matters, UNHCR has four employees dedicated to helping stateless people, though it also trains and employs field workers, according to Refugees International. UNHCR's monetary resources are also limited. Currently, the UN provides only two percent of that agency's budget. The remainder, said the Inter-Parliamentary Union, comes from private donors along with voluntary contributions from various nations.

What more can nations to do address statelessness? Experts from the UNHCR and human rights organizations say that public officials must continue raising awareness on the plight of stateless persons within their respective territories and also increase the political will to help them. (In August 2011, UNHCR launched a new campaign to bring more attention to stateless people.) If they have not already done so, nations must also ratify both the 1954 and 1961 conventions on statelessness, and ensure that domestic laws conform with the provisions in these treaties so that, one day, stateless people will have a clearer pathway to citizenship.

is a good possibility that it can send him back to his country of origin or another nation, or if it determines that he poses a security threat to the community, says the Equal Rights Trust.

But a stateless person may also file a habeas corpus claim and argue that the government is holding him for longer than "reasonably necessary," according to Congressional testimony from experts. In a 2001 case (*Zadvydas v. Davis*), the U.S. Supreme Court ruled that the government may not detain what are called unremovable immigrants for more than six months if "there is no significant likelihood of removal in the reasonable future," and if the government does not show that it has a special reason to hold him such as cases where he poses a security threat. But groups such as Equal Rights Trust say that DHS often delays the start of the six month period, and that it has held many stateless persons for several years at a time.

If ICE concludes that it cannot remove a stateless person from the United States, it must release him under supervision. Under statutory guidelines, a stateless person must report to DHS by telephone once a month, and in person once every six months. These guidelines also restrict a stateless person in the United States from crossing state borders and from receiving health and social services.

Several U.S. senators have pushed for laws to help stateless people within the United States. Senator Patrick Leahy (D-VT) recently sponsored the *Refugee Protection Act of 2010* which would establish a legal pathway for stateless persons to gain permanent residency and citizenship. But the bill never became law. Similar legislation failed to become law in 1999, 2001, and 2002. In the meantime, Refugees International said that the United States provides "some administrative remedies such as work authorization [that] may help stateless people . . ."

Collective punishment and international law: Punished for the acts of others

uring the last decade, human rights groups have accused governments around the world of carrying out what is generally described as collective punishment. Under this practice, a government usually punishes certain individuals or groups for the actions carried out by others. An occupying army may, for example, retaliate against guerilla attacks by punishing the inhabitants of a nearby village even if they were not involved or had no direct role in those attacks. In other cases, a government may stigmatize and harass an entire group of people for the actions carried out by a few individuals from that group.

Why do some governments carry out collective punishment even in modern times? Where and under what circumstances have these incidents taken place? How does international law deal with this ongoing practice? And what more can be done to address the use of collective punishment?

Collective punishment: A long-standing practice

When governments carry out collective punishment, they largely do so during times of war when armies occupy civilian territory or detain large numbers of enemy soldiers. Collective punishment itself takes many different forms. Those carrying out the punishment may, for instance, execute people, destroy their property, institute a blockade of an entire town, and require identity checks, among other measures – all in response to the actions carried out by other groups, according to analysts. The target groups can also vary. The punishers may simply single out the closest civilians or specifically punish, say, the families of the suspected attackers.

Historians say that people have carried out collective punishment since days of antiquity. The Romans, for example, carried out collective punishment through a practice called decimation where they would punish a disgraced army legion by executing every tenth person drawn by a random lot. The Roman historian Titus Livius described an incident where a commander ordered the officers of a routed army "to be scourged with rods and beheaded; of the remaining number [of soldiers], every tenth man was selected by lot for punishment," in an account translated by classics professor Benjamin Oliver Foster.

During the American Civil War, Union General William Sherman – after capturing Atlanta, Georgia, in September 1864 – called on his troops to carry out a scorched earth policy as they marched to Savannah. He linked his treatment of civilians to the activity of Confederate guerillas during his campaign to that port city, according to historian John Keegan. If they launched attacks against Union troops, General Sherman would order his soldiers to destroy more civilian property. Fewer guerilla attacks resulted in less destruction.

In recent history, a Waffen-SS army unit during World War II entered the French town of Oradour-sur-Glane in June 1944 and killed over 600 men, women, and children. According to historical accounts, the German soldiers – after being attacked by the French Résistance – sought revenge against the townspeople by shooting most of the men, burning the women and children inside a church, and then razing the rest of the town. At the end of the war, the French government decided to leave the town in ruins to serve as a permanent memorial.



During the Vietnam War, U.S. forces shot and killed around 500 old men, women, and children in the village of My Lai in March 1968 for what many believe was retaliation for Viet Cong attacks in the area. In *United States v. William L. Calley, Jr.* (1973), a military court convicted Lt. William Calley – one of the officers on the ground and the only person ever put on trial for the My Lai killings – for "the premeditated murder of 22 infants, children, women, and old men, and of assault with intent to murder a child of about 2 years of age," and sentenced him to life in prison. Although Lt. Calley claimed during the trial that he was under orders to massacre the villagers, his superiors denied the accusation. In 1974, he received a pardon from President Richard Nixon.

Arguments against and justifications for collective punishment

Those opposed to collective punishment say that it violates the principle of individual responsibility in modern Western justice systems where courts largely punish those people who are responsible for or are involved in a certain action. But collective punishment – by its very definition – punishes those who are innocent. "In modern . . . societies [where] the relevant moral unit is the individual," writes New York University law professor Daryl J. Levinson in a law review article, "punishing groups for the misdeeds of individuals will be regarded with deep skepticism."

In the United States, legal analysts believe that the Fifth Amendment of the U.S. Constitution – which states that no one may be "deprived of life, liberty, or property, without due process of law" – implicitly forbids federal and state governments from carrying out collective punishment. Under the concept of due process, a court must determine a person's guilt or innocence using fair and established legal procedures. If an individual successfully defends himself against certain charges, the court will usually set him free. It cannot proceed to punish him anyway (under, say, a policy of collective punishment) because doing so would subvert due process of law. As in the case of the United States, many other nations have also passed laws which either implicitly or explicitly prohibit authorities from using collective punishment within their respective jurisdictions.

While many oppose collective punishment, observers explain why governments may use it. First, some may believe that collective punishment serves as a deterrent. If, say, an insurgent group knows that innocent people will be punished for its acts of rebellion, it may decide to cease other planned attacks. Professor Levinson of NYU Law School noted that this deterrent strategy is a "horrifically effective way of controlling a large and resistant population" because "insurgents [have] to bear the moral costs of their acts of resistance."

But using collective punishment as a means of deterrence can backfire, he says, by enraging the people who are being punished, and may actually encourage them to resist along with (or even assist) the insurgents.

A second rationale for carrying out collective punishment is simple retribution. While this can take the form of crude and indiscriminate acts of revenge against a civilian population, some scholars – including Professor George P. Fletcher of Columbia Law School – argue that the basis of this rationale may be more sophisticated than meets the eye. The punishers may believe, for instance, that the people who did not directly carry out an attack may still deserve punishment because they could have, for

example, provided both material and moral support to the group which had actually done so.

Addressing collective punishment through international law

At the international level, no single treaty deals solely and comprehensively with collective punishment. Instead, over the time span of more than a century, the world community passed a wide range of treaties regulating how nations carry out armed conflict. Among many other topics, these treaties address the use of collective punishment (which, again, is more likely to occur during times of war). To address shortcomings, delegates later added provisions to these existing agreements or even created new treaties. Some include the following examples.

The Hague Regulations: In 1899, nations passed the Convention with Respect to the Laws and Customs of War on Land which was one of the first modern treaties setting forth the rules and practices of warfare, and whose provisions applied only in cases of armed conflict between actual nations. It set, for example, minimum standards for the treatment of prisoners-of-war (or POWs) and also some broad guidelines on treating civilian populations during wartime. Delegates updated this convention in 1907 by passing the Convention respecting the Laws and Customs of War on Land. (Collectively, these two treaties are popularly known as the Hague Regulations.)

The Hague Regulations address collective punishment in a single sentence by declaring (in Article 50) that "no general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible." (Article 50 neither mentions nor defines the term collective punishment.)

But critics point out that Article 50 did not completely ban the use of collective punishment. Instead, its ambiguous wording seemed to leave open the possibility that an occupying army could, under some circumstances, collectively punish an occupied population if it finds a reason to do so. In fact, the International Committee for the Red Cross (or ICRC) issued an official interpretation (generally known as a "comment") which said that Article 50 "could be interpreted as not expressly ruling out the idea that the community might bear at least a passive responsibility." Also, while Article 50 mentions that combatants may not inflict collective punishment on an occupied population, it does not extend this prohibition specifically to POWs.

Geneva Convention relative to the Treatment of Prisoners of War (1929): This treaty called on nations to provide further protections to POWs than those given by the Hague Regulations, but only during times of armed conflict between nations. In the area of collective punishment, Article 46 states that "collective penalties for individual acts are also prohibited." Its broad language, say experts, implicitly bans collective punishment not only on civilian populations, but also POWs.

In fact, the ICRC said that the 1929 convention was the first modern treaty to prohibit the collective punishment of POWs. "The most important innovations [in this particular convention] consisted in the prohibition of reprisals and collective penalties," said the ICRC in its comments: Delegates created this convention because of what the ICRC described as "serious abuses" of POWs during World War I, noting that the text of the Hague Regulations contained "deficiencies as well as a lack of precision" in protecting them.

Geneva Convention (III) relative to Treatment of Prisoners of War (1949): In response to atrocities carried out during World War II and the changing nature of warfare, delegates replaced the 1929 convention with Geneva Convention III, which provides even more protections for POWs. (Geneva Convention III applies only during times of armed conflict between actual nations.)

Several provisions deal specifically with collective punishment. For example, Article 26 states that "collective disciplinary measures affecting food [given to POWs] are prohibited." Under Article 87, "collective punishments for individual acts, corporal punishments, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden."

Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949): This convention establishes many more protections specifically for civilians during times of armed conflict between two or more nations only. In comparison,

feared that a nation might inflict collective punishment by using a mechanism outside of the normal system of justice.

Two further articles reinforce the prohibition against collective punishment. Article 75(4) says that no penalty may be imposed on a person without trial by a court "respecting the generally recognized principles of regular judicial procedure." Under Article 75(4)(b), one of these principles says that "no one shall be convicted of an offence except on the basis of individual responsibility."

The ICRC also said that, under its broad interpretation of Article 75, collective punishment must be "understood in the broadest sense" to include "not only legal sentences, but sanctions and harassment of any sort, administrative, by police action or otherwise."

Common Article 3 to the Geneva Conventions (1949): When nations adopted the Hague Regulations and the various Geneva Conventions, these agreements applied only in cases of armed conflict between two or more actual states. But no stand-alone

At the international level, no single treaty deals solely and comprehensively with collective punishment. Instead, over the time span of more than a century, the world community passed a wide range of treaties regulating how nations carry out armed conflict. Among other topics, these treaties address the use of collective punishment.

the Hague Regulations "proved to be insufficient" in protecting civilians, said the ICRC.

In the area of collective punishment, Article 33 bans the collective punishment of civilians without any ambiguity. "No protected person may be punished for an offence he or she has not personally committed," it says. "Collective penalties and likewise all measures of intimidation or of terrorism are prohibited." In its interpretation of Article 33, the ICRC said that, compared to the Hague Regulations, "a great step forward has been taken. Responsibility is personal and it will no longer be possible to inflict penalties on persons who have themselves not committed the acts complained of."

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977) (or simply Additional Protocol I): As modern warfare evolved, this contemporary protocol added more protections to the existing Geneva Conventions for victims of international armed conflicts (between actual nations only), including civilians and combatants.

For example, Additional Protocol I specifically prohibits attacks again civilian populations, indiscriminate attacks, and attacks against places of worship, among other restrictions. It also declares that the definition of international armed conflict (which, by definition, can take place only between nations) now includes cases "in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."

In the area of collective punishment, Additional Protocol I includes more detailed prohibitions on that practice. Article 75(2)(d), for instance, explicitly prohibits collective punishment "at any time and in any place whatsoever," and applies to both civilians and military personnel. According to an interpretation issued by the ICRC, delegates included this article because they

treaty set the rules of combat for a conflict taking place *within* a state (such as civil wars and insurgencies).

To address this situation, the signatories of the 1949 Geneva Conventions created Common Article 3 – the provisions of the third article in each of the 1949 Geneva Convention are identical – which sets very limited protections for people who don't take part in active hostilities during these internal conflicts, including civilians, soldiers who have laid down their arms, and sick and wounded soldiers. For example, it prohibits nations from torturing and murdering these classes of people or subjecting them to humiliating treatment. Some experts, such as Professor Steven Ratner of the University of Michigan Law School, describe Common Article 3 as a "treaty in miniature."

While Common Article 3 doesn't explicitly address collective punishment, it seems to prohibit that practice implicitly. Specifically, Paragraph 1(d) of Common Article 3 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." One of these guarantees, say observers, is to uphold the principle of individual responsibility where only those people who are involved in carrying out an illegal act are punished for their actions.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977) (or simply Additional Protocol II): According to the ICRC, "Additional Protocol II was the first-ever international treaty devoted exclusively to protecting people affected by . . . civil wars." The ICRC noted that Common Article 3 "proved to be inadequate in view of the fact that about 80% of the victims of armed conflicts since 1945 have been victims of non-international conflicts are often fought with more cruelty than international conflicts."

Compared to Common Article 3 (which is about two paragraphs in length), Additional Protocol II provides many more protections (in its 28 articles) to victims of internal conflicts by prohibiting parties from carrying out acts such as murder and torture, among others, against civilians and sick and wounded soldiers. It also prohibits parties from attacking civilian populations, historical monuments, and places of worship.

In the area of collective punishment, Article 4(2)(b) explicitly prohibits that practice "in any time and in any place whatsoever." In its official comments to Additional Protocol II, the ICRC said that collective punishment "should be understood in its widest sense, and concerns not only penalties imposed in the normal judicial process, but also any other kind of sanction . . ." It said that this interpretation would hopefully prevent nations from trying to impose collective punishment through other means outside of a judicial system.

Addressing collective punishment: Military manuals and national legislation

What must nations do once they ratify these various Geneva Conventions? According to these treaties, they must punish individuals within their respective jurisdictions – such as a captured soldier or even a member of its own armed forces – who commit what are called "grave breaches" of the Conventions by adding criminal penalties to their domestic and military regulations. While none of the 1949 conventions specifically say that carrying out collective punishment would be considered a "grave breach," many nations still incorporated the prohibitions on such acts directly into their national legislation and military manuals (which are the rules and guidelines that soldiers must follow during armed combat). The ICRC provides many examples, including the following:

- Argentina: Its Law of War Manual (1969) prohibits the collective punishment of civilians as a fundamental guarantee during internal and international conflicts.
- *China*: Its *Law Governing the Trial of War Criminals* (1946) says that collective punishment is a war crime.
- *Congo*: *Disciplinary Regulations* (1986) prohibit collective punishment against the wounded, POWs, and civilians.
- *France*: This nation prohibits the collective punishment of civilians, the wounded, and POWs. In addition, its *Law of Armed Conflict Manual* (2001) says that collective punishment is a war crime.
- *Israel*: Its *Manual on the Laws of War* (1998) absolutely forbids the collective punishment of POWs.
- Morocco: This nation's Disciplinary Regulations (1974) prohibit the collective punishment of the wounded, POWs, and civilians.
- Russia: This nation's Military Manual (1990) prohibits collective punishment of "war victims," and its Regulations on the Application of International Humanitarian Law (2001) prohibit the collective punishment of non-combatants.
- United States: The U.S. Army Field Manual (1956) reproduces Article 87 of Geneva Convention III, Article 33 of Geneva Convention IV, and Article 50 of the Hague Regulations. Other guides published by the U.S Air Force and the U.S. Navy also reproduce provisions from these treaties. In 1973, the U.S. Army Court of Military Review held in United States v. Calley that soldiers are forbidden from carrying out reprisals against civilians in response to "illegal acts of the enemy."

Addressing collective punishment: The United Nations and its specialized agencies

The United Nations has not passed any single resolution whose sole purpose is to address collective punishment in a comprehensive manner. Instead, various bodies within the UN have passed resolutions which, in part, address collective punishment, though in conjunction with many other issues.

For example, the General Assembly in 1974 adopted Resolution 3318 (XXIX) – known as the *Declaration on the Protection of Women and Children in Emergency and Armed Conflict* – which calls on nations to provide protections specifically for women and children affected by armed conflict. Among many other measures, the resolution says that nations must criminalize "all forms of repression and cruel and inhuman treatment of women and children, including . . . collective punishment."

Other UN agencies such as the Commission on Human Rights and its successor body – the UN Council on Human Rights (or UNHCR) – had passed their own resolutions against collective punishment. But, as analysts point out, these resolutions focused exclusively on Israel and its closure of the Gaza Strip and restrictions of imports and exports to the West Bank, among other measures. For instance:

- In 1989, the UN Sub-Commission on Human Rights passed a resolution (1989/4) reaffirming "that the Fourth Geneva Convention . . . of 1949 is applicable to the . . . Palestinian and other Arab territories occupied by Israel," and that Israel's imposition of "collective punishment [and other acts] . . . are crimes of war under international law."
- In 2006, the UNHCR adopted Resolution S-1/1 calling on Israel to follow "the provision of international humanitarian law and human rights law, and refrain from imposing collective punishment on Palestinian civilians."
- Again in 2006, the UNHCR adopted a resolution (S-3/1) stating that "the Israeli military incursions in the Occupied Palestinian Territory . . . constitute a collective punishment of the civilians therein."

Israel argued that these actions did not constitute collective punishment, and also noted that a voting bloc of Arab nations (and their supporters) had pushed for these resolutions in the UNHCR while generally ignoring other countries accused of carrying out collective punishment. In a 2006 statement, Peggy Hicks, Global Advocacy Director at Human Rights Watch, said that "the human rights situation in the Occupied Palestinian Territories deserves attention, but the new council must bring the same vigor to its consideration of other pressing situations."

