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A recent global meeting reviewed the progress made by individual nations against racial discrimination. But several controversies marred the proceedings, which were boycotted by several of the world's most influential democracies. What progress has been made against racial discrimination, and what more needs to be done?

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The legal implications of the “torture memos”: To prosecute or not?

Since the beginning of the “war on terror,” the Central Intelligence Agency (or CIA) has interrogated many high-level terrorist detainees, including those suspected of belonging to Al Qaeda, the terrorist network responsible for the September 11, 2001, terrorist attacks. In recent months, the media confirmed (and the U.S. government acknowledged) long-held suspicions that some CIA interrogators had used highly coercive techniques which many people now say constituted torture when questioning these detainees. One interrogator, for instance, threatened a detainee with a hand drill. Others carried out waterboarding. Interrogators had also given one detainee the impression that he would be executed.

The current administration—which has repudiated the use of torture during interrogations, and also began a wide-ranging review of the previous administration’s counterterrorism policies—is now investigating not only whether it should criminally prosecute those individuals who had directly carried out interrogations involving acts considered torture, but also whether to prosecute the officials in the U.S. Department of Justice who had (in a series of top secret memos) provided the legal justification to carry out those acts in the first place.

Interrogating suspected terrorists

ABC News has reported that the CIA began using what the agency described as “enhanced interrogation techniques” on several detainees—including Mohammed al-Qahtani, Abu Zubaydah, and Khalid Sheikh Mohammed (all of whom are high-ranking Al Qaeda members)—as early as mid-March 2002 at so-called “black site” locations in Afghanistan, Djibouti, Egypt, Guantanamo Bay, Iraq, and Poland. Interrogators hoped that using such methods would force their detainees to reveal not only important information about future terrorist attacks, but also the identities of those involved in such operations.

For example, in a technique called walling, interrogators would thrust a detainee against a false, flexible wall which then created a sound loud enough to give the impression that such impacts had caused serious injury. Interrogators also forced detainees into awkward “stress positions” (such as kneeling on the floor while leaning back at a 45 degree angle) for extended lengths of time to produce physical discomfort. Using sleep deprivation, interrogators would shackle a detainee’s hands in a position which causes him to wake himself if he begins to fall asleep.

And in a technique called waterboarding—which has received the most publicity—an interrogator securely binds a detainee on a bench where his feet are elevated over the rest of the body, covers the face with a cloth, and then pours water over it, creating the sensation of drowning. While there have been many reports that the CIA had used waterboarding “183 times” on Khalid Sheikh Mohammed (whom officials say played a central role in planning the September 11 attacks), one official said: “The water was poured [on Mohammed] 183 times—there were 183 pours,”

and that “each pour was a matter of seconds.” In other words, he did not undergo waterboarding 183 separate times. According to a news report, Mohammed had told the Red Cross that interrogators had subjected him to a total of five waterboarding sessions. When adding up the number of times interrogators had poured water on his face during *all* five sessions, the total came to 183.

Soon after the September 11 terrorist attacks, the Office of Legal Counsel in the U.S. Department of Justice issued several top secret legal memorandums justifying the use of coercive interrogation techniques—such as waterboarding—which are now widely considered acts of torture.

International law and the use of torture during interrogations

As is the practice of many other countries during times of conflict, the United States and its armed forces routinely interrogate detainees captured during actual battlefield combat to gather intelligence about enemy operations and plans.

But in the current fight against international terrorism—which does not involve, for instance, traditional battlefield combat against enemies who are part of a formal army—many suspected high-level terrorist detainees were interrogated not by American military personnel, but instead, by CIA employees and even contractors in CIA-run prisons (outside of the Pentagon’s authority) around the world. Analysts say that, unlike captured enlisted soldiers of traditional conflicts who were usually not privy to battlefield strategies, suspected high-level terrorist detainees are more likely to have intimate details of planned attacks, and that their interrogation would, therefore, require specialists from the CIA to draw out valuable information.

Experts say that interrogations of detainees and other prisoners must largely conform to standards established by several international treaties.

The Geneva Conventions: Under the Geneva Conventions—which are the most comprehensive set of laws governing the treatment of armed combatants, prisoners-of-war, and civilians during times of international armed conflict—state parties are prohibited from carrying out various acts against detainees, including murder, mutilation, cruel treatment and torture, and humiliating and degrading treatment, among others. Nearly every country in the world, including the United States, has ratified these conventions, which came into force in 1949.

To comply with these obligations and to establish the legal

basis for prosecuting violations of the Conventions, the United States, on its part, enacted Title 18 U.S.C. §2441 (also known as the War Crimes Act). This act makes it a felony for members of the armed forces and a national of the United States to commit those acts prohibited by the Conventions. (Some analysts believe that the term “national” applies to individuals such as CIA personnel, government officials, and civilian contractors working for the military.) Violations are punishable by fines, imprisonment, and even death.

Experts say that the armed forces of many countries have incorporated some of the language from the Geneva Conventions into their procedural manuals. For example, the United States Army’s Field Manual No. 2-22.3 (Human Intelligence Collector Operations) specifically prohibits members of the U.S. armed forces from carrying out various techniques during detainee interrogations, including forcing them to be naked or pose in a sexual manner; placing hoods or sacks over their heads; applying beatings, electric shock, burns, or other forms of physical pain; waterboarding; using military dogs; inducing hypothermia or heat injury; and conducting mock executions. “Use of torture,” states the field manual, “is not only illegal, but also it is a poor technique that yields unreliable results.”

Officials from the Bush administration argued that these international instruments and their protections did not apply to captured terrorist detainees. Groups such as Al Qaeda, they noted, had publicly repudiated the Geneva Conventions (though the U.S. Supreme Court later held that the Conventions provided some minimum protections to terrorists).

United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (or CAT): Entering into force in 1987, CAT prohibits—without exception, even in cases of war and public emergencies—its State Parties from inflicting torture and other acts of cruel, inhuman, or degrading treatment or punishment that do not constitute torture. It defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information . . .”

CAT also requires authorities to criminalize all acts of, participation in, or attempts to carry out torture within its jurisdiction. To comply with CAT, the United States enacted domestic regulations prohibiting and criminalizing the use of torture *outside* of the United States in territories under its control when such acts are carried out by an American national on any victim “irrespective of [the victim’s] nationality.” Specifically:

- 18 U.S.C. § 2340A(a) states: “Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years.”
- 18 U.S.C. § 2340(1) defines torture as an “act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control.” But legal analysts note that the statute does not explicitly describe acts that constitute inflicting “severe physical or mental pain or suffering.”