Collective punishment: Still occurring today?

Even with an established legal framework in place to prohibit collective punishment, human rights groups say that nations continue to engage in that practice. On the other hand, the alleged perpetrators deny committing such acts or argue that their actions should not be viewed as collective punishment. Today, allegations of collective punishment come from all over the world.

The U.S. occupation of Iraq: Many media stories have alleged that U.S. armed forces – after invading and occupying Iraq beginning in 2003 – had used collective punishment in several instances against Iraqi civilians. Iraqi citizens claimed, for instance, that the U.S. Army had bulldozed date palms and orange trees in the village of Dhuluaya north of Baghdad, ac-

cording to *The Independent*, a British newspaper. A local man said that when he had complained to U.S. soldiers, they told him that the bulldozing was carried out as punishment and retaliation for the locals' refusal to turn over insurgents attacking American forces.

The New York Times reported that American forces in 2003 had closed off the town of Abu Hishma with barbed wire, and required its residents to show identification while entering and exiting at a single checkpoint. The commanding officer allegedly said that the barrier would remain in place until the townspeople turned over the insurgents who had earlier killed an American soldier. But the United States responded that the enclosure served as a necessary security measure to maintain control of an area where insurgents had used surrounding buildings and orchards to launch ambushes.

In central Iraq, residents in the city of Ramadi said in 2006 that they wouldn't have any water and electrical service in the days after insurgents had launched terrorist attacks against American or "No collective expulsions were undertaken," said Éric Besson, the French minister for immigration and integration, reported *The New York Times*. Analysts note that France had previously deported thousands of Roma each year, including around 10,000 in 2009.

Under European Union (or EU) law, citizens of other EU member states may enter France, but its government had placed restrictions on people from particular countries, including Bulgaria and Romania. Also, while EU member nations may lawfully expel non-residents for violations of immigration law, singling out specific groups (such as the Roma) may violate EU freedom of movement laws and anti-discrimination provisions in the European Charter of Fundamental Rights (which is comparable to a bill of rights for Europe), said legal analysts.

In a later development, a leaked government memo suggested that French authorities had, indeed, singled out the Roma for deportation. "[Three hundred] camps or illegal settlements must be cleared within three months, Roma camps are a priority," stated

Collective punishment takes many different forms. Those carrying out the punishment may, for instance, execute people, destroy their property, institute a blockade of an entire town, and require identity checks, among other measures — all in response to the actions carried out by other groups.

Iraqi government troops, reported the *Inter Press Service*, a global press agency providing alternative points of views. Many accused U.S. troops of turning off these utilities in retaliation for the terrorist strikes.

Because the United States had ratified the Hague Regulations and the various Geneva Conventions, including the Additional Protocols, the provisions concerning collective punishment would apply in the occupation of Iraq. (Analysts note that the occupation of Iraq was part of an international armed conflict.) But the U.S. government did not carry out any investigations of these accusations of collective punishment, and will likely never do so. At the end of 2011, the United States pulled out nearly all of its troops from Iraq.

Expelling Roma from France: In July 2010, French police shot and killed a young Roma man in the small town of Saint-Aignan as he drove through a police checkpoint without stopping. In retaliation, a large number of Roma men attacked a police station, burned cars, and caused widespread damage. In the following months, the French government moved quickly to dismantle about 300 illegal Roma camps sites throughout France and deported its residents back to their country of origin, usually Bulgaria, Romania or Turkey.

President Sarkozy quickly drew fire for the new policy from critics who claimed that he was collectively punishing the Roma – the largest ethnic minority in Europe, says *BBC News* – for the actions of a small number of criminals. In remarks to the European Parliament in 2010, Viviane Reding, the European Commissioner for Justice, said that no citizen of the European Union must become a target of collective punishment.

The French government responded that its actions were necessary to uphold order, and that it did not single out the Roma.

an August 2010 memo from the French interior ministry, according to reporting from *EUbusiness.com*, an independent business news provider.

Despite the controversy, the Geneva Conventions and the Hague Regulations (and its provisions on collective punishment) would not have applied in the case of the Roma because the deportation did not occur in the context of an actual armed conflict, say analysts. (France had ratified these various treaties.)

But other legal observers note that all EU member nations have a system of justice where the due process of law would prohibit a court and government agencies from punishing an individual or group of people not involved in or carrying out an illegal act. But because European society has shunned the Roma for decades, many believe that carrying out collective punishment (in the form of deportations) on this group would not lead to significant public opposition or even sympathy. In fact, the executive arm of the EU (called the European Commission) decided not to carry out any legal action against France for deporting Roma groups since July 2010.

Destruction and detention in Pakistan (Spinkai and the Swat Valley): In 2008, the Pakistani military began to reassert its control over a Taliban-controlled region within its nation called South Waziristan. In the aftermath of the 2001 terrorist attacks in New York and the Pentagon, the United States invaded Afghanistan and drove out the ruling Taliban. Many Taliban fighters had dispersed themselves across Afghanistan and also crossed into neighboring Pakistan.

During the course of its campaign in South Waziristan, the army destroyed the town of Spinkai, including its hospital and marketplace, in what critics described as an act of collective punishment. According to reporting by *The Guardian*, a British

newspaper, the army believed that the local population did not sufficiently resist their Taliban occupiers. It also quoted a Pakistani officer as saying that collective punishment was successful because Taliban leader Baitullah Mehsud was "being forced to the table because of this destruction" on Spinkai. Another Pakistani newspaper, *Dawn*, a leading English-language daily, referred to the practice in that town as "the infamous local law of 'collective punishment."

Many also accused the Pakistani military of carrying out individual instances of collective punishment as it retook a region called the Swat Valley from the Taliban. In addition to targeting and destroying the property of individual families, "punishing people because their family members may be militants [had] become rampant in the Swat valley," said Human Rights Watch

Chechnya) alleged that Russian authorities had instituted a policy of house-burning as a form of collective punishment. If an insurgent did not heed calls to surrender, armed men would travel to his family's house in the middle of the night, remove all of the occupants, and then burn it down. This practice, according to Human Rights Watch, was widespread. "The police chief was saying we had to get our sons back or everyone would be killed," one witness told that group. "... all the families would be destroyed, because the families were responsible."

Russia's government claimed that house-burning was not its official policy. Rather, it said that burnings which did occur were probably carried out spontaneously by local authorities angry over the insurgent attacks. One official, Nurdi Nukhazhiev, told Human Rights Watch that "for example, insurgents torch

Even with an established legal framework in place to prohibit collective punishment, human rights groups say that nations continue to engage in that practice. And most governments have not seriously investigated claims of collective punishment.

in a 2010 news release. In one example, it said that the Pakistani military had detained and refused to release a man's son until it discovered the whereabouts of another son who had actually joined the Taliban. "They say that they know Naeem is innocent but will only release him when they discover the whereabouts of Imran," said the man, Mohammad Ikram, a resident of Swat, to Human Rights Watch.

The army refused to characterize these measures as collective punishment. Instead, according to reporting from *National Public Radio* in June 2010, a Pakistani official said that local councils in the Swat valley had called for these punishments in accordance with their customs, and that the army was simply following the will of the people.

Because the fighting in Pakistan is an internal armed conflict (where government troops are still battling insurgents), Common Article 3 of the Geneva Conventions and Additional Protocol II would apply to these various situations and others. Under Common Article 3, a nation may not detain a person without a trial and, by inference, may not punish him for an action he did not commit. And Additional Protocol II explicitly forbids collective punishment, and defines that term "in its widest sense." While Pakistan had ratified the Geneva Conventions, it did not ratify Additional Protocol II. Despite allegations that its army had used collective punishment in Spinkai and the Swat Valley, Pakistan has not carried out any investigations.

House-burnings in Chechnya: After the collapse of the Soviet Union in 1991, Chechnya – one of the many republics tied to that former Communist nation – tried to establish its independence from the newly established Russian Federation. Russian armed forces invaded Chechnya several times and eventually reestablished its control over that territory. But Chechen insurgents carried out a protracted guerilla war against Russian troops who, in turn, responded harshly by destroying cities and using what critics described as collective punishment against the Chechen population.

For example, a 2009 Human Rights Watch report (What Your Children Do Will Touch Upon You: Punitive House-Burning in

a policeman's house or ambush a group of servicemen, so their mates jump up, put on masks, and attack a house of a known rebel's family . . ." While he did not condone these reprisals, he added, "I kind of understand on a personal level what's driving them to it."

In 1995, the Russian Constitutional Court held that the conflict in Chechnya was an internal armed conflict, meaning that the prohibitions on collective punishment in Common Article 3 of the Geneva Conventions and Additional Protocol II would apply. But Human Rights Watch said that Russia had turned a blind eye to the house burnings and noted that the government had not carried out any serious investigations or prosecutions. Others note that, after suppressing the rebel movement, Russia withdrew most of its combat forces from Chechnya in 2009, and that the situation may no longer be considered an armed conflict where the laws of war would even apply.

Even if the situation in Chechnya is not an internal armed conflict, some legal observers say that Russia would be bound by the 1950 *European Convention on Human Rights* (or ECHR), which calls on its member states 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. It also established the European Court of Human Rights to adjudicate disputes involving that treaty. Russia signed and ratified the ECHR in 1998.

While the ECHR does not explicitly prohibit collective punishment, some say that it does so implicitly. Article 6(2), for instance, says that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Article 6(3) sets out the rights of those charged with a criminal offense such as having adequate time to prepare for a defense and to question witnesses, among others. Taken together, punishing someone for the actions of another person would violate these articles. In the case of Chechnya, because the families of Chechen insurgents presumably did not commit any crimes, burning their houses in retaliation for the acts of others would seem to violate provisions in the ECHR, say critics.

Israel and the Gaza Strip: In contrast to these previous allegations of collective punishment, observers have focused more attention on how Israel has handled its relationship with the Gaza Strip. After capturing and occupying that territory during a war in 1967, Israel withdrew its military forces and dismantled its civilian settlements in 2005, but closed Gaza's border and water crossings after the Palestinian political party Hamas – which is considered a terrorist organization by the European Union, Israel, and the United States – seized control of the area in 2007 and began to launch rocket attacks against civilian population centers in Israel.

In response, Israel imposed what it called "economic sanctions." For example, it currently prohibits residents from leaving Gaza with very few exceptions. It also imposed restrictions on the movement of goods (including food, construction materials, and medical supplies) into the Gaza Strip. The media have alternatively described these restrictions on the movement of people and goods as a "siege" or a "blockade," according to human rights groups.

Israel justified these actions as necessary security measures to prevent terrorist groups from going into Gaza and delivering goods which could be used as weapons against Israel. "[I]t's our obligation – as well as our right in accordance to international law and common sense – to prevent these weapons from entering by air, sea, and land," said Israeli Prime Minister Benjamin Netanyahu. The Israeli government also argued that its economic embargo was a means of influencing Hamas to stop its attacks. "The opening of the crossings will be reviewed on a daily basis and will be subject to Palestinian militants halting their rocket fire against southern Israel," said an defense ministry spokesperson to Agence France-Presse, a global news agency.

Critics say that the restrictions on the movement of people and goods are far more severe than necessary to meet Israel's security needs, and have mainly harmed Gaza's civilian population and not Hamas. Amnesty International estimates that four of five people in Gaza – which as a population of 1.5 million, half of whom are children – are dependent on international aid, and that the restrictions have led to reports of widespread malnutrition, poverty, and poor access to basic medical care.

Even though the Israeli government has stated that the purpose of the restrictions is to influence Hamas, many believe otherwise. Gisha – an Israeli non-profit organization based in Tel Aviv whose stated goal is to "protect the freedom of movement of Palestinians, especially Gaza residents" – has claimed that, beginning in 2008, Israel had "openly created a direct link" where it would block basic humanitarian goods into Gaza in response to rocket attacks. For instance, it said that after the collapse of a ceasefire agreement with Hamas, Israel had "closed Gaza's borders almost entirely and even to humanitarian goods, preventing the passage of fuel, food, and other basic items."

As a result of these and other actions, Giza concluded in a December 2008 report (*Gaza Closure Defined: Collective Punishment*) that, rather than targeting Hamas, the closure of the Gaza Strip "impacts each and every one of [Gaza's] residents . . . regardless of whether they are personally involved in violent acts against Israel or not. For this reason, the closure constitutes collective punishment, in violation of international law." (Israel is a signatory nation to all of the 1949 Geneva Conventions.) It added that the

closures were "designed to apply pressure on Gaza's civilian population in order to influence the behavior of militants."

Gisha also disputed Israel's descriptions of its actions as anything other than collective punishment. For example, Gisha argued in its report that Israel's restrictions on the movement of people and goods could not be described as a "siege," which is "commonly defined as the act of surrounding a particular area in order to induce surrender." It said that Israel's actions did not meet this definition because "they [did] not have a concrete military objective of inducing capitulation or surrender," also noting that Israel was not "trying to re-conquer Gaza." The report also said that international law requires civilian populations to leave besieged areas, but that Israel was not allowing residents to leave the Gaza Strip.

It also argued that Israel's restrictions did not meet the definition of a "blockade" which is similar to a siege. In addition to surrounding the enemy to induce surrender, the report said that a blockade stops only those "supplies needed to conduct hostilities." But Israel did not implement its blockade to induce the surrender of the Gaza Strip, said the report. And the so-called blockade not only stopped weapons from entering Gaza, but also a "broad range of civilian goods, most of which have absolutely no military use or potential for military use."

Gisha further said that Israel's actions did not constitute "economic sanctions," arguing that such measures are "commonly understood as a group of nations coming together and agreeing to withhold trade or impose other restrictive measures . . . in order to achieve a defined goal." It added that when nations impose sanctions, "no physical barriers are erected or are necessary to enforce the sanction." In the case of Israel's restrictions on Gaza, the report said that they did not have any "clear and precise" objectives, and added that Israel imposed strict physical limits on the movement of people and goods.

Various human rights groups have also argued that even though Israel had withdrawn its troops from the Gaza Strip in 2005, it still – in effect – occupies that territory and, therefore, has many legal responsibilities towards its residents under various international treaties. According to analysts such as Sarah Leah Whitson, the Executive Director of Human Rights Watch's Middle East Division, "under international law, the test for determining whether an occupation exists is effective control by a hostile army, not the positioning of troops." Because Israel still controls all of Gaza's border crossings, airspace, sea access, tax system, and population registry, it effectively controls that territory, argued Al-Haq, a Palestinian human rights group based in the West Bank.

Using this argument, various provisions under Geneva Convention IV (which sets protections for civilians during armed conflicts and in occupied territories) would still apply to Israel even though it had withdrawn its troops from the Gaza Strip. Analysts note that Article 33 explicitly prohibits the use of collective punishment. Others argue that, under Article 55, "the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate." Critics say that Israel's refusal to supply Gaza with sufficient food, fuel, and medical supplies would violate this provision.

In response, a body known as the Turkel Commission (whose members were chosen by Israel to examine, in part, that government's actions in the Gaza Strip) concluded in a May 2010 report that Israel did not have effective control of Gaza, and, therefore, was not occupying that territory. Among other many criteria, the commission said that for Israel to be in effective control of Gaza, it also had to "perform the functions of an existing government." But the commission said that Gaza was under the effective control of Hamas which had won an election there in 2006. It also reasoned that Gaza could not be under the effective control of "two different opposing powers" (i.e., Israel and Hamas), adding: "If Israel did indeed have effective control over the Gaza Strip, then it would have the power to act as the authority responsible for maintaining order in the Gaza Strip."

The commission also concluded that the restrictions imposed on the movement of people and goods in and out of Gaza did not constitute collective punishment. It claimed that an unspecified "humanitarian legal system" currently accepted the practice of punishing a guilty individual as long as "the effect [was] not disproportionate compared to the military advantage," and that it also did not *intentionally* harm innocent parties.

To determine whether Israel had carried out collective punishment, the commission analyzed whether Israel deliberately attempted to harm the residents of Gaza. "The key issue is therefore whether harm is intentionally directed at the civilian population or an unintended outcome," said the commission. While it said that Israel's restrictions on Gaza had "an adverse impact on the daily life of the civilian population," the commission concluded "there is nothing in the evidence . . . that suggests that Israel is intentionally placing restrictions on goods for the sole or primary purpose of denying them to the population of Gaza." In fact, the Commission said that the Israeli army had "set up a system of monitoring and coordinating humanitarian aid in Gaza" to provide food and medical care for its people.

Prosecuting collective punishment: The Special Court for Sierra Leone

Even with allegations of collective punishment being carried out around the world, most governments (as illustrated in the previous examples) have not seriously investigated such claims let alone prosecute those individuals who may have carried them out. And while the United Nations has, in recent decades, established many temporary criminal tribunals to investigate atrocities in civil conflicts in nations such as Cambodia, the former Yugoslavia, and Rwanda, prosecutors have largely gone after individuals accused of ordering or carrying out war crimes and crimes against humanity (such as mass murder and torture), and not collective punishment as a separate charge.

But in a development which has given hope to human rights groups, an international criminal tribunal investigating and prosecuting war crimes during a civil war in the African nation of Sierra Leone from 1991 to 2002 had convicted several individuals for the specific act of collective punishment. After capturing hostile territory, observers said that all sides to the conflict had punished and terrorized the inhabitants (for what they say was either supporting or failing to resist the enemy) through murder, mutilation, pillaging, and rape, among other acts. These forces

also targeted journalists for printing both anti-government and anti-rebel articles.

Human Rights Watch recorded many instances of what it says was collective punishment in a 1999 report called *Sierra Leone: Getting Away with Murder, Mutilation, Rape.* For example, a 28-year-old Sierra Leonean, Abdul (whose last name was not published to protect his identity), said that a rebel squad had caught about a group of 50 refugees in the capital city of Freetown and shot them, killing nine. "They said we didn't support them," said Abdul, "... and after shooting us said, 'now you see we're back if you people want us or not."