As of September 2009, more than 70 countries had ratified (and are thus legally bound to comply with the terms of) CAT.

Congress did not have to adopt new federal laws prohibiting torture *within* the United States because it had adopted such laws long ago. The Eighth Amendment to the Constitution, for instance, prohibits the infliction of cruel and unusual punishment.

Bush administration officials argued that, under CAT, the United States had an obligation to prevent torture only “in any territory under its jurisdiction.” On the other hand, CAT and its prohibitions did not apply to areas outside of American jurisdiction such as Guantanamo Bay and Afghanistan, which is where CIA agents and others had carried out their coercive interrogations.

The legal justification for torture?

Soon after the September 11 terrorist attacks, the Office of Legal Counsel (or OLC)—which is located in the U.S. Department of Justice and serves as the legal advisor to the President and all executive branch agencies—began to issue several top secret legal memorandums concerning various aspects of interrogating suspected terrorist detainees. (They later came to be known as the “torture memos.”)

The John Yoo memo: The CIA, for example, asked the Department of Justice to clarify what would constitute torture under CAT and the federal anti-torture statute in Section 2340. (Again, that section defines torture as acts intended to inflict severe physical or mental pain or suffering, but doesn’t define the term severe pain or suffering.) On August 1, 2002, the OLC concluded—in a legal memo written by former Assistant Attorney General John Yoo—that, for a physical act to amount to torture under Section 2340, the physical pain resulting from that act “must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” It also concluded that “for purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.” Analysts now say that these thresholds allowed interrogators to use highly coercive techniques.

The Jay Bybee memo: In another top secret memorandum (written by former Assistant Attorney General Jay Bybee) also issued on August 1, 2002, and given to the Acting General Counsel of the CIA, the OLC determined that specific interrogation techniques—such as facial slaps, stress positions, sleep deprivation, and waterboarding—carried out against Abu Zubaydah (one of the highest ranking members of Al Qaeda) did not violate the prohibition against torture under Section 2340.

For instance, the memo determined that, although stress positions—which included “sitting on the floor with legs extended straight out in front and arms raised above the head, and kneeling on the floor and leaning back at a 45 degree angle”—resulted in muscle fatigue, “any pain associated with muscle fatigue is not of the intensity sufficient to amount to ‘severe physical pain or suffering’ under the statute.” It also said that stress positions were not “calculated to disrupt profoundly the senses.”

The memo also concluded that facial slaps did not constitute torture under Section 2340 because they didn’t produce severe pain. Such slaps, it noted, were delivered with “fingers slightly spread” to the “fleshy part of the face” to reduce the risk of seri-

ous pain. Facial slaps also did not “disrupt profoundly the senses or personality.” In the case of waterboarding, the memo concluded that because such a technique “inflicts no pain or actual harm whatsoever” and does not lead to “prolonged mental harm,” it would not constitute torture.

When the existence of the 2002 Bybee memo was made public in June 2004, critics argued that the Department of Justice’s definition of torture seemed to allow for many highly coercive techniques that others (including allies) would plainly view as torture. After a public outcry, the Justice Department rescinded the memo and issued a statement in December 2004 where it stated that “torture is abhorrent both to American law and values and international norms.” Daniel Levin, the former OLC Acting Assistant Attorney General, also issued a memorandum which entirely superseded the 2002 Yoo memo. It stated, for example, that the definition of torture is not limited to “excruciating and agonizing” pain or suffering.

The Detainee Treatment Act of 2005: In response to these developments and also to resolve the debate on whether and when treaties such as CAT applied to terrorist detainees, the U.S. Congress in December 2005 passed the Detainee Treatment Act of 2005 (or DTA), which prohibits the Department of Defense (DOD) or any DOD facility from using any treatment or technique not listed in the Army Field Manual on Intelligence Interrogation on any person under its custody. Analysts say that the DTA forced the U.S. armed forces to use the same interrogation techniques on all of their detainees, whether they were actual soldiers from another nation or members of Al Qaeda.

In addition to creating restrictions specifically targeting the DOD, the DTA broadly prohibits the *United States government* from subjecting any individual in its custody—regardless of that person’s nationality or even physical location—to cruel, inhuman, or degrading punishment. Observers believe that this provision applies to various other agencies such as the CIA and individuals working for the federal government. They also say that such language would prevent the U.S. government from arguing that CAT did not apply to territories outside of American jurisdiction.

The Bradbury memos: But even after the Department of Justice had publicly repudiated the 2002 memos, the OLC in 2005 produced several more top secret memos for the CIA in which it justified the use of certain interrogation techniques that are now widely regarded as torture under Section 2340. For instance, a memo written by Steven Bradbury, former Principal Deputy Assistant Attorney General, and issued on May 10, 2005, concluded that using a combination of enhanced interrogation techniques did not violate Section 2340. Another memo issued on the same date examined whether certain enhanced interrogation techniques—in light of the December 2004 memorandum, which stated that “torture is abhorrent both to American law and values and international norms”—violated Section 2340. It concluded they did not.

And a memo issued on May 30, 2005 (also written by Steven Bradbury), discussed whether CAT Article 16—which says that “each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture”—

applies to the CIA’s enhanced interrogation practices. It concluded that, because the interrogation program was not “conducted in the United States or ‘territory under [American] jurisdiction,” Article 16 did not apply to the CIA’s interrogation practices and “thus cannot violate Article 16.”

In October 2007, the media revealed the existence of the 2005 top secret legal memos, which soon fueled speculation about their contents. Many human rights groups called for their release. But the Bush administration refused, warning that doing so would endanger national security by informing terrorist groups about U.S. interrogation methods. While Congress passed legislation in early 2008 which would prohibit the CIA from using certain coercive interrogation techniques, the President vetoed the bill in March 2008.

But in the face of growing unease among the public and overseas allies, the U.S. government later admitted that CIA agents and interrogators had, indeed, carried out torture. In January 2009, for example, the Pentagon determined that the CIA had tortured some detainees. “We tortured [Mohammed al-] Qahtani,” said a high-ranking official, referring to the alleged Al Qaeda member who was supposed to participate in the actual September 11 attacks. “His treatment met the legal definition of torture.”

To prosecute or not?