Another civilian, James Kajue, told Human Rights Watch that some rebels had caught him and his family as they were trying to flee Freetown. After they had demanded money, another rebel group approached and said: "Why are you wasting time with these civilians . . . they've been supporting [our enemies]. We must teach them a lesson. I think we should just fire [kill] them." They then shot and killed six of Kajue's children and his grandson, and wounded the rest of his family.

In a 2004 report, the Sierra Leone Truth & Reconciliation Commission found that "all the armed groups pursued a strategy of detaining women and girls whom they believed to be relatives and supporters of the opposing forces, with the intention of violating them and punishing them for their perceived association with 'enemy forces."

Once the war ended, the new government of Sierra Leone and the UN in 2002 set up a temporary criminal tribunal – known as the Special Court for Sierra Leone (or SCSL) – to prosecute atrocities committed during the conflict, which various estimates say claimed the lives of over 50,000 people. Legal experts such as Shane Darcy – a lecturer at the Irish Centre for Human Rights at the National University of Ireland – said that this court was the first international criminal tribunal ever to prosecute (and, later, became the first to convict) individuals for the crime of collective punishment.

Under Article 3 of the Statute of the Special Court for Sierra Leone, the SCSL has the power to prosecute persons who had committed or ordered to commit what it considers "serious violations" of Common Article 3 of the Geneva Conventions and Additional Protocol II, including murder, pillage, terrorism, and torture. Article 3(b) also says that collective punishment is a "serious violation." (Others note that the 1994 statute creating the International Criminal Tribunal for Rwanda also lists collective punishment as a war crime, though that body has not yet prosecuted any individuals for that act.)

While the SCSL considers collective punishment as a serious violation of several conventions, it did not charge individuals for that act in and of itself. Instead, to hold an individual criminally responsible for the act of collective punishment, prosecutors first have to show that the individual was responsible for other criminal acts – such as murder and cruel treatment – used to carry out collective punishment. "The physical acts which form the basis for a charge of collective punishment [will be comprised of] separate and distinct war crimes, or even crimes against humanity, in and of themselves," said Shane Darcy.

In June 2007, the SCSL found a former rebel commander (Alex Tamba Brima) guilty of carrying out or ordering various war crimes and crimes against humanity, including enslavement, extermination, murder, mutilation, and pillage, among many

other acts. It also found him guilty of collective punishment (the first conviction for collective punishment in modern day history), which the court determined he had ordered against the civilian population in Freetown. It sentenced him to 50 years in prison.

In August 2007, the SCSL found Moinina Fofana and Allieu Kondewa (leaders of the Civil Defence Forces, a pro-government paramilitary organization, according to a group called the Hague Academic Coalition) guilty of cruel treatment, murder, pillage, and collective punishment, and sentenced them to prison terms of 15 years and 20 years, respectively. As in the case of Alex Brima, the SCSL found Fofana and Kondewa guilty of collective punishment only after showing that they were guilty of carrying out other illegal acts first. "The Chamber recalls that only those acts for which the Accused have been found to bear criminal responsibility under another count of the Indictment may form the basis of criminal responsibility for collective punishments," said the judgment.

But in 2008, an appeals court overturned Kondewa's conviction for collective punishment, but later convicted him on several counts of crimes against humanity and sentenced him to 20 years in prison.

Future cases of collective punishment: The International Criminal Court

Even with the historic convictions of several individuals for collective punishment in the case of Sierra Leone, human rights groups don't believe that these convictions will stop such acts from occurring in the future. They note that many governments have not, in recent times, seriously investigated or punished acts of collective punishment. And while some international criminal tribunals – such as the one for Sierra Leone – consider acts of collective punishment as war crimes, most others have not.

Observers also don't place much hope in the International Criminal Court (or ICC) to address collective punishment. In contrast to *temporary* tribunals – such as those for Sierra Leone and the former Yugoslavia – which are handling prosecutions for specific conflicts only (and will dissolve once their work ends), the ICC is the world's first *permanent* criminal tribunal, and has the authority to investigate and prosecute a wide range of crimes occurring within its 119 member states. But the ICC, which came into operation in 2003, is also known as the "court of last resort" because it will largely carry out a prosecution only if a member state is unwilling or unable to do so itself.

Under the *Rome Statute of the International Criminal Court* (which created the ICC), that tribunal does not have the legal authority to investigate and prosecute collective punishment. In fact, according to a brief history of the development of the Rome Statute, Shane Darcy at the National University of Ireland said that negotiators had decided not to include collective punishment as a war crime. Instead, the ICC has the legal authority to prosecute many separate acts – such as enslavement, murder, pillage, rape, and torture, among others – which could be carried out as part of collective punishment.

While the signatory nations can amend the Rome Statute so that the ICC will have the legal authority to prosecute collective punishment as a war crime, they have not yet taken this step and are not expected to do so in the immediate future.



Lunch in the Boardroom Lecture Series November 7, 2011

The Development of Russian Law since the Collapse of the Soviet Union



Robert E. Langer Partner, K&L Gates (New York and Moscow offices)

Robert E. Langer will speak to students in an informal setting about his legal practice in Russia. He has more than two decades of experience in advising Russian and foreign companies and individuals on structuring strategic and portfolio investments in Russia, the former Soviet Union, and worldwide. As a resident in the Moscow office from 1990-2000, Mr. Langer served as an advisor on many transactions that are now considered major milestones in the evolution of Russia's financial markets. He is also a recognized leader in giving legal opinions on Russian transactions.

Visit www.nyls.edu/CIL for more information and registration.

The United Nations and the Rule of Law: Delivered by His Excellency Ban Ki-moon, the Secretary-General of the United Nations



n October 3, 2011, the Secretary-General of the United Nations delivered the 2011-2012 Otto L. Walter Lecture, an annual memorial lecture established by the Center for International Law (and currently under the direction of Professor Lloyd Bonfield) in honor of Dr. Otto L. Walter '54 to address topics of international law. Prior to becoming the eighth Secretary-General, Mr. Ban served as the Minister of Foreign Affairs

and Trade of the Republic of Korea where his 37 years of service included postings in New Delhi, Vienna, and Washington, D.C. His ties to the United Nations date back to 1975 when he worked for the Foreign Ministry's United Nations Division. His assignments included serving as Chairman of the Preparatory Commission for the Comprehensive Nuclear Test Ban Treaty Organization and Chef de Cabinet during the Republic of Korea's 2001-2002 presidency of the UN General Assembly. Mr. Ban received a bachelor's degree in international relations from Seoul National University in 1970, and a master's degree in public administration from the Kennedy School of Government at Harvard University in 1985.

[as delivered]

Thank you Mr. Zirin for your very kind introduction,

Dean Matasar,

Professor Bonfield,

Distinguished faculty and students,

Ladies and Gentlemen,

It is a great honour and privilege for me to address this very distinguished group and audience.

As Secretary-General during the last almost five years, I have been addressing many different types of audiences – starting from government officials, business leaders, civil society leaders. But I have never addressed any group of lawyers, future lawyers and distinguished law professors.

I believe that one of the very difficult audiences to address [are] lawyers. That is why I am here with my Legal Counsel to defend me! If there is going to be any controversies, legal troubles, I hope, Patricia O'Brien, you will protect me.

Not long ago, a dinner companion told me that there is a very nice place with a heavy emphasis on public service. A place where people are working very hard to better themselves, juggling jobs and other responsibilities.

I told my companion I would like to visit that place and talk

with those people about how their talents are just what the United Nations needs at this critical time in world affairs.

So that's why I am here.

That companion was James Zirin, one of your trustees.

And that place was this institution – a very distinguished institution.

New York Law School may not have what the biggest schools have – a stadium or a campus with a classic quad.

You may not have the traditional mascots – no Lions, Orangemen, or Wolverines.

But this great school has a motto that gets a loud cheer from me:

"Learn Law. Take Action." That's very important. That is exactly the same philosophy [that] I have. Lead by example. Take action. Deliver results.

That is what your graduates have been doing for more than a century.

On the Supreme Court.

At City Hall.

In boardrooms and the diplomatic corps.

Even on television. Perhaps when Judge Judy ['65] decides she has had enough of her reality show, she can become a United Nations mediator to deal with our global reality!

One of your most remarkable graduates was Otto L. Walter.

An accomplished lawyer, he also devoted himself to UN causes.

He sought post-war harmony between Germany and the United States – even though, as a Jew, he was persecuted by the Nazis.

He helped shape our understanding of international law.

And much later in life, he supported the establishment of the UN Human Rights Council.

Even today, the Otto and Fran Walter Foundation supports literacy programmes in Guatemala, and fights against hunger and domestic violence here in New York City.

Otto Walter's name graces my talk tonight.

I welcome this opportunity to talk to you about the rule of law in today's world – why it is important, and what the United Nations is doing to advance the rule of law principle.

Ladies and Gentlemen,

I speak to you just after the busiest period of the United Nations general debate. That is when world leaders gather at our headquarters to tell us what's on their minds. And I tell them what's on mine.

This year, we face an increasingly complex set of realities.

Global economic turmoil; mega-disasters; rising joblessness; growing inequality between rich and poor.

We are seeing tectonic shifts in global power.

There is disillusion with the established order, be it democratic or repressive.

We see distrust in institutions, be they public or private – a sense that the playing field is tilted in favour of entrenched interests and elites.

On the last day of this month, 31 October, the human family will welcome its 7 billionth member.

That new face brings us face-to-face with what I call the 50-50-50 challenge.

By 2050, the world population will grow to reach 9 billion – that will be a 50 per cent increase compared with the last decade.

By that time, we will have to cut by 50 per cent greenhouse gas emissions. By that time, we will have [nearly] 7 billion people living in the cities. That, again, creates a lot of problems and challenges for organizations. That's what I am calling the 50-50-50 challenge.

movements in the streets of Syria.

The United Nations stands with all those seeking to build societies where nobody is above the law and where laws are publicly promulgated, equally enforced and consistent with human rights.

These democratic yearnings were also on display in Côte d'Ivoire following last December's disputed presidential elections.

Yet the intransigent leader who lost the election refused to step down, unleashed violence against his own people.

At that moment, the United Nations stood firm and helped the Ivorian people to defend their genuine freedom, their genuine right, on the basis of democratic principles.

The United Nations demonstrated for the first time the principle of the "responsibility to protect." That new doctrine

This great school has a motto that gets a loud cheer from me: "Learn Law. Take Action." That's very important. That is exactly the same philosophy [that] I have. Lead by example. Take action. Deliver results.

Unless we address it properly, we will be facing a very serious problem.

This turbulence and anxiety figured prominently in the speeches and meetings of the past two weeks.

A "historic period," said one prime minister.

An "extremely delicate moment," said another president.

The Israeli-Palestinian conflict claimed most of the headlines, and rightly so: a peace agreement is long overdue, vital for both sides, the region and the world.

But many issues were on the table.

Nuclear safety and women's health.

Racism and energy security.

Famine in the Horn of Africa.

The sweeping democratic movements in the Middle East and North Africa.

These are disparate issues and events.

But some threads are clearly visible.

First, just as countries are more interconnected, so are the challenges.

Second: no country can take on today's challenges alone – however powerful and resourceful one country may be. Look at the case of the United States: the United States, by any standards, is the richest and most powerful, resourceful country. But the United States cannot do it alone now, as it might have been possible even two decades ago.

A legal expression captures this idea perfectly: when it comes to global problem-solving, there is no opt-out clause.

Ladies and Gentlemen,

The past nine months have been one of the most dramatic periods in recent history.

Millions of people have taken to the streets demanding freedom, democracy and better governance.

The Arab Spring has captured the global imagination.

It should be especially inspiring to you. After all, the banner that has united them is the rule of law.

We saw that banner waving in Tunis and Cairo's Tahrir Square and then again in Tripoli and in Syria. We see all these

aims to ensure that people facing mass atrocity crimes are not alone when their own country cannot or will not protect them.

After months of conflict, the man who won the election was inaugurated as president – President Ouattara of Côte d'Ivoire – a huge victory for democracy and human rights, not only in Africa but everywhere.

Indeed, that experience set the stage for the further application of the responsibility to protect, when the international community came together to protect the people of Libya from a massacre by their own government.

Two weeks ago, the flag of a new Libya was raised at the United Nations. I was there and I was at the inauguration ceremony in Côte d'Ivoire. I was there when the new flag of Libya was raised at the United Nations.

Where once the idea was widely debated but not put into practice, we can now say that the responsibility to protect has arrived

But let us remember: the concept is too often misunderstood as a license for intervention. That is exactly the point where many countries have fears or concerns about officially accepting this idea of the responsibility to protect. Yet human protection begins with prevention.

We far prefer early engagement to late intervention. We prefer helping States succeed to responding when they fail.

Our challenge now is to help these societies successfully manage their transitions, and build the foundation they need to ensure that the gains they have achieved are irreversible, and that the peace they have found is sustainable.

That foundation lies in the rule of law.

Where the rule of law is weak, impunity prevails and the risk of a society lapsing into violent conflict is strong.

The chain of events is all too common.

Institutions meant to ensure justice and security lack the capacity to uphold these basic sovereign responsibilities.

Corruption, cronyism and criminal networks exploit these weaknesses.

Citizens begin to feel less safe, and have nowhere to turn when

their rights are violated.

Investment dries up. Public services diminish.

Jobs vanish, especially among young people.

Distrust or outright hostility towards the state grows.

Often, extremists harness these sentiments, inciting marginalized groups of people and restless youth to challenge the established order through violent means.

Societies fragment under the stresses of increasing lawlessness.

This is not just theory. The global implications of these dynamics are self evident.

Pirates would not threaten international shipping lanes if not for Somalia's deep poverty, political instability and lack of legitimate justice and security institutions.

Conversely, were it not for the substantial efforts of the United Nations to build justice and security in post-conflict Liberia, thousands of demobilized combatants might now be agitating for another civil war.

This is why the United Nations and its regional and civil society partners seek to strengthen the rule of law at the national and international levels.

Newly constituted governments are looking to us for a wide range of assistance.

They want help in drafting constitutions.

They want to rebuild - or establish for the first time institutions trained in human rights and due process. We are there, training judges, prosecutors, police and corrections officers in international best practices. In fact, the United Nations, during the last six decades, has accumulated experience in these areas.

They want to conduct peaceful, credible, democratic elections. We are there, in dozens of countries, providing technical assistance. We have already deployed electoral [teams] in Tunisia and Egypt. This month there will be an election in Tunisia and next month there will be elections in Egypt.

We have secured real advances in recognizing conflict-related sexual violence as a threat to international peace and security.

We are pushing hard to overcome long-standing gender inequalities through legislative reform, restitution and reparations programmes, and increased participation in decision-making.



And we are helping societies address the roots of crisis and the legacy of past atrocities.

That has meant facilitating truth commissions and other transitional justice efforts.

International criminal tribunals have carved out new legal territory, winning convictions for genocide and establishing rape as a crime against humanity.

Perpetrators of international crimes are being held accountable - to soothe the suffering of victims, and to put a nation at peace with itself.

International criminal justice also has a strong preventive element.

Reckoning with the past also helps to deter future war criminals.

We want to move from retribution to reconciliation, and from punishment to prevention.

The trend is clear: we are mobilized against impunity. We are moving with ever greater determination into an age of accountability.

I want to see a world where accountability, the rule of law and a culture of prevention work together for sustainable peace.

Dear students,

Ladies and Gentlemen,

Your responsibility as students is to master your material and pass those exams, get a good job.

But you also have responsibilities as global citizens.

So I ask you to consider joining one of our peace missions for a year or two to help build accountable justice systems. Try to broaden your vision. You are living in a most prosperous and rich country. But try to look beyond the United States, try to look around the world where many people are in danger, are in need of immediate help -- humanitarian or legal protections. There are many people whose human rights are abused, brutally abused. Then, instead of just sitting in this ivory tower and getting good jobs as lawyers, why don't you broaden your understanding and vision towards other parts of the world?

Work with bar associations, prosecutors and ministries of justice in a country rebuilding after civil war.

Use your knowledge to develop training programmes.

Give some part of your careers to assisting with security sector reform in emerging democracies.

Other paths will surely entice you, especially those that might be more lucrative.

But at times of great flux and transformation such as those we are living through today, opportunities to make a difference are especially compelling.

Therefore, I will look to all of you, faculty and students alike, to stand up for the principles that animate this school - justice, equality and the certainty of law.

And I sincerely hope that we will work together, with the United Nations, to build this world, better for all, where all human rights are equally protected and where all people can live without any fear.

Thank you for your attention. 😚



International Law News Roundup

INTERNATIONAL ART LAW

Does international law effectively protect cultural property?

ollectors from around the world buy and sell cultural property such as antiquities from historical civilizations, and artifacts unearthed in archeological sites across the globe. The market in cultural property also includes art looted from occupied nations during wartime, and objects stolen or illicitly taken from museums and private collections by modernday thieves, say experts. During the past several decades, source nations began to regulate excavations, and initiated campaigns seeking the return of what they claim to be their rightful cultural objects from foreign museums and other institutions which house and display them today.

Governments have also passed domestic laws and even negotiated international treaties to protect cultural property and address the return of stolen ones to their countries of origin. What are some of the provisions of these laws and agreements? Have they been effective?

Analysts say that "cultural property" is both an ambiguous and expansive term. The United Nations Educational, Scientific, and Cultural Organization (or UNESCO, an agency which has been called the cultural wing of the United Nations, and functions as a clearinghouse for sharing and distributing information and ideas) defines cultural property as "property which, on religious or secular grounds, is specifically designated by each state as being of importance for archeology, prehistory, history, literature, art or science," and includes items such as ceramic objects, coins, figurines, jewelry, paintings, religious icons, statutes, and vases, among many others.

Highly valued by museums and private collectors for their age, beauty, craftsmanship, and also their historical significance, cultural properties are often stolen from their rightful owners (by "tomb-robbers, smugglers, . . . and assorted thieves," said one U.S. federal judge), and are then bought and sold on the black market, which has existed for centuries and continues into modern times.