After Barack Obama was sworn into the presidency, he issued “Executive Order 13491—Ensuring Lawful Interrogations” on January 22, 2009, which revoked all executive directives, orders, and regulations issued to or by the CIA concerning its interrogation policies from 2001 through 2009 to the extent of their inconsistency with the current executive order. It also called on the CIA to close, “as expeditiously as possible,” its overseas detention sites where the agency had carried out its interrogations. It further prohibited an officer, employee, or any other agent of the United States government from using any interrogation technique not listed in Army Field Manual 2-22.3 on any individual in their custody or detained in a facility which they own, operate, or control.

Prosecuting the interrogators: While the OLC had written many legal memos concerning various aspects of detainee interrogation, the Obama administration, on April 16, 2009, publicly released the last four torture memos cited in this article, explaining that it wanted to avoid “an inaccurate accounting of the past, and fuel erroneous and inflammatory assumptions about actions taken by the United States.” While the President said that “those who carried out their duties relying in good faith upon legal advice from the Department of Justice . . . will not be subject to prosecution,” the Attorney General of the United States, Eric Holder, determined otherwise.

After reviewing an internal 2004 CIA report which described interrogators choking a detainee, carrying out a mock execution on another detainee, and intimidating others with a drill and handgun, the Attorney General said that the law compelled him to appoint a prosecutor who would determine whether the government needed to carry out a criminal investigation of these alleged acts. “As Attorney General, my duty is to examine the facts and to follow the law,” he said. Many have argued that it

would be unfair to punish interrogators who had relied on the legal memorandums in good faith when carrying out their duties, though others disagree.

Prosecuting the OLC lawyers: In a similar debate, the Office of Professional Responsibility in the Department of Justice is now completing a report on whether the government should prosecute the authors of the so-called torture memos for criminal conspiracy to violate anti-torture statutes. Those who are opposed to prosecuting these officials have largely argued that doing so would hurt national security. One commentator said, for instance, that “any investigation would discourage intelligence officers from acting boldly for fear of later second-guessing.” Another added that “prosecution of Justice Department officials would have a chilling effect on future U.S. government officials.” Some have also claimed that because the use of enhanced interrogation techniques had revealed important information—which the CIA claimed in several other reports—the government shouldn’t prosecute those individuals who were involved in such interrogations.

In contrast, those who are pushing for prosecution of the authors of the legal memos argue that these individuals had violated federal anti-torture statutes by conspiring to commit such acts. They point out that Section 2340(A)(c) says that “a person who conspires to commit an offense [i.e., torture] under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense.” Others have broadly stated that prosecution would “restore America’s commitment to human rights . . . [and] create a public record of government misconduct as a lesson to future generations and a caution to future administrations.” And in response to those who imply that the use of torture would be acceptable in cases where

it revealed important information, one analyst argued that “the use of torture would [still] not become lawful . . . neither necessity nor effectiveness could render legal that which otherwise would have been illegal.” Observers note that this debate continues today.

Some have also pointed out that CAT seems to require its State Parties to prosecute individuals who have allegedly carried out or were involved in torture. Specifically, Article 7(1) says: “The State Party in territory under whose jurisdiction a person alleged to have committed any offence . . . [shall] submit the case to its competent authorities for the purpose of prosecution.” But Prof. Allan Weiner, an international law expert at Stanford University, notes that CAT also seems to allow a government to initiate a prosecution, but then drop it later because of, say, “good faith” arguments. He points out that Article 7(3) states: “These authorities shall take their decision [on prosecution] in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.”

Even if the United States decides not to prosecute the authors of the memos, other State Parties could decide to do so. Article 5(2) of CAT says that “each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction.” So a foreign government could decide to prosecute an author of an OLC memo if the United States declined to do so. In fact, a judge in Spain had indicated in March 2009 that he wanted to investigate whether several Bush administration officials, including John Yoo and Jay Bybee, had provided legal cover for acts of torture.

Others believe that the authors of the torture memos could face prosecution for violating the Geneva Conventions, which prohibits torture. One legal expert said that the OLC memos largely did not examine whether the coercive interrogations techniques violated the Geneva Conventions because the Bush administration believed that the Conventions did not apply to terrorist groups such as Al Qaeda.

Even if the U.S. government decides to prosecute the authors of the memos, many have pointed out that doing so successfully will be very difficult. Prof. Weiner said that “where a lawyer gives advice in good faith, or that he believes is well-founded, he cannot be held liable for an error in judgment.” During the course of an actual prosecution, he adds, the government would have to prove that “the purpose of the lawyer’s advice was to facilitate conduct that the lawyer knew to be criminal.”

Analysts note that the Office of Professional Responsibility will soon release its report, which, according to one source, “has concluded that Bush administration lawyers committed serious lapses of judgment in writing secret memorandums authorizing brutal interrogations, but that they should not be prosecuted,” and that it could recommend “that state bar associations consider possible disciplinary action against [them].” Some observers have, in fact, offered such a middle ground, arguing that this approach would ensure that future officials would avoid similar interpretations in the future, and would also help to avoid what could become a highly politicized prosecution. Others say that Congress should create special committees to increase their oversight over the executive branch. 🌐



Using international law to combat uncooperative tax havens

Since the end of World War II, countries around the world have been opening their markets to greater competition in an effort to increase global prosperity and to avoid damaging trade wars. Even today, many governments continue, in varying degrees, to lower tariffs and eliminate quotas on imported goods. They are also opening a wide variety of previously protected economic sectors (including their banking and financial services markets) to foreign investment and even ownership.

The global competition to attract foreign investment has also encouraged a now long-running practice known as “tax competition” whereby governments extend favorable treatment (such as offering tax credits) to foreign investors who build, say, a manufacturing plant which could, in turn, create new employment opportunities and streams of tax revenue.

But tax competition has also led to what experts believe are troubling developments. For example, more and more countries have become what they describe as tax havens. While supporters say that there are legitimate uses for tax havens, critics believe that these jurisdictions mainly attract people and companies who wish to evade the payment of taxes owed to their respective home governments. And as tax havens have proliferated, nations say that they have seen a corresponding decline in the collection of tax revenues.

In the last few months, as the world community debated how to address the global financial downturn, many nations pointed out that growing unemployment has led to a substantial decline in the collection of badly-needed tax revenues. In one

approach to remedy this particular problem, several national leaders—including the President of the United States—have proposed more aggressive measures to curb and generally discourage the use of tax havens.

What are tax havens and some of their characteristics? How much in assets do they hold? Why do opponents of tax havens criticize their use? Is there an existing international standard which regulates the structure and operation of tax havens? What measures have some countries proposed in regulating or even curbing their use? And what is the current status of this debate?

Legal and illegal ways to lower taxes

Since days of antiquity to modern times, people and businesses have tried to minimize the payment of taxes owed to their respective governments. Many have done so by simply evading the payment of their taxes. (They may, for instance, underreport or hide their incomes and assets.) Others undertake “tax avoidance” measures to reduce their taxes legally. For example, many governments allow people to deduct (i.e., subtract) certain expenses—such as those made to charities or those used for legitimate business purposes—from gross income, which, in turn, lowers taxable income. Others may transfer a portion of their assets to a legal entity called a trust where beneficiaries pay any taxable gains. But officials point out that, every year, many individuals and companies abuse these tax avoidance measures as a way to evade taxes.

In addition to using tax avoidance measures at home, individuals and companies do so abroad. For instance, they have long used a wide variety of “offshore entities”—such as foreign corporations, foreign partnerships, foreign trusts, and international



business companies—available in other nations. (The term “offshore” generally refers to any jurisdiction outside of a home country’s jurisdiction, whether it may be another nation, dependency, or territory.) Because individuals and companies who use some of these entities—such as foreign trusts—could legally end up paying lower taxes to their home governments, experts generally view them as tax avoidance measures.

Many countries allow their residents to use offshore entities for legitimate purposes. For instance, while the United States does not outright prohibit residents from using offshore entities, they must report certain activities—such as “creating or transferring assets to a foreign trust, receiving certain foreign gifts, [owning] 10 percent of a controlled foreign corporation, or [transferring] assets to a foreign corporation”—by filling out certain forms. (Doing so would discourage them from using these offshore entities for questionable purposes.) The Internal Revenue Service (or IRS) notes that “there are severe penalties imposed on the U.S. taxpayer for failure to report these transactions and/or relationships.”

While the use of offshore entities may have legitimate functions, U.S. officials believe that “many are created with tax evasion as the primary motivation.” In fact, the use of such entities to evade taxes is pervasive among their promoters and users. And as tax competition among nations becomes fiercer, critics believe that more and more jurisdictions may be tempted to facilitate tax evasion. The IRS said that “in contrast to their legitimate roles, foreign entities are increasingly being promoted as a means to divert income and conceal assets for taxpayers who have no real operations in a foreign country.” In 2009, that agency announced that one of its pri-

orities is to combat “abusive offshore tax avoidance schemes,” which have been growing significantly in recent years.

How do individuals and companies use these offshore entities to evade taxes? Many simply hide their assets—including cash, stocks, and bonds—in anonymous offshore bank accounts. Others transfer assets into a particular entity, ignore its intended purpose, and then engage in questionable practices. Foreign trusts, for instance, “lend themselves to being the type of entity through which income and assets are more easily hidden or disguised,” noted the IRS.

To disguise these largely illegal activities and deceive tax authorities in other jurisdictions, the enablers of such schemes—which include unscrupulous accountants, bankers, and lawyers, among other professionals—create front companies, fabricate legal documents, and make fictitious transactions, among other dubious practices. The IRS said that the promoters of these schemes “operate virtual factories making false documents to create paper trails to confound auditors.”

Using tax havens to evade taxes

Many individuals and businesses who want to evade their taxes turn specifically to jurisdictions generally known as “tax havens,” say experts. The popular image of tax havens revolves around the idea of people and companies who transfer a sizeable portion of their assets to banks and other financial institutions located on tropical islands or countries with mountain resorts where the level of taxation on income from other jurisdictions is very low or even non-existent. An American company may, for example, establish a corporate subsidiary in a tax haven with low tax rates and keep its profits there instead of transferring them back to the United States where they would be subject to higher tax rates. (One study in the *Quarterly Journal of Economics* estimated that American multinational corporations held 31 percent of their profits in tax havens.)

Important characteristics of tax havens: While the popular descriptions of tax havens are not wholly inaccurate—indeed, nations such as Bermuda and Switzerland have long been described as tax havens—they neither capture the full range of activities carried out by these jurisdictions nor do they mention other important characteristics. Experts say that while tax havens generally do offer a low-tax regime, they also provide the use of offshore entities such as those described earlier. In fact, individual tax havens may specialize in the creation and administration of certain entities which cater to the needs of particular clients. “Some tax havens specialize in provision of [offshore] corporate and trust formation and management,” said the Tax Justice Network, a tax research organization whose members include accountants, economists, and lawyers.

In addition, tax havens have strict banking and secrecy laws which shield the activities of non-resident account hold-



ers from outside scrutiny. These laws also generally prohibit the exchange of information concerning a particular account (such as the identities of its shareholders and documentation of financial activities) with other jurisdictions seeking such information. As a result, it is extremely difficult for outside authorities, creditors, and litigants to claim assets residing within these accounts, say analysts. One company that promotes the use of offshore accounts stated that this particular feature of tax havens “makes it impossible for third parties to link the assets in question to the ultimate beneficial owner.”

But the totality of these features, say legal observers, makes the use of tax havens particularly appealing to those who seek to evade their taxes. Strong secrecy laws, in particular, can shield activities tantamount to tax evasion. The IRS notes that some tax havens have “gone so far as to offer asylum or immunity to criminals who invest sufficient funds.”

Just as utilizing an offshore entity is not automatically illegal,

Supporters and opponents of tax havens: Analysts have long debated the merits of tax havens along with their costs. And this debate continues even today and sees no resolution in sight. Supporters of these jurisdictions say that tax competition pushes countries to modernize their tax systems, many of which have been previously described as antiquated and inefficient. Others say that tax havens provide people and companies all around the world “with a choice between different combinations of taxes.”

Some argue that those who move their assets to offshore accounts were protesting what could be considered unfair levels of taxation in their home jurisdictions or were seeking more economically and politically stable jurisdictions. Still other observers add that tax havens provide people with financial privacy and protection. “Those living in un-free and corrupt jurisdictions would have no place to protect their financial assets from kidnappers, extortionists, blackmailers, and assorted government and nongovernmental thugs,” said Richard Rahn of the Cato Institute.