UNESCO estimates that the global sales of cultural property reached \$60 billion in recent years, which includes around \$6 billion in illicit sales, making it the third most profitable black market after drugs (which totaled in the hundreds of billions of dollars in 2010) and also illicit arms (around \$100 billion). Currently, a broad cross-section of nations struggles to protect their cultural properties. They include:

Greece: A major source nation of classical antiquities, Greece has been seeking the return of cultural property which has been looted from its territory over hundreds of years and even continues to this very day. For example, in the 19th century, the British ambassador to the Ottoman Empire, Thomas Bruce (the 7th earl of Elgin), removed about half of the Parthenon's remaining sculptures and decorative friezes, and transported them to Britain for what he described as safekeeping. The government later acquired the "Elgin Marbles," and put them on

display at the British Museum where they remain today. While the Greek government continues to demand the return of these antiquities, Britain said that its parliament had concluded long ago that Lord Elgin's actions in taking them were legal.

Still, Greece has had some success in recovering many of its looted antiquities. For example, in recent years, Italy and the Vatican had returned several friezes which had been removed from the Parthenon. In 2001, nearly 275 objects which had been stolen from the Archeological Museum of Ancient Corinth (located outside of Athens) were returned to Greece. The FBI had discovered these stolen antiquities (missing since 1990) in a Miami warehouse after it received a tip that smugglers were attempting to auction them, according to the Greek consulate in Atlanta, Ga.

But problems still continue to this very day. Greece's embassy in Washington, DC, said that "there is hardly an area in Greece that has not been pillaged by antiquities thieves," estimating that, since the Corinth Museum robbery, Greece has suffered more than 30 serious cases of antiquities theft. The "illicit antiquities trade," according to reporting from *Kathimerini*, a Greek news daily, "continues to thrive in Greece."

Egypt: Antiquities smugglers have long targeted Egypt for its rich cultural history, say experts. Several years ago, a U.S. federal court convicted an antiquities dealer for "plotting to smuggle a stolen bust of a pharaoh out of Egypt," according to reporting from the *Associated Press*.

In 1922, British archaeologist Howard Carter discovered the tomb of the young Egyptian pharaoh Tutankhamen which had been undisturbed since his death in 1315 B.C. The Metropolitan Museum of Art in New York later acquired much of the tomb's contents. In August 2011, it reached an agreement with the Egyptian government to return 19 items from the tomb. The Grand Egyptian Museum will display these objects (which were previously a part of the Met's permanent collection for over 50 years) when it opens near the Giza Pyramids in 2012.

Despite increased awareness of the need to protect cultural properties, the damage caused by illegal looting in Egypt has been "catastrophic," according to Vivian Davies, Keeper of Egyptian Antiquities at the British Museum, who added that "massive destruction is being done to archeological sites in Egypt on a daily basis." The sheer size of the Egyptian desert has made it difficult to guard archeological sites, and insufficient security at museums (especially during times of political unrest) has made it easier to steal cultural antiquities, say analysts. In January 2011, for instance, demonstrators during the Arab Spring political protests looted the Museum of Egyptian Antiquities in Cairo.

Iraq: Experts say that Iraq – with its rich cultural history, including antiquities dating from the times of the Babylonian empire – has been targeted for smuggling and looting for decades.

In 2003, during the American military invasion of Iraq to topple the government of Saddam Hussein, the National Museum of Iraq was left unprotected, and, over the course of four days, looters had stolen over "15,000 priceless antiquities," according to a briefing from the United States Institute of Peace. In July 2011,

the United States (with the help of the FBI's Art Crime Unit) had recovered and returned to Iraq several Babylonian antiquities which had been looted by U.S. Defense Department contractors. Since 2003, it had returned over 7,000 pieces stolen from Iraq.

Experts estimate that 90 percent of stolen Iraqi antiquities are smuggled through Amman, Baghdad, Beirut, Damascus, Dubai, and Geneva, and are then sent to London, New York, Paris, and Tokyo, among other destinations.

Mexico: Experts estimate that Mexico has over 200,000 archeological sites where excavators are unearthing antiquities from the Aztec, Mayan, and Teotihuacan civilizations, among many others, which not only attract tourists, but also "looters and traffickers [who] see a chance to profit from the wealth of the past," said *BBC News*.

However, the country says that only 40,000 of them have been properly registered, and, of this total, only 160 are supervised by Mexican authorities. All of the other sites are "unsupervised," and "vulnerable to those who illegally extract artifacts to sell . . . sometimes for thousands of dollars," said analysts. Enrique Vela, editor of a Mexican magazine on archeology, told the media that criminal organizations "have capacities that sometimes us [sic] archaeologists don't even have, of digging in some areas because they know exactly where the objects will appear."

But in the last few years, authorities have carried out raids across Mexico to prevent the smuggling of its antiquities to other parts of the world. *BBC News* reported that a raid in July 2010 had recovered 180 archeological pieces.

Experts say that the looting and destruction of these artifacts deprive nations of their heritage, and that such historical items cannot be replaced. "Cultural property," said UNESCO, "constitutes one of the basic elements of civilization and national culture." Analysts point out, for example, that most Americans would feel outrage if smugglers managed to steal the original copies of the *Declaration of Independence* and the *U.S. Constitution*, and sold them on the black market to the highest bidders. Groups such as SAFE (which monitors the illicit cultural property trade) also point out that illicit removal of cultural property could deprive nations of potential tourism revenues.

Many also argue that cultural properties lose their education and scientific values when looters and smugglers crudely remove them from their original surroundings in contrast to archeologists who are trained to collect scientific data and document information during the excavation process.

Other analysts point out that organized criminal and terrorist groups export and import antiquities as a way to disguise other illegal activities. According to Matthew Bogdanos, the U.S. Army colonel who was in charge of investigating the looting of Iraq's National Museum, terrorist groups used the same trade routes, shipping sites, and storage centers to smuggle both guns and antiquities out of the Middle East. "Every single weapons shipment that was seized, whether from terrorists or insurgents, also contained antiquities," he said. In 2005, he noted that a series of raids in northern Iraq lead to the arrest of five terrorists who were found in underground bunkers stockpiled with ammunition and items looted from the National Museum of Iraq in 2003, including 30 cylinder seals, statutes, and vases.

Because the smuggling and theft of cultural properties cross international borders, nations have negotiated several agreements. They include:

Convention for the Protection of Cultural Property in the Event of Armed Conflict and Protocols (or 1954 Convention) is the first international treaty whose primary purpose is to protect cultural property specifically during times of international armed conflict, which is defined as a war between nations. Experts say that the world community had adopted this agreement in response to World War II and other past conflicts where warring parties had heavily damaged historical buildings and also looted galleries, museums, and private residences. Currently, 123 nations have joined this agreement.

During times of actual armed conflict, Article 4 calls on nations to refrain from directing any acts of hostility against cultural property, and also from using such property and its immediate surroundings "for purposes which are likely to expose it to destruction or damage" such as firing anti-aircraft guns from a historical monument. But nations may waive these obligations in cases of "military necessity," though Article 4 doesn't provide more details. They must also prohibit, prevent, and stop their forces from "any form of theft, pillage, or misappropriation of . . cultural property."

Under Article 5, occupying forces must "as far as possible" help national authorities of the occupied nation safeguard and preserve their cultural properties. Article 8 says that nations may designate and grant special protection to a "limited number of refuges" used to shelter movable cultural property as long as they are located away from military targets. Article 12 allows nations to transfer cultural property during wartime under international supervision.

During conflicts which take place within nations (such as a civil war or during a rebel insurgency), armed forces must comply with Article 4 "as a minimum."

The world community also passed two protocols, which are additional agreements attached to the main 1954 Convention. The first protocol (also adopted in 1954) calls on its 100 signatories to prevent the exportation of cultural property from occupied nations or to use such property as war reparations, among other restrictions. The second protocol, adopted in 1999, clarified certain provisions in the original 1954 Convention for its 60 signatories. For instance, under Article 6, a nation may invoke its waiver to refrain from attacking cultural property when "that cultural property has, by its function, been made into a military objective," and also when "there is no feasible alternative available to obtain a similar military advantage."

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (or 1970 Convention) is the first international treaty which calls on nations to prohibit and prevent the illicit import and export of cultural property. As of 2011, 120 nations have ratified the agreement, including the United States (which did so in 1983).

Cultural property, as defined by the 1970 Convention, is property designated by a State party as having importance for archeology, history, literature, art, or science, and specifically includes coins, engravings, fossils, furniture, lithographs, old books, paintings, prints, rare manuscripts, sculptures, stamps, and even sound, photographic, and cinematographic archives, among many other items. What measures do nations have to take to prevent the illicit import and export of cultural property?

Article 5 broadly calls on nations to pass laws and regulations

which prohibit and prevent the illicit import and export of cultural property, create a national inventory of protected property, supervise archeological excavations, and establish codes of conduct for collectors, curators, and dealers.

Under Article 6, nations must create a certificate program which authorizes the export of cultural properties, and also prohibits their export without a certificate.

Article 7 says that nations must take "necessary measures" to prevent museums and similar institutions from buying cultural property that was illegally exported from other nations. It also says that a nation must prohibit the import of cultural properties stolen from a "museum or a religious or secular public monument" in another State party as long as these properties appear on the inventories of these institutions.

Even with a legal framework of domestic laws and international treaties in place to curb the theft of cultural properties, the black market in those goods remains one of the largest in the world today.

The 1970 Convention allows only State parties to claim the recovery and return of cultural property – whether they belong to a State or private party – from other State parties, and only through "diplomatic offices." (So a private party seeking the return of its cultural property must work with their respective governments, and not by itself through, say, the court system.) At the request of a State party from which a cultural property was originally located, the other State party must take "appropriate steps" to seize and return such property as long as the requesting party pays "just compensation to an innocent purchaser or to a person who has valid title to that property."

Experts say that the terms of the 1970 Convention are not self-executing, meaning that a nation must pass its own domestic legislation to carry out its obligations. (On the other hand, a self-executing treaty automatically becomes part of a country's laws.) For its part, the United States in 1983 passed a domestic law called the *Convention on Cultural Property Implementation Act* (or CPIA) to carry out its obligations under the 1970 Convention.

Specifically, the CPIA gives authority to the President to enter into bilateral or multilateral agreements (made at the request of another State party) which set restrictions on the import of "cultural patrimony" threatened by pillaging. But before entering into such agreements (which are generally called "memorandums of understandings," or MOUs), the President must determine that: (1) the cultural patrimony of the requesting state is in jeopardy from pillaging, (2) the requesting nation has already undertaken its obligations under the 1970 Convention to protect its cultural patrimony, (3) the use of U.S. import restrictions "would be of substantial benefit in deterring a serious situation of pillage," and (4) the use of U.S. import restrictions would be "consistent with the general interest of the international community."

According to the Bureau of Educational and Cultural Affairs at the U.S. Department of State, the United States has entered into 15 MOUs geared at protecting and preserving cultural properties with countries such as Bolivia, Canada, Cyprus, Honduras, Italy, Mali, and Peru.

In July 2011, the United States signed an MOU where it agreed to place a ban on the import of most Greek antiquities into the

United States. Like many other source countries, Greece struggles to control the illegal looting and trade of its antiquities. Because that nation is currently going through economic upheaval, the Ministry of Culture has even fewer resources to protect its museums and preserve its archeological sites. In the months leading up to the signing of the U.S.-Greece MOU, underfunded museums and archeological sites had to close earlier and also reduce the number of guards and other staff members on duty, which led to an increase in illegal excavations and thefts, according to the Ministry of Culture in an interview with Artinfo.com, an arts media Web page.

Under the agreement, the United States must restrict the import of a wide variety of archeological materials from Greece from 20,000 B.C. through the 15th century A.D., and also ecclesiastical materials (which are related to and used in churches) from the 4th century A.D. through the 15th century A.D., including bone, ceramic, ivory, metal, stone, and wood. In return, Greece must consider increasing the ability of its police "to monitor and protect cultural heritage sites throughout the country," and continue efforts to protect its archeological resources through the "enhanced enforcement of its cultural heritage protection legislation," among other measures.

In January 2009, the United States signed an MOU where it agreed to restrict the import of "archeological material originating in China" from 75,000 B.C. to 907 A.D. (in broad categories such as ceramic, metal, stone, and textiles), and also "monumental sculpture and wall art at least 250 years old." But the Chinese government may issue licenses to export these cultural materials for display in other nations.

In return, China must agree to "expand efforts to educate its citizens about the long-term importance of safeguarding its rich cultural heritage," and also "use its best efforts to increase funding and professional resources for the protection" of its cultural heritage. Observers say that China did not actively carry out these activities in the past, which they believe allowed smugglers and others to steal cultural properties from various sites and institutions across the nation. The agreement also calls on China to improve the effectiveness of its customs officers to stop the illegal exports of its cultural properties, especially at border crossings and ports in Hong Kong and Macau.

UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (or 1995 Convention, which uses the French acronym for the International Institute for the Unification of Private Law) creates "minimal legal rules" for the return of stolen and illicitly exported cultural properties filed by both State and private parties. It also sets broader definitions for stolen cultural property. According to UNESCO, the 1995 Convention created a "uniform minimum body of private law rules for the international art trade to complement the public law provision of the [1970 Convention]." It defines "cultural property" in the same way and includes the same examples of such property as the 1970 Convention. As of 2011, 31 nations have joined the 1995 Convention. The United States is not a party to that agreement.

Article 3 says that the possessor of a stolen cultural object (regardless of whether it was stolen from a museum or public monuments as in the case of the 1970 Convention) must return such property. The 1995 Convention also considers as stolen those cultural objects which had been unlawfully excavated and also objects which were "lawfully excavated, but unlawfully retained."

For the restitution of stolen cultural objects, a private party may (under Article 8) file a claim "before the courts or competent authorities of the Contracting State where the cultural object is located." (It may not do so under the 1970 Convention.) When a court decides that it must be returned, the possessor of the stolen object will be entitled to "fair and reasonable compensation" provided that he could not have reasonably known that the object was stolen and can also prove that he had "exercised due diligence when acquiring the object."

For the return of illegally exported cultural objects from its territory, a State party (under Article 5) may file a claim with a court or other competent authority rather than work through diplomatic channels. The possessor of the cultural object will also be entitled to "fair and reasonable compensation" provided that he could not have reasonably known "at the time of acquisition that the object had been illegally exported."

Domestic laws: Nations also use domestic laws to protect cultural antiquities, and also resolve disputes concerning them in cases where they did not sign an international treaty or negotiate an MOU with another state. For example, before the United States adopted the 1970 Convention, the federal government had, for the first time (in 1974), successfully prosecuted individuals for the illegal trafficking of antiquities by using an existing domestic statute – the *National Stolen Property Act* (or NSPA) – which makes it a criminal act to knowingly transport, receive, and sell stolen goods and other merchandise worth more than \$5,000.

In the case of *United States v. McClain*, the government charged Patty McClain and four defendants with conspiring to violate the NSPA by transporting, receiving, and selling pre-Columbian artifacts which prosecutors had argued was stolen from Mexico. After a jury found them guilty of these charges, McClain and the others appealed their convictions by arguing that the government of Mexico did not own the artifacts in the case. In fact, it had never even possessed them or even knew of their existence, they said. While the defendants admitted that they had illegally exported the artifacts without permission from Mexico in violation of its export control laws, they did not – within the meaning of the NSPA – "steal" the artifacts since the Mexican government never owned them in the first place. Therefore, the United States could not charge them under the NSPA which criminalizes the act of transporting and receiving only stolen goods.

In 1977, the U.S. Court of Appeals for the Fifth Circuit concluded that a 1972 Mexican law had clearly given ownership of undiscovered antiquities to the Mexican government. The appeals court also created two criteria (popularly known as the McClain doctrine) to determine whether a foreign government actually has ownership of antiquities taken from its territory for the purpose of allowing the United States to prosecute an individual under the NSPA. First, the terms of the foreign law which gives ownership of antiquities to the government must be clear. Second, the antiquities in question must have been found within the foreign nation's modern borders after the passage of the law giving ownership to the government.

Because the trial court did not determine whether the antiquities in the case had been discovered before or after 1972 (the date of the law which gave Mexico ownership rights for undiscovered antiquities), the appeals court reversed the defendants' convictions and ordered a new trial. Another jury later convicted the defendants of violating the NSPA.

In a similar case which reaffirmed the use of the McClain doctrine, the U.S. Court of Appeals for the Second Circuit in 2003 upheld the conviction of a New York antiquities dealer – in *United States v. Schultz* – who prosecutors say had violated the NSPA by conspiring to remove and sell several antiquities from Egypt. The appeals court said that an Egyptian law had clearly given ownership of antiquities found in Egypt to its government, and was not an export control law as argued by the defendant. "In concluding that such antiquities are stolen, the Second Circuit has clearly reiterated that this rule of law [i.e., the NSPA] applies in the New York area, the heart of the antiquities market in the United States," according to Patty Gerstenblith, a law professor at DePaul University College of Law.

But even with all of these international and domestic legal measures, the black market for stolen cultural properties continues to grow and remains one of the world's largest. Smugglers, thieves, and unethical dealers will continue their efforts to steal and sell them to the highest bidders as long as such objects remain a limited and highly prized resource, say officials. Others believe that nations must do more to protect archeological sites, museums, and other institutions in their respective jurisdictions. But many say that doing so is usually a never-ending battle given the limited resources of many nations and the tenacity of those who want to acquire cultural objects.

Similar voluntary agreements have also been reached between museums and individuals governments. Rather than litigate, several museums – such as the Boston Museum of Fine Arts, the Metropolitan Museum of Art in New York, and the Getty Museum in Los Angeles – have reached settled agreements with source nations allowing for long-term loans or partial repatriation of collections.