Many international organizations—including the United Nations, the International Monetary Fund, the World Bank, and the OECD—have long pushed tax havens to cooperate in investigating tax evasion. But these efforts have largely been carried out in a piecemeal and uncoordinated fashion.

neither is the use of a tax haven if it is done with a legitimate purpose and follows proper rules and procedures. (A Government Accountability Office report released in December 2008 said that, of the largest 100 public companies in the United States, 83 have created thousands of subsidiaries in tax havens.) Still, tax authorities around the world generally believe that many financial institutions located in tax havens do actively help their clients engage in tax evasion, though they constantly disguise their efforts in doing so.

How do tax havens benefit from their policies? Many jurisdictions decide to become tax havens, in part, to increase their national revenues. One report said: “Some small, poor, and vulnerable economies have found that establishing themselves as tax havens is an attractive economic option partly because of the lack of economic alternatives open to them.”

Account holders in these tax havens must pay a low tax or an annual maintenance fee to the jurisdictions where they maintain their accounts. Though these fees can range from a few hundred to thousands of dollars, they are generally still lower than what a person or company would have paid in taxes in their home jurisdictions. But because a single tax haven can attract *hundreds of thousands* of individuals and companies, its revenues could be sizeable. For instance, the Isle of Man (a well-known tax haven located in the Irish Sea) derives more than half of its national revenues from maintenance and other fees paid by account holders, say some analysts. The Central Intelligence Agency said that, as of 2003, “more than 68,000 companies were registered in the Cayman Islands [another well-known tax haven], including almost 500 banks, 800 insurers, and 5,000 mutual funds.” Others estimate that the British Virgin Islands “are home to almost 700,000 offshore companies.”

On the other hand, critics say that the costs of using tax havens outweigh their alleged benefits. By transferring a sizeable portion of their assets to offshore jurisdictions (either for the primary purpose of legally avoiding or illegally evading taxes), wealthy individuals and companies deprive their nations of substantial amounts of revenue, which are needed to build schools and hospitals, fix roads and bridges, and maintain national defense, all of which are costly, though necessary, endeavors, they argue. Tax havens also deprive developing nations of tax revenues, say critics, because the wealthy in those countries also transfer or hide a large portion of their taxable wealth in those jurisdictions.

How much revenue are nations losing due to tax havens? Analysts say that estimates have varied widely because tax havens don’t divulge specific information on their holdings. But experts believe that the amounts could be significant. For instance, though the IRS has not conducted its own comprehensive study, it said that “one authority has estimated the annual revenue loss to the United States at a minimum of \$70 billion.” Tax Justice Network said that tax havens held \$11 trillion in assets (which it describes as a “conservative estimate”), and that governments would be able to collect an additional \$255 billion in annual revenues if they were able to tax them.

Critics also respond that the tax competition arguments used by supporters “[assume] that all citizens and companies are equally mobile, which is not the case.” They point out that only wealthy individuals and multinational corporations are truly able to move their funds offshore while leaving the vast majority of people in a certain country to pay their taxes fully. And Tax Justice Network argues that tax competition has not pushed nations to become more efficient in their collection of revenues because “governments are not profit-maximizers in the economic sense of that term.”

Tax havens and international law

Over the past several decades, tax officials from around the world have tried to persuade individual tax havens to help them curb activities such as tax evasion, though the success of these efforts has been mixed. But because policies implemented in one jurisdiction can directly affect economic well-being in others, more and more countries have been working together in pressuring tax havens to provide much more cooperation.

Currently, there is no single international treaty or international organization whose sole function is to regulate how nations should administer specific aspects of their domestic tax systems or policies (including the creation and use of tax havens and offshore entities), and also the extent to which they should cooperate with other jurisdictions concerning disputes arising from such matters. Individual countries generally have the sovereign right to administer and regulate their tax policies in ways which they believe best suit their national interests. (To become a tax haven, a nation can simply amend its tax laws and implement domestic legislation to protect the privacy of account holders—all without seeking permission from foreign authorities.)

Instead of trying to eliminate completely the operation of tax havens, a hodgepodge of international efforts has taken aim at that particular feature of tax havens which makes it very difficult for authorities to uncover activities such as offshore tax evasion—namely domestic laws which impede the exchange of tax information with other jurisdictions.

Efforts by the Organization for Economic Cooperation and Development (or OECD)

Analysts say that the OECD has taken the most prominent global role in addressing the use and abuse of tax havens and related entities. Established in 1961, the OECD is an intergovernmental organization of 30 industrialized nations (which also works with developing nations) whose aim is to increase cooperation involving a wide variety of economic issues, including corporate business and labor practices, competition policy, and regulatory reform, among many others. It does so by negotiating formal agreements, creating standards and models of conduct, and issuing broad recommendations.

In the general area of tax, the OECD says that “it does not seek to dictate to any country what its tax rate should be, or how its tax system should be structured.” Instead, that organization says that “countries should remain free to design their own tax systems—as long as they abide by internationally accepted standards in doing so.” In regard to tax havens, the OECD formulated criteria to identify tax havens, and then created what it calls an international standard on how nations should share and exchange tax information with each other so that countries can “fully and fairly enforce their tax laws.” It then placed countries on different lists reflecting their willingness to cooperate with other nations in cracking down on activities such as tax evasion.

Identifying tax havens: There is currently no global consensus on a definition for tax havens simply because different nations have conflicting standards and perceptions on what should—and should not—constitute a tax haven. Rather than crafting a comprehensive description, the OECD in 1998 released an influential report—*Harmful Tax Competition: An Emerging Global Issue*—listing several factors which help to identify whether a

particular jurisdiction is operating as a tax haven. They include the following:

- A particular nation may impose a nominal (i.e., insignificant) or even no tax on certain income that is transferred to a financial institution—such as a bank—located in its jurisdiction.
- There is a “lack of transparency in the operation of the legislative, legal, or administrative provisions” which underlie the tax haven itself.
- A country has implemented laws and administrative practices (such as the use of bank secrecy rules) that prohibit its financial institutions from disclosing information which can identify the owner(s) of and the activities taking place within their accounts.

Using these criteria, in 2000, the OECD identified 41 jurisdictions which it believed were operating as tax havens.

An international standard on the exchange of tax information: The OECD then created an international standard on how countries should share and exchange information with each other concerning tax cases. (A requesting nation may, for example, need certain information from another jurisdiction to uncover possible tax evasion by one of its home residents.) Under the OECD’s standard on information exchange—which is contained in Article 26 of its *Model Tax Convention on Income and on Capital* (or the OECD Convention)—a jurisdiction has an obligation to exchange fully “all types of information” so that a country requesting such information may properly administer and enforce its domestic tax laws.