INTERNATIONAL CRIMINAL COURT

Who will prosecute the son of Col. Muammar Qaddafi?

fter toppling Col. Muammar Qaddafi's long-standing regime in August 2011, Libyan rebels later captured and killed the former dictator who was wanted by the International Criminal Court (or ICC) on charges of ordering the murder of hundreds of Libyan protestors during the start of the Arab Spring protests. His son, Saif Al-Islam Qaddafi, is also wanted by the ICC, and is in custody of rebel forces. Who should prosecute former leaders and officials accused of ordering international human rights violations? Their own country or a tribunal such as the ICC? The interim Libyan government and the ICC are currently debating this question in the case of Saif Qaddafi.

The ICC is the world's only permanent criminal tribunal, and has the authority to prosecute individuals accused of genocide, war crimes, crimes against humanity, and crimes of aggression. 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 the former Yugoslavia and Rwanda, the ICC (based in The Hague) has much wider jurisdiction to try individuals from those countries – called States Parties – which have ratified the *Rome Statute of the International Criminal Court*, the agreement creating that tribunal.

As of February 2012, 120 countries have joined the Rome

Statute (which came into force on July 1, 2002, and covers criminal acts occurring only after that date) and are legally bound to abide by its provisions. On the other hand, the ICC doesn't have the authority to prosecute individuals from non-signatory states such as China, India, Russia, and the United States, though there are exceptions.

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, a nation's legal system may lack the ability to carry out an effective prosecution. In other cases, a country may – for political reasons – refuse to prosecute an individual or simply carry out a half-hearted investigation, arguing that he had committed no wrongdoing. There may even be instances where a nation is deliberately carrying out policies which lead to large-scale human rights abuses, and will ignore concerns from other nations.

In these cases, the Rome Statute has certain provisions which will allow the ICC to begin taking some action. For example, any States Party (under Article 14) may refer a certain "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 pass a resolution calling on the ICC to investigate a particular situation even in nations which have not signed the Rome Statute. (Legal experts say that this authority also comes from the UN Charter which says that the Security Council has the primary responsibility to "maintain or restore international peace and security.")

As part of its investigation, the ICC may even issue arrest warrants for particular individuals under certain circumstances. For instance, the ICC issued an arrest warrant in 2009 for the president of Sudan, Omar Hassan al-Bashir, on allegations that he ordered pillage, murder, extermination, and attacks against civilians, among other charges, all in the Darfur region of his country. "Warrants of arrest are lifetime orders," said the ICC, "and therefore individuals still at large will sooner or later face the Court."

The ICC is currently prosecuting 17 cases in 7 situations – all in Africa. It is also conducting preliminary examinations in various nations, including Afghanistan, Colombia, Georgia, Korea, and Palestine, to see whether alleged crimes under the ICC's jurisdiction had taken place.

Although many nations have cracked down on protestors in the midst of the Arab Spring, Libya has been the only one (so far) to face the scrutiny of the ICC. Uprisings beginning in early 2011 across the Middle East have toppled governments in Tunisia and Egypt, and then spread to Libya in February 2011 where thousands of people across the country rallied against its regime. Political analysts said that Qaddafi had ordered a crackdown, and reported that security forces had shot hundreds of peaceful protestors.

In response, the Security Council unanimously passed Resolution 1970 where its members said that they "[deplored] the gross and systematic violation of human rights, including the repression of peaceful demonstrators," and added that the "widespread and systematic attacks currently taking place in [Libya] against the civilian population may amount to crimes against humanity," which is defined as certain acts "committed as part of a widespread or systematic attack directed against any civilian population."



Lunch in the Boardroom Lecture Series November 14, 2011

The EU High Representative for Foreign Affairs and Security Policy: All Hat and No Cattle?



Lloyd Bonfield Professor of Law and Director, Center for International Law, New York Law School

The U.S. Secretary of State serves as the chief foreign affairs advisor to the President and carries out American foreign policy. But who speaks for the European Union in foreign policy? In December 2009, the Treaty of Lisbon came into force and, among other acts, established the post of High Representative for Foreign Affairs and Security Policy. Soon after, the onset of the "Arab Spring" tested the role of the High Representative as EU member nations were forced to enhance their collaboration on foreign policy matters. Did the Treaty of Lisbon resolve the question of who speaks for Europe in foreign affairs? Professor Lloyd Bonfield will discuss this question and others.

Visit www.nyls.edu/CIL for more information and registration.

The resolution also referred the situation in Libya to the Prosecutor of the ICC for an investigation, and called on Libyan authorities to "cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution." Even though Libya is not a signatory to the Rome Statute, experts say that Resolution 1970 had brought that nation and its officials under the jurisdiction of the ICC.

While the International Criminal Court says that it will determine whether Libya can prosecute Muammar Qaddafi's son for crimes against humanity, Libya's new government may have plans of its own.

After carrying out a preliminary investigation, the ICC prosecutor said that "there was a reasonable basis to believe that crimes under the ICC's jurisdiction had been committed." In June 2011, the ICC issued an arrest warrant for Qaddafi where it accused him of "the commission of murder and persecution of civilians as crimes against humanity from 15 February 2011 onwards throughout Libya . . ." The warrant did not say that Qaddafi had personally carried out any killings, but accused him of ordering them "through the Libyan State apparatus and Security Forces."

Along with the authority to punish an individual who had directly carried out a crime, the ICC (under Article 25) may also hold responsible a person who "orders, solicits or induces the commission of such a crime which in fact occurs or is attempted." And under Article 27, the ICC can prosecute heads-of-state, elected representatives, and government officials. "Official capacity," it says, "shall in no case exempt a person from criminal responsibility under this Statute." Richard Dicker, who is director of international justice programs at Human Rights Watch, said that the arrest warrant had sent a "jarring message to dictators elsewhere who thought they were beyond the reach of the law."

The ICC also issued an arrest warrant for Qaddafi's son where it said that "there were reasonable grounds to believe" that he was also criminally responsible for both murder and persecution as crimes against humanity carried out by "Security Forces under his control in various localities of the Libyan territory," from February 15, 2011, until at least February 28, 2011. It noted that as his father's "unspoken successor and the most influential person within his inner circle," Saif Qaddafi had "exercised control over crucial parts of the State apparatus, including finances and logistics, and had the powers of a de facto Prime Minister." As such, "he had the power to frustrate the commission of the crimes by not performing his tasks." Instead, Saif Qaddafi "contributed to the implementation of the plan" to kill civilians, charged the warrant.

Analysts have noted the speed in which the ICC had issued the arrest warrants against Muammar Qaddafi and his son. Libya's crackdown began in February 2011, and the ICC issued the warrants in June 2011. In explaining why it had to quickly issue the arrest warrant for Saif Qaddafi, the ICC said it wanted to "ensure that he [did] not continue to use his power to obstruct or engender the investigation, in particular by orchestrating the cover-up of crimes committed by the Security Forces," and also to "prevent him from continuing to use his power and absolute control over the Libyan State apparatus to continue the commission of crimes within the jurisdiction of the Court."

Because the ICC does not have its own police force to apprehend wanted individuals, it must rely on the States Parties to arrest and transfer them to the ICC. In fact, once the ICC issues an arrest warrant, the States Parties have a legal obligation to carry out its orders. For example, Article 86 says that "States Parties shall . . . cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." Under Article 89, "the Court may transmit a request for the arrest and surrender of a person . . . to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person."

After rebel forces captured and killed Qaddafi in October 2011, the ICC terminated his case and withdrew his arrest warrant. It said in a statement that "the purpose of criminal proceedings [was] to determine individual criminal responsibility," and that it could no longer do so in his case because "jurisdiction cannot be exercised over a deceased person."

In November 2011, rebel forces captured Saif Qaddafi while he was trying to escape to Niger, and currently have him in custody. But the interim Libyan government announced that it would prosecute Saif Qaddafi in Libya rather than send him to the ICC. "It is only fair for the Libyan people that he is tried here," said the Libyan information minister Mahmoud Shammam in an interview with the *Associated Press*. "Saif al-Islam committed crimes against the Libyan people." In addition, Human Rights Watch said that Libya's general prosecutor and other officials had told the organization that "they are determined to try Qaddafi in Libya."

The two sides are now trying to decide who will prosecute Saif Qaddafi and also whether Libya even has the ability and means to hold a fair trial.

The ICC argued that Libya has a legal obligation to allow that criminal tribunal to prosecute Saif Qaddafi. It noted that Resolution 1970 had called on Libya to "cooperate fully with and provide any necessary assistance to the Court," and that this cooperation extended to complying with the arrest warrant. (In some ways, the ICC was saying that it should prosecute Saif Qaddafi because it had claimed jurisdiction over him before anyone else by issuing his arrest warrant.) "The issue is that there is already a case before the court," said the ICC's chief prosecutor. Human Rights Watch added: "Because the ICC is a judicial institution, its proceedings must run their independent course."

If Libya now wants to claim jurisdiction over Qaddafi and prosecute him, it must meet certain criteria, said legal experts. Under Rule 51 of the ICC's rules of procedure and evidence, Libya must show (in a legal submission to ICC judges) that "its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct." They must also charge Saif Qaddafi on charges substantially similar to those issued by the ICC. Libyan officials said that they would try Saif Qaddafi on corruption charges committed before the February 2011 uprising, and also "crimes committed during the conflict," though it didn't provide more information.

The ICC said that its judges will make the final determination on whether Libya will be able to carry out an effective prosecution of Saif Qaddafi. "Any decision on the admissibility of a case is under the sole competence of the Judges of the ICC," said an ICC spokesperson. Human Rights Watch agreed: "The ICC judges would review the challenge and determine whether the Libyan

proceedings make it unnecessary for the ICC to hear the case." If Libya is successful, the ICC must (under Article 17 of the Rome Statute) declare its own case "inadmissible" (i.e., unnecessary).

Analysts say that under Col. Qaddafi's decades-long rule, Libya had "intentionally weak state institutions and a government that barely existed . . . As a result, a capable court system, like other state bodies, must be built from scratch." The *New York Times* reported that Libya's "justice system is in disarray."

The ICC has called on Libya to provide it with information concerning its ability to prosecute Saif Qaddafi by January 10, 2012.

INTERNATIONAL HUMAN RIGHTS

Saudi Arabia: Arrested for being a woman driver

n May 22, 2011, the police in Khobar, Saudi Arabia, arrested a woman, Manal al-Sharif, and charged her with "violating the public order" and "inciting public opinion." What had she done? She was driving a car in a nation which does not allow women to do so. Why does Saudi Arabia prohibit women from driving? How have opponents responded to the driving ban? And does the ban on women drivers violate international law?

Saudi Arabia imposes what analysts describe as a puritanical form of Islam which strictly segregates men and women, and imposes special limits on what women can do. Freedom House, a New Yorkbased NGO, reported that "gender inequality is built into Saudi Arabia's governmental and social structures, and is integral to the country's state-supported interpretation of Islam . . ."

Under this system, women generally cannot go outside or travel within the country (or even use public transportation) unless they receive permission from or go in the company of a male relative. Men and women who are not related to each other cannot mix in public, and could be arrested if they do so. Observers note that women lawyers may not argue in court. Saudi Arabia also has the distinction of being the only country in the world which prohibits all women – "both Saudi and foreign" – from driving, according to the *New York Times*.

Many Saudi Arabian women say that the driving ban makes it difficult for them to carry out basic tasks such as going to work or to the store. While families can hire full-time chauffeurs, many others cannot afford the month salaries for them, which range from \$400 to \$600 a month.

In response to the driving ban, a group of women activists in Saudi Arabia called *Women2Drive* staged a protest on June 17, 2011, where they drove in their cars to perform everyday tasks.

No actual law or regulation forbids women from driving in Saudi Arabia, say observers. Instead, the current ban comes from religious edicts (called fatwas) issued by Muslim clerics, which the *Wall Street Journal* says are officially enforced by the state. It adds that the government uses these edicts to prevent women from receiving driver's licenses.

Because no law forbids women from driving, police aren't sure how or even whether to charge women who are caught driving. During the June 17 protest, most of the women drivers told several newspapers that they did not encounter much trouble. The police did stop several of them, but simply sent them home. One woman driving near the capital, Riyadh, reported that she driven past two policemen who pretended not to notice her. Another activist said that the police had issued a ticket to her for not having a license.

Although no law in Saudi Arabia explicitly prohibits women from driving cars and other vehicles, authorities detained several women who protested the ban by driving their cars to perform basic tasks such as shopping.

On the other hand, Al-Sharif, the woman driver from Khobar, was not treated so lightly when she was arrested in May 2011. The police held her for over a week, and forced her to sign a statement promising not to drive again. The news media also reported that a Saudi court in September 2011 had sentenced another woman, Shaima Jastaina, to receive 10 lashes for driving, but noted that the Saudi king overturned the punishment soon afterwards.

Why does Saudi society bar women from driving? First, many fear that driving could lead to moral corruption. As their reasoning goes, if women can drive, they can more easily associate with men and then engage in immoral behavior. "In general," wrote reporter Ellen Knickmeyer for *Foreign Policy* magazine, "most of the restrictions on Saudi women are meant to block mingling of the sexes in shops, workplaces, and schools, which many in the country's Wahhabi sect of Sunni Islam say is immoral."

Second, the Saudi royal family fears that if the government allowed women to drive, then it would have to grant them further rights, which will then lead to an erosion of its authority, according to political analysts. And the ongoing popular protests against many entrenched regimes throughout the Middle East (known as the "Arab Spring") have only heightened these fears. The Washington Post reported that King Abdullah himself does not personally object to women drivers, but believes that Saudi society is not yet ready for them. One activist claimed that religious authorities believe that the women who are pushing the driving issue are part of "a conspiracy against the country, started by Shia who are supported by liberals, secularists, Jews, and the West," according to the New York Times.

Opponents of the driving ban argue that it violates what they say is the fundamental principle of equality between the sexes. If men and women are equals in society, then Saudi Arabia must end its driving ban which discriminates against women solely on the basis of their sex. Activists in Saudi Arabia have described the ban as a "ridiculous abuse of our most basic human rights." One woman who drove on June 17 told *Asharq Alawsat*, a London-based Arabic newspaper, "that she was only exercising her legal rights . . ." She later told the BBC that "[e]nough is enough, I have the right [to drive]."

Many have also challenged the religious basis of the ban, arguing that Islamic religious tracts do not prohibit women from driving. They point out that one of the Prophet Muhammad's wives rode a camel at the head of an army. "If Muslim women could ride camels 14 centuries ago, why shouldn't they drive cars today?" wrote Farzaneh Milani, chairwoman of the Department of Middle Eastern and South Asian Languages and Cultures at the University of Virginia, in an op-ed for the *New York Times*.

Those who oppose the ban further point out that Saudi

authorities have allowed women in rural areas to drive for years. While the fatwas against women drivers apply across the nation, officials have not enforced the ban in the countryside because doing so would be too impracticable for those women and their families, said observers. While Saudi Arabia is predominantly an urban country – the CIA's *World Factbook* states that 82 percent of the population lived in urban areas in 2010 – activists point out that allowing women to drive in rural areas has not led to societal breakdown or moral degradation. So authorities should allow women in cities to drive, too.

At the international level, no treaty or agreement explicitly says that people have a fundamental right to drive or operate any vehicle of their choice. But some analysts believe that a driving ban which applies only to women could violate certain provisions in the following treaties and agreements.

The Universal Declaration of Human Rights (or Declaration): Adopted by the UN General Assembly in 1948, the Declaration calls on nations to recognize and respect a wide variety of human rights for "all peoples," including the right to liberty, freedom of thought, to own property, and to work, among many others. While the Declaration does not explicitly give people the right to drive a vehicle, Article 13(1) says that "everyone has the right to freedom of movement . . . within the borders of each state." So a law which bans women from driving (thus restricting their movement) could conceivably violate this article.

When recognizing and respecting these various rights for people within their respective jurisdictions, the Declaration calls on nations to do so (under Article 2) without making distinctions "of any kind," including those based on a person's sex, among other factors. So a driving ban which applies only to women could violate Article 2 because it makes a distinction based solely on a person's sex.

The Declaration also calls on nations to recognize and respect these rights on an equal basis. Specifically, Article 7 states that "all are equal before the law and are entitled without any discrimination to equal protection of the law." Under the doctrine of equal protection, when a government administers and enforces its laws (on people in similar situations or circumstances, it must treat everyone alike. A government violates equal protection when it gives some individuals the right to engage in a certain activity while denying the same right to others based on factors such as gender and race — unless there is a compelling public interest to do so. So in the case of Saudi Arabia, allowing men to drive while banning women would violate the concept of equal protection unless its government had a compelling reason to ban women from driving.

Despite these arguments, experts point out that 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 treaty, and that they don't have the force of law. In fact, many legal experts do not view the Declaration as an international treaty.

The International Covenant on Civil and Political Rights (or ICCPR): Adopted by the UN General Assembly in 1966, the ICCPR calls on nations to recognize and protect fundamental civil and political rights, including the right to life, freedom of association, and the right to a fair trial, among many others. (Unlike the Universal Declaration, the ICCPR is an enforceable treaty.) While the ICCPR does not explicitly give people the right

to drive a vehicle, Article 1 states that "all peoples have the right to self-determination," and are free to "pursue their economic, social and cultural development." Analysts could argue that a ban on women drivers limits their freedom to pursue their economic and social development.

As in the case of the Universal Declaration, the ICCPR requires nations (also under Article 2) to recognize and respect these various rights for people within their respective jurisdictions without making distinctions such as those based on a person's sex, and also to ensure that they do so on an equal basis (under Article 26). So a driving ban which applies only to women could violate Articles 2 and 26 because it applies only to women (solely on the basis of their sex) while exempting men.

The ICCPR also says that an individual has the right to freedom of movement. Article 12(1) states: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement . . ." So if women have the right of movement, then a government cannot unduly restrict them from driving cars, so goes the reasoning.

But Article 12(3) does allow exceptions to the right to liberty of movement for reasons of public order, public health, and morals. While Article 12(3) could conceivably allow Saudi Arabia to prevent women from driving, a person must believe that allowing women to drive will actually harm public order. However, Article 12(3) further states that restrictions must be "consistent with the other rights recognized in the present Covenant." So if the ban is based solely on a person's sex, then it could violate Article 2.

The International Covenant on Economic, Social and Cultural Rights (or ICESCR): Adopted by the UN General Assembly in 1966, ICESCR calls on nations to ensure the basic economic, social, and cultural rights of individuals such as the right to work, the right to free primary education, and the right to safe working conditions, among others. (It does not explicitly say that people have a right to drive.)

As in the case of Article 1 of the ICCPR, the first article of the ICESCR states that "all peoples have the right to self-determination," and are free to "pursue their economic, social and cultural development." Article 2 calls on states to recognize and ensure the various rights in the ICESCR without discrimination of any kind, including those based on a person's sex, among other factors. Activists can argue that a driving ban could violate these articles.

In addition, such a ban could violate Article 6, which states that the right to work "includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts." But a driving ban which applies only to women could deny them of many opportunities to find work.

The Convention Against All Forms of Discrimination Against Women (or CEDAW): Adopted by the UN General Assembly in 1979, CEDAW calls on nations to take measures to end discrimination against women in various fields and areas of life, including education, employment, health care, and family life, among many others (though, as in the case of other treaties, it does not explicitly mention a right to drive). Saudi Arabia signed the treaty in 2001. Under Article 2(d), nations must "refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation." Some believe that a state-sanctioned prohibition on only women drivers would violate this provision.

But Saudi Arabia had previously announced that it would enforce the various provisions in CEDAW as long as they adhered to Sharia law. "In case of contradiction between any term of [CEDAW] and the norms of Islamic law," it previously said, "the Kingdom is not under obligation to observe the contradictory terms of the Convention."

As of January 2012, no group has yet lodged a formal complaint with the United Nations which argues that the Saudi Arabian ban on women drivers violate provisions in these various treaties.

Will the Saudi government lift its ban on women drivers any time soon? Foreign Policy magazine notes that the country has been dealing with this issue since at least 1975. The last time activists made a push for the right for women to drive was in 1991 (during and after the first Gulf War against Iraq) when Saudi women saw female American soldiers driving vehicles around their country, reported the Wall Street Journal. About 47 women drove through Riyadh in protest afterwards. But they abandoned the movement after losing their jobs.

Have other nations tried to ban women from driving? Observers say that revolutionaries in Iran had wanted to ban women drivers when they took power in 1979, but that driving among women had already become an accepted part of Iranian society.

In the United States, no jurisdiction had outright prohibited women drivers. According to *Life* magazine, the first woman to receive a driver's license in the United States was Anne French of Concord, Massachusetts, in 1900 who then chose to stop driving three years later. The magazine noted that, during her time as a driver, Mrs. French had "never made an improper signal; she [had] never dented a fender; she [had] never exceeded the speed limit; she [had] never been scolded by a cop."

INTERNATIONAL INTELLECTUAL PROPERTY

United States: Copyright protection for fashion designs?

omen who can't afford the latest *haute couture* fashions (which can cost tens of thousands of dollars) can often find affordable mass-produced replicas at various retail stores. In response, many fashion designers have been urging Congress to pass legislation which will give copyright protection specifically to original fashion designs. Why doesn't U.S. copyright protection currently extend to fashion designs? What efforts have Congress undertaken to help protect American fashion designers? And do other nations extend copyright protection to their own fashion designs?

For decades, fashion designers have filed lawsuits to protect their products. For example, in 2010, American fashion designer Tory Burch filed a lawsuit against 40 online companies who had taken her original designs for shoes, handbags, and other accessories, and then sold exact replicas using her registered trademarks without permission, reported various media sources. Merchandise and goods which use a trademark (i.e., words, phrases, or symbols that distinguishes one party's goods from similar ones made by others) without the owner's permission are called counterfeit goods, and those involved in such activities are engaged in trademark infringement, say legal experts.

The federal judge presiding over the case – Tory Burch LLC, et al. v. Yong Sheng International Trade Co., Ltd, et al. – awarded her \$164 million in damages specifically for trademark

infringement, one of the largest ever given to a fashion designer for online counterfeiting, according to *TechCrunch*, an online technology news site.

Fashion designers have to deal not only with counterfeiters, but also mass market businesses which take the original designs, make replicas using cheaper materials, attach a different brand name, and then sell the knockoffs at significantly reduced prices — a practice which is generally legal under current U.S. law. Designers claim that this long-standing practice in the fashion industry has cheapened their brands and also hurt them financially.

Legal fashion blogs such as *CaseClothesed* (at New York Law School) have reported that fashion designers, including Prada, are suing mass-market companies such as Zara and Urban Outfitters for making clothing and accessories which they believe substantially copy their original designs, but sell them under another trademark. (These cases do not involve trademark infringement.) Some in the media have accused these companies of violating the copyright of these original designs.

But legal analysts say that U.S. copyright law generally does not protect original fashion designs. "[F]ashion companies trading in the U.S. have never been able to rely on copyright law to protect their unique and novel designs, and as a result, knockoffs have become a way of life in the U.S. fashion industry," said Louis S. Ederer and Maxwell Preston of law firm Arnold & Porter.

A copyright gives authors the exclusive right to use and control their "original works of authorship," for a fixed period of time, according to Title 17 of the U.S. Code which lays out the nation's copyright laws. These works include not only literary one (such as articles, novels, and poems), but also musical compositions, the content of computer programs and video games, and pictorial, graphic, and sculptural works. Any of these creations copied and reproduced without the permission of a copyright holder are called pirated goods, and those involved in making them are engaged in copyright piracy.

While copyright protects a wide range of creative works, it generally does not extend to what are called "useful articles," which the U.S. Code defines as "an article having an intrinsic utilitarian [i.e., useful or practical] function." Useful articles include, for example, bicycles, furniture, and tools (along with their respective designs), among many other examples. "Copyright doesn't protect the mechanical or utilitarian aspects of useful articles," according to publicdomainsherpa.com, a resource for intellectual property rights. Analysts say that if U.S. law extended copyright protection to useful items and their respective designs, doing so could impede creativity and innovation.

Clothing and their respective designs are also considered to be useful articles, and, therefore, don't receive copyright protection. The Congressional Research Service (or CRS) said: "Copyright protection has been denied to fashion designs because clothing garments have traditionally been viewed as useful articles – basic items of necessity having utilitarian value – rather than as artistic creations."

But U.S. copyright law does allow exceptions. Under 17 USC § 1301, Congress does have broad authority to grant copyright protection for an "original design of a useful article." But it must specify (through legislation) which original designs will receive such protection. Currently, 17 USC § 1301 allows copyright protection for the original design of only one useful article – "a

vessel hull or deck." (An analyst at CRS said that "the design protection for vessel hulls and decks . . . is a unique, specially carved-out area of protection for designs of useful articles," and points out that 17 USC § 1301 presently defines "useful article" as only a "vessel hull or deck.") Owners of such designs, under 17 USC § 1308, now have the exclusive right to "make, have made, or import, for sale . . . any useful article embodying that design," and also to "sell or distribute for sale . . . any useful article embodying that design."

Many in the fashion industry say that they want 17 USC § 1301 to include fashion designs. If Congress amends the U.S. Code to give copyright protection to original fashion designs, then fashion designers will be able to stop others from copying them without permission.

Fashion designers have used other intellectual property rights to protect their products, but argued that they have not been effective in protecting the unique designs themselves. For example, designers may file a patent which gives people and businesses the exclusive right to use and sell their inventions and prevent others from doing so. Stuart Weitzman, a high-fashion shoe designer, had specifically patented a shoe buckle to prevent fast-fashion houses from copying it. However, analysts say that the invention must be non-obvious, and also note that "design patents are difficult and expensive to obtain, and entail a lengthy examination process," which could quickly outlast the short fashion seasons. In the case of Stuart Weitzman, the patent would also apply only to one specific component of the shoe (the buckle), and not to design of the shoe.

Fashion designers have also relied on trademarks to protect their products. In the Tory Burch case, the defendants had, without permission, reproduced her registered trademark which is two stylized letter "T"s arranged top to bottom. But a trademark protects only "those product configurations that identify the source of the product [i.e. the trademark itself located on the fashion piece], while the other aspects [such as the original design] are not protected."

For the last several years, members of Congress have proposed laws which would explicitly give copyright protection specifically to fashion designs. For example, in 2010, Senator Charles Schumer (D-NY) introduced the *Innovative Design Protection and Piracy Prevention Act* (known as S. 3728), which would have:

- Amended 17 USC § 1301 to include "fashion design" (along with vessel hulls and decks) as a specific type of design protected by copyright;
- Defined fashion design as an "article of apparel" that provides a "unique, distinguishable, non-trivial, and non-utilitarian variation over prior designs for similar types of articles";
- Defined apparel broadly as "an article of men's, women's, or children's clothing, including undergarments, outerwear, gloves, footwear, and headgear; handbags, purses, wallets, tote bags, and belts; and eyeglass frames";
- Provided copyright protection to fashion designs for a period of three years;
- Allowed a plaintiff to file a lawsuit for copyright infringement against a party which produced an article of apparel "substantially identical" to the protected fashion design, meaning that it is "likely to be mistaken for the protected design." But it doesn't provide exact standards or more specific guidance.

Existing provisions in Title 17 would have applied in cases of copyright piracy of protected fashion designs. For example, a court would have the ability to order the copyright infringer to stop producing the pirated goods and award "damages adequate to compensate for the infringement."

While the Senate Judiciary Committee unanimously approved S. 3728, the full Senate did not vote on it, and the bill died at the end of its Congressional session. So supporters would have to reintroduce the bill again at the following session. Legislative analysts point out that they did not do so in 2011. But in July 2011, the U.S. House of Representatives introduced H.R. 2511 which is identical to S. 3728, and even has the same title. But as of January 2012, a House subcommittee was still studying the bill and did not yet take a vote on it.

Supporters of the legislation – both Democrats and Republicans, and prominent fashion designers, including Lazaro Hernandez, Jack McCullough, Diane von Furstenberg, and Jason Wu – say that without copyright protection for original designs, the fashion industry could see less innovation because designers will be less likely to make new, innovative designs (which can cost millions of dollars) if others can copy them with impunity. Others believe that copyright protection for original designs will encourage designers to create cheaper lines of their fashion to sell in the mass market, which will then increase sales, and help the economy.

In contrast, critics say that even without copyright protection for original fashion designs, clothing still manages to undergo major innovations every season. "If innovation is not lacking in fashion designs," said legal analyst Chia-Yu Chang, "why should we worry about the ineffectiveness of intellectual property protections."

Others believe that the long-standing practice of copying original designs actually promotes innovation in the fashion industry. "The absence of copyright in fashion frees designers to incorporate popular and reemerging styles into their own lines without restricting themselves for fear of infringement, thus facilitating the growth of new trends," said David Wolfe, creative director of Doneger Creative Services, during congressional hearings. But various bills in Congress could stifle overall creativity and the current competitive atmosphere which forces top designers to continually push the envelope in creating something new, say critics.

Others say that copyright protection for original designs could lead to more lawsuits where juries could have difficulty deciding whether one designer had copied the original design made by another because the proposed legislation does not set well-defined standards as to when exactly one design becomes substantially identical to another. In his testimony to Congress, Professor Christopher Sprigman of the University of Virginia Law School said that "drawing the line between inspiration and copying in the area of clothing is very, very difficult, and it likely to consume substantial judicial resources."

The U.S. Copyright Office said that while proponents of extending copyright protection to original fashion designs have provided their officials with "anecdotal evidence that fashion designers are harmed by the sale of 'knockoffs' of high-end fashion designs," it noted that they needed to see "more such evidence as well as some evidence quantifying the nature and extent of the harm suffered by fashion designers due to the lack of legal protection for their designs."

At the international level, no treaty explicitly calls on nations to give copyright protection to original fashion designs. For example, the *Berne Convention for the Protection of Literary and Artistic Works* (1886) – one of the world's first modern copyright treaties – not only sets minimum standards of copyright protection, but also calls on a signatory nation to recognize and protect the copyright of works created by non-nationals just as it would for its own nationals.

Article 2 gives copyright protection to "literary and artistic works," which includes "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression." While it lists a wide range of examples of those literary and artistic works, it does not specifically include "fashion designs," though some legal analysts say that it implicitly does so.

In 1995, the World Trade Organization (or WTO) implemented the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (or TRIPS), which it calls "the most comprehensive multilateral agreement on intellectual property." (It also administers other treaties unrelated to intellectual property rights.) While the world community had previously adopted many other intellectual property treaties (separate from TRIPS) which address areas such as copyrights, patents, and trademarks, the TRIPS agreement covers all of these topics and includes many others, setting minimum international standards for each one and includes provisions which update and make up for shortcomings in other treaties.

In the specific area of copyrights, the TRIPS agreement says that WTO member nations must comply with the Berne Convention, and also adds protections for new forms of literary works such as computer programs. But it does not specifically mention fashion designs. Rather, Article 9 generally provides that "copyright protection shall extend to expressions," which some legal analysts believe should include artistic expression embodied in fashion designs.

While international treaties don't provide copyright protection for fashion designs, legal analysts point out that some regional agreements do, including a regulation passed by the European Union (or EU) called *Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.* EC 6/2001 creates a single system to give uniform protection to "community designs" throughout Europe only. Paragraph 15 of the preamble states that "a Community design should, as far as possible, serve the needs of all sectors of industry in the Community," which includes the fashion industry, say experts.

Unlike U.S. law which focuses, in part, on whether an item or design seeking copyright protection has a utilitarian function before granting copyright protection, EC 6/2001 says that the term design "means the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation."

To receive copyright protection, a design must be "new" and have "individual character." The length of protection depends on whether a person has registered a design. For an unregistered design, EC 6/2001 provides protection for three years starting on the date in which a person first publicized the design. Registered designs, on the other hand, receive five years of protection starting on the filing date. A person can renew protection for another five-year period, up to a total of 25 years.

To comply with EC 6/2001, many EU nations have passed their own domestic laws whose provisions mirror those found in that regulation. For example, Italy gives copyright protection to fashion designs under its copyright laws which says: "Works of the mind having a creative character and belonging to literature, music, figurative arts, architecture, theatre or cinematography, whatever their mode or form of expression, shall be protected in accordance with this Law. In particular, protection shall extend to . . . works of industrial designs which themselves have a creative and artistic value."

In addition, its *Intellectual Property Rights Code* defines the term "design" in the same way as EC 6/2001, and extends protection to unregistered designs for three years from the time that the fashion designer introduces his design to the general public to 25 years for registered designs, reports Medialaws, an Italy-based media and law Web page.

France has a copyright system which extends protection to any "original works of the mind," according to law firm Hahn Loeser & Parks LLP, adding that "the French system covers any work of the mind and does not consider what kind or the form of expression that embodies the work." Specifically, Article L.112-2 of the *Intellectual Property Code* protects "creations of the fashion industries of clothing and accessories," and includes dresses, fabrics, and leather goods, among other examples.

While many observers say that the United States should adopt Europe's model in protecting fashion designs, others believe that European laws have not discouraged fashion companies in Europe from copying designs from each other.

INTERNATIONAL TREATY

Arctic Council: Setting the stage for more cooperation in the Arctic?

rowing economic and strategic changes in the Arctic have prompted the member states of a 15-year-old international forum to complete its first ever international treaty, which could set the stage for what many believe to be the growing role of international law in that region. What obligations do they have under this new treaty? Does it address broader issues concerning the Arctic? And are there existing agreements which regulate other issues concerning the Arctic region?

Recently seen as only a cold wasteland, the Arctic region of the world has drawn much more attention from several nations as the melting polar ice caps (caused by what scientists believe to be climate change) could open new shipping routes and also vast areas of exploration for resources such as oil and natural gas. The U.S. Geological Survey estimates that there could be 90 *billion* barrels of oil and 44 *billion* barrels of natural gas liquids in the Arctic.

In response, several nations have been jostling for position in the region during the past decade. Russia, in 2007, sent a submarine down to the bottom of the Arctic Ocean and planted a flag at the North Pole, symbolically staking a claim to vast swathes of territory. Diplomatic cables revealed that the United States is preparing for the possible independence of Greenland from Denmark, which could create more opportunities for American companies in that territory. And in August 2011, Canada carried out its largest military exercises in the Arctic

involving 1,000 troops in what political analysts was a way to reaffirm its influence in Arctic affairs.

A patchwork of several existing forums and agreements, say legal analysts, is sorting through these various issues. In the latest round of activity, the Arctic Council, in May 2011, passed its first binding treaty called the *Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic*, which calls on its members "to strengthen aeronautical and maritime search and rescue cooperation and coordination in the Arctic" by carrying out several specific duties and responsibilities.

Created in 1996, the Arctic Council – a high-level forum comprising of Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden, and the United States – addresses issues and resolve disputes concerning the Arctic, including those involving climate change, the environment, and shipping routes in meetings held every two years. (All these nations have territory in the Arctic region.) However, the declaration creating the Council explicitly states that it "should not deal with matters related to military security."

The 2011 treaty calls on each state to patrol and conduct search and rescue operations in a specific area of the Arctic. Roughly speaking, each state is now responsible for the wedge of territory beginning at the point of the North Pole and then expanding outwards over its territory. Russia has the largest area to patrol followed by Canada. The United States has responsibility over Alaska while Denmark patrols Greenland. Iceland and Norway have relatively small zones over their territory. Finland and Sweden are only responsible for their own territory, and do not patrol Arctic waters. The treaty adds that these patrol regions (which could touch another nation's territory) have no bearing on any nation's territorial claims.

The 2011 treaty also requires each state to designate a specific agency to conduct the actual search and rescue operations. For example, the agencies for the United States are the Coast Guard and the Department of the Defense. Canada also uses its coast guard and military forces to patrol its region.