In addition, a jurisdiction cannot deny such a request for information by citing bank secrecy laws. The OECD notes that bank secrecy is not absolute, and that all countries lift such secrecy “in well defined circumstances” such as criminal matters. Furthermore, a jurisdiction may not deny a request for information simply because “it has no domestic interest in such information.” (That is to say, a nation cannot refuse to exchange information by arguing that a particular non-resident under investigation in the requesting country had not undertaken any action which could be considered illegal within in its own jurisdiction.) A requesting nation may also ask for information not only on certain individuals, but also “information on companies and trusts and their owners and beneficiaries.”

While the OECD standard may seem all-encompassing, there are several limits. For instance, under the standard, nations do not *automatically* exchange information with one another. Instead, when requesting information, a nation must be “as detailed as possible,” and also “demonstrate the foreseeable relevance” of the information being sought. (Such a requirement will prevent a requesting country from conducting a “fishing expedition” into unrelated matters.) And in order to protect the privacy rights of an account holder, countries must keep the requested information strictly confidential, and use it for “authorized purposes” only.

Information exchange is also not absolute under the OECD standard. A jurisdiction may decline to exchange information for reasons of “public policy” such as instances where the disclosure of taxpayer information could reveal a state secret or if authorities believe that “a tax investigation in another country was motivated by racial or political persecution.” The OECD says that its standard now serves as “the internationally agreed standard for exchange of information.”

To carry out the actual exchange of information, “the vast majority” of countries have negotiated formal agreements with one another, either through bilateral tax treaties (based on the OECD standards) or through “tax information exchange agreements” (or TIEAs), which deal specifically with information exchange. (The OECD itself created the model TIEA agreement.) After signing a bilateral tax treaty or a TIEA, a nation must, in turn, usually amend domestic laws or even introduce new legislation so that its government will be able to comply with the terms of those agreements.

The lists: After identifying the tax havens themselves and formulating an international standard on information exchange, the OECD placed countries on different lists based on the extent to which they have committed themselves to comply with OECD standards. It placed those countries which have “substantially implemented” its information exchange standards on a so-called *white list*. To be placed on this list, a jurisdiction must first have signed at least 12 information exchange agreements with other countries based on OECD standards. Second, it must demonstrate a willingness to sign more agreements beyond this threshold. “A jurisdiction that refuses to agree to the exchange of tax information on the grounds that it has already ‘substantially implemented’ the standard cannot be seen to be fully compliant with the standard,” said the OECD. Third, a jurisdiction must show that it has effectively implemented its obligations by ratifying these information exchange agreements in their domestic legislatures and then, if necessary, amend domestic laws to bring the agreement’s provisions into force.

For those jurisdictions which have “committed to the internationally agreed tax standard, but have not yet substantially implemented” them, the OECD places them on a *gray list*. While some jurisdictions on this list have not signed a single information exchange agreement, others are close to reaching the 12-agree-

A hodgepodge of international efforts has taken aim at that particular feature of tax haven jurisdictions which makes it very difficult for authorities to uncover activities such as tax evasion—namely, domestic laws which impede the exchange of tax information with other jurisdictions.

ment threshold needed for placement on the white list. Most tax havens are currently on this gray list.

For those jurisdictions that refuse to sign information exchange agreements with other nations, the OECD places them on a list of “uncooperative” tax havens, otherwise known as a *black list*. Being placed on this list, say political analysts, would be viewed as an embarrassment in the eyes of the world community. Individual OECD member nations may then undertake—at their own initiative—what the OECD calls “defensive measures” against such jurisdictions. (The OECD itself “does not have power to impose sanctions on countries” that refuse to eliminate or modify their harmful tax practices.) Nations may decide, for example, to amend their tax codes to offset any tax benefits that its residents might gain from transferring their assets to a black-listed jurisdiction.

Efforts by other international organizations

Many other international organizations are also trying to deal with tax havens, tax evasion, and related matters. But these efforts have largely been carried out in a piecemeal and uncoordinated fashion. Some duplicate existing endeavors carried out by other groups. Others focus their attention on entities related to tax havens.

United Nations efforts: Article 26 of the *United Nations Model Double Taxation Convention between Developed and Developing Countries* (or UN Convention) contains general guidelines on how UN member nations are to exchange information with one another to prevent tax evasion. Passed in 1980, the UN Convention—which is administered by the Committee of Experts on International Cooperation in Tax Matters (or the Committee)—provides model provisions on various technical issues which developed and developing countries may use when negotiating general tax treaties with each other.

But has it been effective in promoting the exchange of tax information among different jurisdictions? In a review released in 2006, the Committee concluded that while “the exchange of information is a key element to fight against tax evasion,” it noted that the “UN is one step behind [other] international organizations” in setting information exchange standards. For example, unlike the OECD, the UN did not have a model agreement concerning information exchange on tax matters, according to the Committee. It also implied that some member states were narrowly interpreting the provisions contained in Article 26 of the UN Convention, possibly in an effort to avoid exchanging information with other member nations.

While the Committee revised Article 26 in October 2008 so that its members would have to interpret the obligation to exchange information broadly, current tax treaties mostly base their provisions on OECD rather than UN standards, according

to Tax Justice Network. And unlike the OECD, the UN does not maintain a list of cooperative and uncooperative jurisdictions in the global effort to eliminate harmful tax practices.

The Financial Stability Board (or FSB): Rather than focusing its efforts on tax havens, the FSB oversees the effects of what it calls “offshore financial centers” (or OFCs), which are jurisdictions similar to tax havens. (It conducts this work in conjunction with the International Monetary Fund [or IMF] and the World Bank.) Just like tax havens, the OFC offers various incentives to non-residents who agree to transfer assets to its domain, including “low or no taxes on business or investment income . . . and an inappropriately high level of client confidentiality based on impenetrable secrecy laws.” It also said that OFCs provide “financial services to nonresidents on a scale that is incommensurate with the size and the financing of its domestic economy.” (Some

consider the distinction between a tax haven and an OFC to be largely “academic.”)

While the IMF says that there are legitimate uses for OFCs, it also believes that these jurisdictions are used for “dubious purposes such as tax evasion and money laundering by taking advantage of a higher potential for less transparent operating environments.”