Furthermore, each state must create "Rescue Coordination Centers" (or RCCs) which serve as bases of operations for rescue missions, and also as official contact points for their respective Council members. The United States maintains two RCCs, both of which are in Alaska. One is in Juneau, and the another at Elmendorf Air Force Base near Anchorage. If rescuers from one state need to enter another state as part of an operation, they can contact the other state's RCC, which will then promptly decide whether to grant permission to do so.

Moreover, under the treaty, parties should exchange techniques helpful for rescue operations, and also conduct joint missions and training exercises as well as provide support to each other's rescue operations as needed. Each party must bear its own costs in implementing the treaty.

The May 2011 treaty is based on the 1979 *International Convention on Maritime Search and Rescue*, which broadly calls on states to maintain adequate search and rescue capabilities for their coastlines, and also to publicize its coastal search and rescue capabilities so that other states will know what sort of aid they can expect from other nations. In contrast, the Arctic Council agreement calls on nations to take much more specific steps when cooperating on search and rescue issues.

Before 2011, the Council did not pass any binding resolutions or treaties. However, it did release seven declarations (i.e., non-binding statements) dealing with issues ranging from environmental protection to indigenous group welfare. The Council also created a number of working groups to conduct scientific research and publish reports on "such issues as monitoring, assessing, and preventing pollution in the Arctic; climate change; biodiversity, conservation and sustainable use, and emergency preparedness and prevention in addition to the living conditions of the Arctic residents."

Increasing competition for undiscovered natural resources in the Arctic region may have spurred a largely unnoticed forum of powerful nations to pass its first international treaty.

In addition to signing the 2011 search and rescue treaty, the Council released a separate, non-binding agreement (called the *Nuuk Declaration*, named after the capital of Greenland) which sets forth the future intentions of that forum. While it does not create new rules or regulations, the declaration created a number of working groups and task forces to study certain Arctic issues so that the Council could later adopt concrete policy decisions to address them. It also creates a secretariat (a permanent standing body with staff members) for the Arctic Council to "respond to the challenges and opportunities facing the Arctic."

Furthermore, the declaration will establish several task forces. One will study "short-lived climate forcers" (or CLCFs) which are dark-colored particulate matters (such as carbon dust and soot often emitted by power plants, factories, and wood burning stoves) which wind currents carry and deposit on Arctic glaciers. Because these dark particles absorb more heat energy from the sun, they can cause glaciers to melt faster. A task force will study this problem and then recommend possible means of addressing the issue.

Another task force will develop a system to prevent and respond to Arctic marine pollution by 2013. The members of the Arctic Council expressed concern on how nations would respond to an oil leak comparable to the one which occurred in the Gulf of Mexico in 2010. Experts say that cleaning up oil spills in the Arctic will be much more difficult due to much colder temperatures.

Along with the Arctic Council and its 2011 treaty, other existing agreements and international bodies deal with certain aspects of the Arctic. For example, the 2008 *Ilulissat Declaration* (named after the city in Greenland where it was signed) created an informal Arctic Ocean Conference where the United States, Canada, Denmark, Norway, and Russia discuss issues concerning the Arctic Ocean.

Another forum, the Nordic Council (composed of Denmark, Finland, Iceland, Norway, and Sweden) tries to increase cooperation and integration among Nordic countries, and also discusses Arctic region issues.

The 1988 Agreement on arctic cooperation between Canada and the United States calls for greater cooperation between those two nations "in order to advance their shared interests in Arctic development and security." The agreement also says that Canada

and the United States should share their research on "icebreaker navigation" off their Arctic coasts, which analysts say is an oblique reference to the Northwest Passage, a disputed sea route (once completely frozen in ice) on top of North America which would shorten shipping transit times between Europe and east Asia. (The agreement does not even explicitly mention the Northwest Passage.) But with the melting of the polar ice caps, ships may soon be able to traverse that waterway. While both Canada and the United States have disputing claims to that route, the 1988 agreement doesn't contain any provisions to resolve them.

Political and legal analysts say that as the sea ice in the Arctic melts further in the coming decades (according to assessments by scientists), the Arctic Council and other similar forums will eventually have to resolve disputes concerning territorial claims and natural resource exploration rights. "Government and international bodies are scrambling to come up with rules and emergency response protocols as economic activity increases," reported the *Wall Street Journal*.

INTERNET LAW

Do Internet restrictions violate international law?

oting that the Internet has become one of the most important means by which people can exercise their right to freedom of opinion and expression, a special representative for the United Nations concluded in a May 2011 report that any restrictions on the Internet should adhere to international human rights standards. Which treaties currently protect the right to freedom of expression and opinion? What kinds of limits are nations placing on the Internet? And do they comply with international law?

Several existing international treaties and declarations already call on nations to protect the right of freedom of opinion and expression for people who reside within their respective jurisdictions. For example, Article 19 in both the 1948 *Universal Declaration of Human Rights* (or Declaration) and the 1966 *International Covenant on Civil and Political Rights* (or ICCPR) says "everyone has the right to freedom of opinion and expression." It also says that, under this right, people have the freedom to "seek, receive, and impart information and ideas" through any media of their choice.

But the right to freedom of opinion and expression is not absolute. A government may impose certain limits, but only if they pass a three-part test listed in Article 19 of the ICCPR. First, a domestic law (written clearly and also "accessible to everyone") must specifically allow a government to impose such limits on freedom of expression. Second, a government may impose limits only to (a) "protect the rights or reputations of others" or (b) protect national security, public order, public health, or morals. (The ICCPR does not mention any other justifications.)

Third, if a government does impose a limit on freedom of expression, it must prove that the limit was necessary (i.e., no other limit would have been adequate) and was the also "least restrictive means required to achieve the purported aim." Experts add that the limit must then be carried out by an independent body to guard against "any political, commercial, or other unwarranted influences."

Up until a decade ago, people primarily used long-standing media such as printed publications, radio, and television, among others, to express their opinions and also to seek, receive, and exchange information, said the special representative Frank La Rue – a human rights expert whose mandate from the UN calls on him to promote and protect the right of freedom of opinion and expression – in his report (A/HRC/17/27) presented to the UN Human Rights Council. Any limits on these activities (such as those which interfered with or completely blocked access to these media) were (and still is) subject to the ICCPR's three-part test.

Many governments are trying to restrict people from using the Internet to share and disseminate information almost instantly around the world, but doing so could violate the right to freedom of opinion and expression.

Now a new form of media, the Internet, is allowing people to express themselves and interact with others, said La Rue, though in "unprecedented" ways. He noted that more than two billion people use the Internet to communicate and carry out transactions with others almost instantly (and, if desired, anonymously) on a truly global scale at relatively low costs through e-mail, text messages, document sharing platforms, and streaming videos.

The report also said that the Internet has greatly increased access to information, allows people to participate in "building democratic societies," and would be "particularly valuable in countries where there is no independent media, as they enable individuals to share critical views and to find objective information."

In short, the Internet has become, in the words of the report, one of the "key means" by which people worldwide now exercise their right to freedom of opinion and expression (and also to seek, receive, and share information), both of which are guaranteed by treaties such as the ICCPR. Therefore, nations should facilitate and protect access to the Internet "for all individuals, with as little restriction to online content as possible" just as they currently protect access to traditional media such as printed publications and radio, it said.

La Rue added that the Internet not only allows people to exercise their right to freedom of opinion and expression, but also "enables" them to enjoy other rights such as the right to education and the right to take part in cultural life, among others. (As the reasoning goes, if a person cannot freely seek and exchange information, then he won't be able to enjoy the right to education, for instance.)

But because the Internet (compared to other media) allows individuals to interact with one another in real time, disseminate information quickly, and even mobilize people on short notice to take action, the report noted that it has "created fear amongst Governments and the powerful."

In response, nations around the world have enacted a wide variety of measures which not only limit people's rights to express themselves on the Internet, but also restrict their ability to seek, receive, and exchange information on that medium, said La Rue. According to the report's preliminary analysis, these measures have failed to meet the ICCPR's three-part test on whether a nation may limit freedom of expression. ("In many instances, States restrict, control, manipulate, and censor content disseminated via the Internet without any legal basis, or on the basis of broad and ambiguous laws, without justifying the purpose of such actions," said La Rue.) Therefore, governments could be in violation of their obligation under the ICCPR.

What kinds of limits and restrictions have nations placed on the Internet and how do they violate international treaties such as the ICCPR?

Blocking or filtering of content: Using a measure called "blocking," nations prevent people from accessing specific Web sites on the Internet such as Facebook (a social networking site), Twitter (a microblogging service), and YouTube (a video-sharing homepage), among others, noted La Rue. Experts note that nations such as China completely block these sites within their respective jurisdictions. In 2010 alone, China had shut down 1.3 million websites, according to the *BBC*.

Nations also engage in what the report described as "timed blocking" where they prevent people from using the Internet to spread information "at key political moments such as elections, times of social unrest, or anniversaries of politically or historically significant events." For example, during the Arab Spring protests in 2010 where people across the Middle East rose up against entrenched regimes, governments ranging from Egypt to Libya to Syria blocked access to certain many social networking sites to prevent demonstrators from mobilizing against them.

Along with blocking, many nations use filtering technologies which prevent people from accessing websites containing certain terms, including "democracy" and "human rights," among others. China, said the report, has one of the most sophisticated filtering systems.

The report concluded that blocking and filtering measures did not satisfy the three-part test set out in the ICCPR. So using those measures would violate a nation's obligation to protect the right to freedom of expression. For example, it said that many governments either don't have laws which specifically allow them to use these measures or that they are written in an "overly broad and vague manner." In addition, protecting people's reputations or national security does not justify the use of blocking and filtering, said La Rue, though he didn't provide more details. Furthermore, the special representative said that such limits were unnecessary (i.e., a government could have used less sweeping means to protect, say, public order) and even disproportionate because they blocked unrelated content on the Internet.

The report recommended that nations which blocked or filtered specific websites should provide lists of those websites and explain in full detail the "necessity and justification" for carrying out those measures.

Criminalizing legitimate expression: La Rue said that many nations are criminalizing legitimate discussions on the Internet (such as those which criticize government policies or corruption), and justify it by arguing that they are trying to protect national security or the rights and reputations of others. But in practice, such a measure is used simply as a cover or excuse to "censor content that Government and other powerful entities do not like or agree with," concluded the report, which noted

that several nations – including China, Iran, and Vietnam – imprisoned hundreds of bloggers because of the "content of their online expression."

Under La Rue's analysis, a nation may not restrict the right to freedom of expression to protect public order or national security unless it can show that (a) "the expression is intended to incite imminent violence," (b) "it is likely to incite such violence," and (c) there is a direct connection between the expression and the likelihood of violence. The report added that the right to freedom of expression includes "expression of views and opinions that offend, shock, or disturb."

Furthermore, La Rue said that while nations do, indeed, have a right to protect the rights and reputation of others, they should not imprison people for the act of defamation. Observers note that many governments around the world have criminalized defamation (which they usually define in a broad manner) as a way to put critics in jail. (Others simply impose penalties such as fines.) For instance, analysts believe that Thailand is using a 2007 law (called the *Computer-Related Offenses Act*) to imprison critics of the monarchy, despite the claims of an official who said that its main purpose was to "[defend] against criminal activity such as credit-card fraud." In 2010, prosecutors were reviewing 36 cases of lèse-majesté (or crimes against the sovereign) compared to 18 in 2005, reported the *Wall Street Journal*.

Holding intermediaries liable for third-party content: The report noted that private intermediaries such as Internet service providers (or ISPs, including AOL and Verizon, for instance), search engines (Google and Yahoo!, among others), and video services (YouTube) make it possible for third-party users (e.g., members of the general public) to transmit information through and share content on the Internet, and that many nations have passed laws which protect an intermediary from being held legally responsible (or even prosecuted) for illegal third-party content such as a case where a person posts pirated movies or child pornography on a Web page hosted by an intermediary.

But in recent years, the special representative noted that more and more nations have passed laws which "impose liability upon intermediaries if they do not filter, remove, or block content generated by users which is deemed illegal." The report noted, for instance, that an Italian court in 2010 convicted three Google executives of violating a data protection law when a user in Italy (not related to them) posted a video "depicting cruelty to a disabled teenager" on Google's video service, which was taken down "within hours of notification by Italian law officers." In Thailand, the government is prosecuting a webmaster for "being too slow to delete antiroyal messages" on one of her popular web forums, according to the *Wall Street Journal*.

In the United States, both the Senate and the House of Representatives are holdings hearings on their proposed laws – the Protect IP Act, and the Stop Online Piracy Act (or SOPA), respectively – to curb Internet piracy. Under the Protect IP Act, the Attorney General of the United States could seek a court order which call on "Internet service providers, search engines, payment providers, and advertising networks" to stop all transactions and block all links to Web pages engaging or facilitating in online piracy and counterfeiting.

SOPA, on the other hand, would change current laws which protect websites from being held liable for illegal third-party

content if they quickly remove such content upon notification. Analysts say that, under SOPA's proposed terms, private companies can "sue service providers for even briefly and unknowingly hosting content that infringes on copyright," and, if they refuse to remove certain content (because of, say, free speech concerns), these providers themselves will have the burden of proving that the content does not infringe on another party's copyright.

All of these developments, said La Rue, "severely [undermine] the enjoyment of the right to freedom of opinion and expression, because it leads to self-protective and over-broad private censorship [on the part of intermediaries], often without transparency and the due process of law."

Even nations which adopt "notice-and-takedown" laws (where intermediaries won't be held responsible for illegal third-party content, but only if they remove it once they are notified) could undermine freedom of expression because intermediaries "are [still] inclined to err on the side of safety by over-censoring potentially illegal content," said the report.

Instead, La Rue recommended that "no one should be held liable for content on the Internet of which they are not the author," and that "censorship measures should never be delegated to a private entity."

Disconnecting users from the Internet: The report said that many nations are considering (or have passed) laws which require ISPs to cut off Internet access completely to users who, for example, violate intellectual property rights. Some are known as "three-strikes laws" under which the government or a business will track the Internet Protocol (or IP) address of an individual who is suspected of engaging in copyright infringement using his computer. (Every computer has a unique digital address composed of several numbers.) It will then send a warning to that person's IP address each time he engages in illegal activities. After a third warning, the ISP will disconnect that person's access to the Internet for a specified amount of time.

In 2010, France became the first nation is the world to begin enforcing a three-strikes law (called the *Creation and Internet Law*) under which a regulatory body called the "High Authority for Diffusion of Works and Protection of Rights" will warn people engaged in copyright infringement through e-mail and then by registered mail. After a third warning, a special judge will have the authority to order an ISP to cut a person's access to the Internet from three months to a year, and also issue fines up to \$00,000 (or US\$415,000).

In the United Kingdom, legislators introduced a "Digital Economy Bill" in November 2009 which would, among other measures, allow the government to work with ISPs in slowing down or cutting off Internet access of those individuals who repeatedly trade in copyrighted materials over the Internet. But Parliament has put the bill on hold so that it may clarify many provisions such as whether the government would, for instance, cut off Internet access to an entire household for the actions of one family member.

Ireland does not have a three-strikes law to combat Internet piracy. Instead, Ericom (Ireland's largest ISP) had reached an agreement with four major record companies, including EMI and Sony BMG, where the major record labels would provide

Ericom with the IP addresses of people who are allegedly engaging in copyright infringement using the Internet. The ISP would then send out warnings to these individuals, and then cut off their Internet access after a third warning. But in December 2011, media analysts say that regulators may soon ask Ericom to stop its warning system after a government report concluded that the ISP had wrongly accused 300 customers of sharing Internet files illegally, according to *The Register*, an online publication focusing on technology issues.

No jurisdiction in the United States has passed three-strikes laws to address Internet piracy specifically. But recent agreements among private companies may lead to the same results. For instance, in July 2011, some of the nation's largest media companies (including movie and recording studios) reached an agreement with major ISPs (such as AT&T, Time Warner Cable, and Verizon) to curb Internet piracy. The media companies would identify people suspected of engaging in online piracy and request that the ISPs send them four to six warnings which begin with "simple e-mail notifications" and escalate to reduced Internet speeds or even a complete cutoff from the Internet – all without a court order, though customers can challenge these efforts. Some analysts point out that ISPs can already take these measures against those users who violate their "terms of service," which are the rules a person must follow when using a certain service.

The special representative said that cutting off all Internet access to a person – "regardless of the justification provided, including on the grounds of violating intellectual property rights laws" – would violate the ICCPR's three-part test because such a measure is not (in his view) the least restrictive means to stop online piracy. In fact, doing so can be a disproportionate response. One observer said that cutting off Internet access to an online copyright infringer would be the equivalent of barring a person from visiting a library or bookstore because he had illegally reproduced a novel on a copy machine, said one observer.

La Rue called on governments to maintain Internet access "at all times" (even during political unrest), and also urged them to "repeal or amend existing intellectual copyright laws which permit users to be disconnected from Internet access."

Not adequately protecting the right to privacy: The report said that the ability to use the Internet anonymously to exchange information and engage in online debate is one of its benefits. But many governments now use various means to track, monitor, and identify Internet users. For example, many use software programs to monitor people's Internet communications such as the content of e-mail messages.

Under "real-name identification systems," Internet users must register their true identities to post comments or upload information on websites. China, For example, unveiled new rules in December 2011 where microbloggers in Beijing must register their real names within a three-month period or face unspecified penalties. China's microbloggers — numbering in the hundreds of millions — have quickly disseminated posts about what they believe are instances of government corruption and cover-ups, which have led to large public protests. But authorities say that these posts are simply "spreading rumors, disturbing social order, or undermining social stability." Media analysts believe that Shanghai and Guangzhou will introduce similar rules.

These measures and others could violate the right to freedom of expression and even impede the free of information on the Internet because people will be less likely to express their thoughts if they know that authorities are monitoring their communications, said the report, which recommended that nations "ensure that individuals can express themselves anonymously online and . . . refrain from adopting real-name registration systems."

La Rue also pointed out that while governments may have legitimate reasons to monitor an individual's activities on the Internet (to combat terrorism, for instance), he concluded that "surveillance often takes place for political, rather than security, reasons in an arbitrary and covert manner."

All of these measures could also violate people's right to privacy under international law, said the report. For instance, Article 17 of the ICCPR says that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence." It adds that "everyone has the right to the protection of the law against such interference . . ." So a government which monitors people's Internet communications by reading their content, for instance, could be in violation Article 17. Rather, concluded the report, governments have an obligation under Article 17 to "ensure that e-mails and other forms of online communication are actually delivered to the desired recipient without interference or inspection by the State organs or by third parties."

Even with these recommendations, recent events around the world have fueled an ongoing debate on the extent to which governments may regulate the use of the Internet without violating people's human rights such as the right to freedom of expression. For example, in the wake of extensive rioting in London in August 2011 where "rioters and looters used [Internet social networks] to outmaneuver the police," the British government met with officials from major social networking sites such as BlackBerry, Facebook, and Twitter "to discuss voluntary ways to limit or restrict the use of social media to combat crime and periods of unrest," reported the *New York Times*. One person recommended that services such as Twitter should require their users to reveal their real names.

According to various sources, British officials said that they did not want to restrict Internet services, but, instead, wanted to "crack down on the networks used for criminal behavior." A senior police official said that if Internet social networking sites are "allowing criminal activity . . . I struggle to see how that can just go on. We have a duty to protect people, and that's always been balanced with human rights, online of offline. It's no different now" with the Internet.

But some observers worry that, without proper controls, democratic governments may implement Internet limits "similar to those [they] had criticized in totalitarian and one-party states." In an interview with the *New York Times*, Jo Glanville, the editor of a magazine called the *Index of Censorship*, said: "You do not want to be on a list with the countries that have cracked down on social media during the Arab Spring."

Some governments have pushed back against the report's recommendations. In September 2011, four nations – China, Russia, Tajikistan, and Uzbekistan – introduced a resolution (A/66/359) in the UN General Assembly calling on the world community to adopt what it called a voluntary "international

code of conduct for information security" where every country pledges to stop those who use information and communications technologies to carry out "terrorist and criminal activities," and also "hostile activities or acts of aggression" which "pose threats to international peace and security."

But critics note that the resolution further calls on nations to cooperate in stopping "the dissemination of information that . . . undermines other countries' political, economic and social stability, as well as their spiritual and cultural environment." They worry that dictatorships will use this vaguely-worded phrase as a basis to restrict freedom of expression, and also limit people's ability to seek, receive, and share information on the Internet.

The United States opposed the resolution, saying that it would "impose a system, cemented in a global code, that expands control over Internet resources, institutions and content, and centralizes that control in the hands of the government." Analysts point out that, in a March 2011 report, Reporters Without Borders (a group which promotes press freedoms) listed the resolution's sponsors as "Internet enemies."

NATIONAL SECURITY LAW

Killing Osama bin Laden: Legal or illegal under international law?

fter a search lasting nearly a decade, the United States located and killed Osama bin Laden, the head of the terrorist network Al-Qaeda, which had planned and carried out the bombing of the World Trade Center in New York, among several other deadly attacks around the world. While many people say that the United States had legitimately carried out its operation, others believe that bin Laden's killing may have violated international law. For those who say that the United States had a legal right to track down and kill bin Laden, what reasons do they give? And how have critics responded to these justifications?

In the early hours of May 2, 2011, a group of U.S. Navy SEALs boarded a pair of stealth helicopters in Afghanistan and headed towards a compound in Abbottabad, Pakistan (a city about 35 miles north of that nation's capital), where they found bin Laden who not only oversaw the planning of the World Trade Center attack, but also the bombings of two U.S. embassies in Africa in the 1990s and the American destroyer USS *Cole* in 2000 – all of which killed over 3,000 people. Up to this point, bin Laden had evaded all efforts to find him.

After killing several adults in the compound, the SEAL team found bin Laden in his room, and shot him in the chest and head. White House spokesman Jay Carney said that the SEAL team had shot bin Laden because he had "resisted" capture, but also noted that it had received instructions to "capture him if that was possible." While the terrorist leader was unarmed when he was shot, Carney said that there was a pistol and an assault rifle within his reach. The SEAL team then put bin Laden's corpse into the helicopter, and flew his body to the USS *Carl Vinson* – an aircraft carrier – in the Indian Ocean where officials formally verified bin Laden's body before burying him at sea.

According to press reports, the United States did not notify Pakistan of the raid in advance. Instead, the SEAL team had travelled into Pakistan in secret, and managed to leave the country before encountering Pakistani military units. The Chairman of the Joint Chiefs of Staff Michael Mullen did not inform Pakistani President Asif Ali Zardari of the operation until after the SEALs had completed the raid.

The U.S. operation which found and killed Osama bin Laden in a compound in Pakistan raises more questions compared to American attempts to target him immediately following the September 11 terrorist attacks.

In response, many Pakistani officials and much of the public expressed outrage over what they viewed as a violation of their territorial sovereignty. The government announced that it would reduce the number of American personnel advising Pakistani intelligence officers, among other measures.

For their part, many members of Congress voiced suspicions that Pakistani officials had probably known that bin Laden was living in Abbottabad. Political analysts note, for example, that Pakistan's intelligence service largely sympathizes with Al-Qaeda. And according to the Congressional Research Service, Abbottabad is home not only to "the country's premier military academy," but also to many active and retired Pakistani military officers. Still, a U.S. Defense Department official told the Washington Post that "[w]e have no indications that the Pakistanis were aware that Osama bin Laden was at the compound in Abbottabad."

Experts say that the raid had brought up a number of issues such as whether the United States could (under international law) legally target bin Laden in the first place for targeting and killing, whether the SEALs gave bin Laden a chance to surrender and whether they had the right to shoot him when they did, and whether the United States had a right to enter Pakistan without its permission to track down bin Laden.

The legality of pursuing and targeting bin Laden: Was it legal under international law for the United States to pursue and target bin Laden for death?

According to one view, the United States is engaged in an international armed conflict with the terrorist network Al-Qaeda, which was headed by bin Laden. When a nation is engaged in an international armed conflict, it must comply with what experts broadly call the "laws of war." (Analysts use this term interchangeably with others such as the "laws of armed conflict" and "international humanitarian law.") The laws of war are those treaties – close to 100 today, according to the International Committee of the Red Cross – which regulate how belligerents may carry out the actual conduct of warfare such as deciding which individuals to target and how to treat prisoners-of-war and civilians, among other issues. (Some of them include the *Hague Regulations* and the *Geneva Conventions*.) Under the laws of war and subject to certain conditions, "combatants may

be targeted at any time and any place," said New York University Professor of Law Philip Alston who also served as an independent human rights expert for the United Nations.

In the case of bin Laden and Al-Qaeda, the Legal Advisor of the U.S. Department of State, Harold Koh, said that, "as a matter of international law, the United States is in an armed conflict with Al-Qaeda," and that bin Laden was a legitimate target. Many analysts note that killing enemy military commanders in combat has been an acceptable practice since times of antiquity.

"Six hundred Spartans . . . made straight for the tent of the king," wrote Dutch philosopher Hugo Grotius in the 17th century. During World War II, the United States shot down and killed Japanese Admiral Isoroku Yamamoto, the planner of the Pearl Harbor attacks and commander of the Japanese fleet, an action that was not considered illegal according to U.S. military analysts. The *Law of War Handbook* (2005) also states that "targeting military leadership . . . is not assassination." And in the days after the killing of bin Laden, U.S. Attorney General Eric Holder said that bin Laden was "by my estimation, and the estimation of the Justice Department, a lawful military target, and the operation was conducted consistent with our law [and] with our values."

Various treaties, however, impose limits on how belligerents may kill enemy fighters. For example, Article 23(b) of *Hague Convention IV* (1907) forbids combatants from "[killing] or [wounding] treacherously individuals belonging to the hostile nation or army." In its interpretation, the *Department of the Army Field Manual 27-10: The Law of Land Warfare* (1956) says that of Article 23(b) prohibits "assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive."

Those who believe that the United States had legally targeted and killed bin Laden point out that U.S. special forces had directly attacked his hideout. So his killing was not, as the term is legally understood, "treacherous," they argue.

In contrast, many critics argue that the United States is not engaged in an international armed conflict with Al-Qaeda. They note that, under the *Geneva Conventions*, an "international armed conflict" can only occur between actual nations, and not between a nation and, say, a non-state actor such as a terrorist network. As a result, the laws of war would not apply to the targeting and killing of bin Laden, who they view as a non-state actor.

Rather, they argued that his pursuit and targeting should have been undertaken as a law enforcement (or police) matter governed by human rights laws, which place much stricter limits on the use of deadly force. "The legality of a killing outside the context of armed conflict [would be] governed by human rights standards, especially those concerning the use of lethal force," wrote Alston of NYU Law School in a separate and unrelated report for the United Nations concerning the use of drones in targeting terrorists.

While the laws of war allow enemy combatants to target each other "at any time and any place," human rights law does not.

Under the framework of human rights law, "a State killing is legal only if it is required to protect life . . . and there is no other means, such as capture or nonlethal incapacitation, of preventing that threat to life (making lethal force necessary)." As an example, experts note that a police officer may not target a dangerous criminal for immediate death if he can be apprehended without the use of deadly force.

According to the views of Martin Scheinin, the UN Special Rapporteur on the promotion of human rights and fundamental freedoms, "... [t]he norm should be that terrorists be dealt with as criminals, through legal processes of arrest, trial and judicially decided punishment."

Giving bin Laden a chance to surrender: The actual killing of bin Laden by the SEAL team at the moment they shot him has also sparked controversy. Some commentators wonder whether the administration had ordered the SEALs to kill bin Laden immediately on sight.

President Obama, in his speech to the nation announcing the death of bin Laden, stated that the goal of the mission – presumably military in nature (in the views of the administration) and, thus, governed by the laws of war – was the "killing or capture of bin Laden." Media outlets reported that the U.S. military had stationed several lawyers and interpreters on a warship to communicate with bin Laden if he had been captured. Still, the administration said that the SEAL team had the legal right to shoot him because he had "resisted" capture, though it didn't provide any further details.

Later, during a Congressional hearing, Attorney General Holder stated that there was "no indication" that bin Laden had attempted to surrender. And because the commandos were in a dangerous situation, said Holder, they acted reasonably in shooting bin Laden before he had a chance, say, to find a weapon or set off a suicide bomb vest, which he could have very well been wearing. The exact circumstances surrounding bin Laden's death remain unknown to the public.

Analysts recognize that during actual armed conflicts, international law sets standards on accepting the surrender of a combatant, and that these standards can be applied to the official version of bin Laden's death. For example, Article 23(c) of *Hague Convention IV* (1907) prohibits the killing of enemy combatants who have surrendered. ("It is especially forbidden . . . to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion.") Article 23(d) forbids a nation from declaring that no quarter will be given. (In other words, it will not give combatants a chance to surrender.) Thus, if bin Laden clearly indicated that he wanted to surrender, the SEALs could not have legally shot him under international law.

In a related matter, analysts are debating what level of force a soldier may use when capturing another combatant, and whether the SEAL team had acted recklessly when they shot and killed bin Laden. In a memorandum, Marine JAG Colonel W. Hays Parks believes that neither article discussed above "precludes the attack of enemy combatants with the intent to kill rather than

capture so long as those who endeavor to surrender are availed that opportunity when circumstances permit." The enemy must be given a reasonable opportunity to surrender before the use of deadly force, keeping in mind that what seems reasonable to a normal person may not be reasonable during actual combat. A soldier can look to his immediate surroundings and circumstances to determine whether he can reasonably accept the enemy's surrender. It must be reasonably possible for soldiers to accept surrender, and that he is not expected to endanger himself or his fellow soldiers to check whether the enemy will indeed capitulate.

But as in the case of the targeting and killing of bin Laden, some critics argue that the killing of bin Laden did not take place during an international armed conflict. They note, for instance, that the United States and Pakistan (where bin Laden was hiding) were not at war. So human rights law (and not the laws of war) would have governed how the SEAL team apprehended bin Laden, they argued.

Under that specific legal framework, "the intentional use of lethal force in the context of law enforcement is only permitted in defence of life," wrote Alston of NYU Law School. "Thus, outside the context of armed conflict, law enforcement officials are required to be trained in, to plan for, and to take, less-than-lethal measures – including restraint, capture, and the graduated use of force – and it is only if these measures are not possible that a law enforcement killing will be legal." If the SEAL team had deliberate ignored the graduated use of force or had even planned to kill bin Laden all along, such an action could be viewed as an unlawful execution.

So did the SEAL team legally kill bin Laden in his compound? Analysts say that if bin Laden did resist arrest and if the SEAL team members felt an immediate danger and threat to their lives, then they had a right to shoot and kill him. Assuming that the administration's claim that bin Laden resisted arrest was completely true, Martin Scheinin, the UN human rights expert, said that the killing would be lawful. "The United States offered bin Laden the possibility to surrender, but he refused," said Scheinin, so bin Laden could be lawfully killed.

Still, many critics have continued to criticize the United States for killing bin Laden. Writing for *The Independent*, a British news daily, human rights lawyer Geoffrey Robertson criticized the killing of bin Laden, and argued that his capture would have been better. According to Robertson, bin Laden's capture and trial "would have been the best way of de-mystifying this man, debunking his cause, and de-brainwashing his followers."

The Archbishop of Canterbury, Rowan Williams, also had some reservations over the killing. "I think the killing of an unarmed man is always going to leave a very uncomfortable feeling because it doesn't look as if justice is seen to be done," he said. It would have been better if bin Laden had been captured alive so he could be put on trial. Bin Laden's son, Omar, also condemned the attacks. Writing in *The New York Times*, he called for an international investigation into the killing, which he believes violated his father's right to a trial.

In an effort to determine whether bin Laden actually resisted arrest and presented a danger to the SEAL team, Amnesty International released a statement calling on the Obama Administration to disclose all the details of the raid. Another group, Human Rights Watch, has asked for the details so that it may determine whether the killing was justified under international law. But the Obama administration has refused to do so, citing national security concerns.

Months after bin Laden's death, people are still debating whether the United States had legally killed him. In August 2011, an article in The New Yorker magazine (written by freelance reporter Nicholas Schmidle) claimed that the United States had planned to kill bin Laden from the very beginning. It quoted a special-operations officer who said: "There was never any question of detaining or capturing him - it wasn't a splitsecond decision. No one wanted detainees."

Questions concerning Pakistan's sovereignty: There is also a running debate over whether it was legal under international law for the United States to enter Pakistan without its permission to find and then use deadly force against bin Laden. Generally, international law would prohibit such an action, say experts. Article 2(4) of the UN Charter states "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Legal scholars say that the protection of a country's sovereignty and territorial security is one of the main pillars of international law. Respecting a state's sovereignty and territorial borders, they say, helps to maintain peace and security by encouraging predictable relations among the nations of the world.

But there are exceptions. A country may, for example, give explicit permission to another nation to use force within its borders. Also, under Article 42 of the UN Charter, the Security Council may authorize member nations to use force to restore international peace and security, even if doing so violates a nation's sovereignty.

Furthermore, the UN Charter allows a nation to use force as a means to defend itself against an attack. Specifically, Article 51 says that states have an "inherent right of individual or collective self-defense" in the case of armed attack by another state. Some legal analysts have even argued that a nation may defend itself against attacks from non-state actors hiding in a second country if that second country is unable or unwilling to deter such attacks. The basis of this "unable or unwilling test," they say, comes from Resolution 1373 (passed by the Security Council after the September 11 attacks), which calls on states to "prevent movement of terrorists or terrorist groups by effective border control," and to "deny safe haven to those who... commit terrorist acts." So if a state fails to fulfill these obligations, another state would have a right to use force to defend itself under Article 51, reasoned some analysts.

One legal expert, Professor Jordan Paust of the University of Houston Law Center, declared that "the vast majority of writers agree that an armed attack by a non-state actor on a state, its embassies, its military, or other nationals abroad can trigger the right of self-defense addressed in Article 51."

The United States has relied on Article 51 as a basis to attack terrorists in other states. Because Al-Qaeda (which is a non-state actor headed by bin Laden) had attacked the U.S. multiple times at home and abroad, the United States had an inherent right to use force to defend itself. For example, following the September 11 attacks, the United States had invaded Afghanistan, the nation which had sheltered Al-Qaeda, even though Afghanistan was not directly involved in the terrorist attacks. Analysts note that, at the time of the American invasion, the ruling Taliban government had refused to root out Al-Qaeda and hand over its leaders to the United States.

Going back to the case of bin Laden, commentators say that the Obama administration had most likely concluded that Pakistan was probably unable, and perhaps even unwilling, to apprehend bin Laden, and that it had no choice but to defend itself from further attacks by tracking him down in Pakistan - all without permission from that nation's government. The fact that bin Laden had long hidden in a city associated with the military only strengthened this belief, say observers. Extensive media coverage also indicated that Pakistan's intelligence and military agencies, and also large swaths of the public, had sympathized with bin Laden and his terrorist network.

On the other hand, if the U.S. located bin Laden in, say, Sweden, "it almost certainly would be unlawful for the United States to use force against that individual without Sweden's consent," writes Columbia Law School academic fellow Ashley Deeks, "because there is no reason to believe that the Swedish government would be unwilling or unable to take appropriate measures against that Al-Qaeda member."

In direct contrast to these justifications, Professor Alston argues that "it has been a matter of debate whether Article 51 permits States to use force against non-state actors" in selfdefense rather than asking another state (where the non-state actors are operating) for its permission first. He points to a case (the Wall Opinion) decided by the International Court of Justice - dealing with Israel's creation of a separation wall between Israel and the West Bank - where it held that nations may not invoke Article 51 against armed attacks by non-state actors that are not imputable to another State. So in the case of bin Laden, because Pakistan was not officially helping Al-Qaeda, the United States could not invoke the right of selfdefense in carrying out its deadly operation without getting permission from Pakistan first.



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