Using its criteria, the FSB—which mainly serves as a forum where financial regulatory authorities from the world’s largest economies discuss ways to enhance international financial cooperation and stability—identified 42 OFCs in 2000. It also issued a “Compendium of Standards,” which is a listing of 12 broad economic and financial guidelines which countries should implement to help maintain sound and stable financial systems, including the adoption of international accounting standards, auditing standards, and principles for effective bank supervision, among others. The IMF and the World Bank currently monitor whether

trative Assistance in Tax Matters, which is one of the most comprehensive agreements setting out the rules, procedures, and obligations that countries must follow when they assist one another in tax matters. (It entered into force in 1995.) For example, it sets out certain procedures that nations must follow when they try to recover taxes owed in other countries or when they exchange tax information. (Like the OECD Convention, it calls on the exchange of information “that is foreseeably relevant to the assessment and collection of tax.”) But analysts note that the 14 signatory countries do not include well-known tax havens which harbor much of the world’s undeclared income and other hidden assets.

To stop tax evasion on interest income, the EU passed the *EU Savings Tax Directive*, which came into force in July 2005. Under the directive, EU member states—including territories which have reputations for being tax havens such as Aruba, the British Virgin Islands, the Cayman Islands, Jersey, and the Isle of Man—

Analysts predict that tax haven jurisdictions that had reluctantly made commitments to cooperate in investigating tax evasion will try to prolong discussions. “Some of the targeted countries make no secret of their intention to drag out reforms,” stated one critic.

participating OFCs are in compliance with these standards through a voluntary assessment program.

But some observers have questioned the effectiveness of this effort. In the last comprehensive assessment undertaken in 2006, the IMF noted that only 16 jurisdictions (which included tax havens such as Bermuda, the Cayman Islands, Guernsey, Isle of Man, Jersey, and Monaco) had submitted data for review. They also note that the Compendium doesn’t call on countries to undertake activities which can help to uncover tax evasion such as exchanging tax information or cooperating with other jurisdictions in a tax investigation. Still, one analyst pointed out that the FSB, IMF, and World Bank usually address economic problems from a macroeconomic perspective, and that the FSB’s broad goal is to oversee OFCs and monitor their effects on global financial stability as a whole.

European Union (or EU) efforts to curb tax evasion: The EU has also passed several measures to combat tax havens and harmful tax practices, but critics say that several shortcomings have limited their effectiveness. For example, in 1977, the EU passed *Council Directive 77/799/EEC* to combat tax evasion. The directive requires EU member states to exchange “any information which appears relevant for the correct assessment of taxes on income and on capital.” But critics point out that, under Article 8 of the directive, an EU member is not obligated to provide information if doing so “would be contrary to its legislation or administrative practices for the competent authority of that State.” As a result, EU nations and tax havens can, for instance, hide behind bank secrecy laws to prevent the disclosure of tax information to another jurisdiction.

In 1988, to help combat tax evasion, the Council of Europe and the OECD jointly passed a *Convention on Mutual Adminis-*

trative Assistance in Tax Matters, which is one of the most comprehensive agreements setting out the rules, procedures, and obligations that countries must follow when they assist one another in tax matters. (It entered into force in 1995.) For example, it sets out certain procedures that nations must follow when they try to recover taxes owed in other countries or when they exchange tax information. (Like the OECD Convention, it calls on the exchange of information “that is foreseeably relevant to the assessment and collection of tax.”) But analysts note that the 14 signatory countries do not include well-known tax havens which harbor much of the world’s undeclared income and other hidden assets.

The Inter-American Center for Tax Administrations (or CIAT) is an international organization which serves as a forum for national tax administrators from 38 countries (located mostly in the Western hemisphere) where they discuss ways to improve cooperation in various tax matters. Since its founding in 1967, CIAT has signed technical agreements with several nations on exchanging tax information. It also created a *Model Agreement on Exchange of Tax Information* which one analyst at the United Nations described as being “similar to the OECD model.” But as in the case of the UN Convention, the efforts undertaken by CIAT has been largely supplanted by work carried out by the OECD.

Mutual Legal Assistance in Criminal Matters Treaties (or MLATs): Some nations utilize MLATs, which are formal agreements negotiated between particular countries to facilitate the exact process of gathering and exchanging information concerning specific criminal matters. According to the U.S. Department of State, MLATs include “the power to summon witnesses, to compel the production of documents and other real evidence, to issue search warrants, and to serve process.” But some analysts note that many of these treaties do not cover tax evasion. The IRS itself points out that “tax evasion is not considered a criminal

act subject to [every MLAT].” Also, while the United States has negotiated 19 MLATs, it has concluded only five with well-known tax havens.

The G-20 summit: A final ultimatum to tax havens?

In April 2009, the G-20—an organization of the world’s 20 largest economies—held a summit where it discussed how its member nations could address the global financial downturn. They also devoted some time on how to deal with uncooperative tax havens. Because severe economic problems led to decreasing consumer activity and increasing unemployment, many nations saw a sharp decline in the collection of tax revenues. While tax havens were not responsible for the struggling global economy, world leaders professed outrage that, as struggling banks and companies—whose business practices had led directly to the global financial crisis—received hundreds of billions of dollars in taxpayer assistance to stave off bankruptcy, these very same recipients still kept hundreds of billions of dollars of their profits in offshore accounts.

Working with the OECD, the G-20 pressured many tax havens to carry through on implementing OECD information exchange standards. For example, it said that countries on the gray list (which had already made such commitments, but not taken substantive action in carrying them out) should be placed on the OECD black list. In fact, almost a decade ago, the OECD said that if “there is at any time evidence that the jurisdiction is not acting in good faith in accordance with its commitments, the

[OECD would] place the jurisdiction on the ‘List of Uncooperative Tax Havens.’” Some of the jurisdictions which had made such commitments but had not implemented them included Austria, Belgium, Luxembourg, and Switzerland, which collectively hold a substantial portion of the world’s offshore accounts, according to analysts. Some have even described Switzerland as “the world’s biggest tax haven” with almost \$2 trillion in assets. (Contrary to media reports, the G-20 did not establish its own list of uncooperative tax havens.)

Also, in a communiqué which stated that “the era of banking secrecy [was] over,” the G-20 nations agreed to take action against blacklisted jurisdictions by using sanctions if necessary, though the statement did not provide any further details. But some nations such as France had proposed that international financial institutions such as the IMF should restrict their dealings with countries on the black list. Others say that nations should disallow deductions for expenses paid to “anyone based in noncompliant tax havens.” Some have proposed going as far as prohibiting any financial transactions with these jurisdictions. These warnings have had some effect. For instance, shortly before and by the end of the G-20 summit:

- All four countries on the OECD’s black list—Costa Rica, Malaysia, Philippines, and Uruguay—had made commitments to “propose legislation to remove the impediments to the implementation of the [OECD’s standard on the exchange of information].” As of September 2009, “no jurisdiction is currently listed as an uncooperative tax haven,” says the OECD.



- Andorra, Austria, Belgium, Monaco, and Switzerland said that they would start contacting their existing tax treaty partners to begin negotiations to incorporate Article 26 of the OECD Convention into their existing bilateral tax treaties.
- Luxembourg did not sign any information exchange agreements with any country before the G-20 summit. But, in July 2009, the OECD propelled Luxembourg to its *white list* because that nation had concluded enough agreements for placement on that list.
- Hong Kong, Macau, and Singapore separately announced that they would introduce domestic legislation by mid-2009 which will allow them to negotiate information exchange agreements with other countries.

Despite these results, the OECD said that “a great deal of work remains.” While a progress report issued in September 2009 revealed that 52 nations were currently on the white list, 34 were on the gray list, including many of the most well-known tax havens located in the Caribbean region. Of these 34 jurisdictions, 41 percent hadn’t signed *any* information exchange agreements with any other country. And nearly 80 percent have signed

other similar agreements (where countries must *request* information), it is argued that the world community must create a single global framework under which countries *automatically* exchange financial information with other jurisdictions, including interest, dividend, royalty, and other income statements, and also regulatory filings concerning individuals, corporations, and trusts. “Automatic information exchange would be vastly better,” said one financial commentator, “with all data on income earned by residents of one state in another state being automatically sent to their home tax jurisdictions.” But Tax Justice Network notes that there aren’t “any global initiatives under way . . . to implement a global framework for automatic information exchange of relevant tax information.”

The creation of a World Tax Authority: Others are calling for the creation of a single international organization—a so-called World Tax Authority—whose main function would be to examine the implications of national and international tax policies, and also coordinate responses among nations to counter uncooperative tax jurisdictions. (Because many organizations—ranging from the IMF to the UN to the OECD—address differ-

While tax havens were not responsible for the world financial crisis, world leaders professed outrage that struggling banks and companies responsible for the downturn had received hundreds of billions of dollars in taxpayer assistance while keeping an equivalent amount of their profits in tax havens.

five or fewer agreements. But many are still negotiating TIEAs with other countries, said the OECD. In addition, it noted that many completed TIEAs were “awaiting ratification.”

Despite this seemingly quick progress, political analysts believe that the many jurisdictions which had reluctantly made commitments to negotiate information exchange agreements with other nations will use various excuses to prolong discussions. “Some of the targeted countries make no secret of their intention to drag out reforms,” stated one critic, who also said that their offer to make reforms “smack[ed] of opportunism.” Some jurisdictions such as Switzerland have argued, for instance, that it could take years to overcome domestic political opposition to pass domestic legislation to allow the exchange of tax information. Nearly 80 percent of people polled in Switzerland supported strict bank secrecy, claimed the Swiss Bankers Association. In describing these possible domestic challenges, one observer said: “There is still plenty of room for foot-dragging and hair-splitting, and it is likely to be several years before any information is actually exchanged.”

What else can be done to address tax evasion and uncooperative tax havens?

Critics of tax havens say that the world community needs to carry out a sustained effort against harmful tax practices wherever they appear rather than focusing on this issue during times of economic uncertainty. Proposals include:

An agreement on automatic information exchange: To prevent countries from skirting their obligations under TIEAs and

ent aspects of various tax issues, international efforts in addressing harmful tax policies have resulted in fragmented, overlapping approaches.) Such an organization would also recommend best practices in creating tax laws, better coordinate the exchange of tax information, collect tax statistics, and establish common rules on how to treat certain income. (No one has called on a World Tax Authority to have any legal power to regulate directly and oversee tax systems in individual nations.)

But many question whether such an organization would address uncooperative tax havens more effectively than existing efforts. As a result, “there is a lack of political will for the creation of a global tax body,” concluded Oxfam, a humanitarian group.

Greater tax assistance for developing countries: Other organizations recommend that international organizations and industrialized countries provide more technical and monetary assistance in helping developing countries create a sound taxation system rather than relying on harmful tax practices to support their economies. But they say that developed countries should also set an example by eliminating any harmful tax regimes on their part.

Ending tax havens? Some groups say that it is not enough to encourage tighter regulation of tax havens because doing so only serves to “strengthen the legitimacy of the offshore system itself, which will preserve the right of firms and individuals to escape their tax obligations through legal means.” They add that tax havens “with tightly regulated financial institutions can be most attractive to money launderers precisely because they provide the cover of respectability.” Organizations such as

Oxfam have not explicitly called for the outright elimination of tax havens. But observers believe that it is highly unlikely that the world community would ever follow through on such a course of action.

Initiatives undertaken by individual countries: Even with initiatives taken at the global level, analysts point out that any efforts to combat uncooperative tax havens have to be implemented at the national level by individual states. “The international agenda is important,” says the Tax Justice Network, “but tax reform has to be national.” Various countries are undertaking their own initiatives in combating tax havens and increasing their scrutiny of those who have accounts in these jurisdictions. For example, in his budget proposals released in May 2009, President Barack Obama of the United States announced a number of initiatives to clamp down on what he described as abuses of tax havens by wealthy individuals and multinational corporations.

He proposed, for instance, to limit sharply the ability of U.S. corporations to defer paying taxes on the profits made by their foreign subsidiaries located in tax havens. Under current U.S. law, these subsidiaries can defer paying taxes indefinitely on their foreign earnings kept in tax havens. (The government taxes these earnings once they are transferred back to the United States.) In another proposal, the United States would amend its tax rules so that companies cannot claim deductions for their overseas operating expenses unless they first pay taxes on their foreign earnings kept in tax havens. The government also wants to tighten reporting requirements for individuals and companies who have overseas accounts, and stiffen penalties against them if they do not comply with such requirements.

Critics of the President’s plan say that most other countries around the world allow their foreign subsidiaries to defer paying taxes on their profits, and that limiting this rule will put American companies at a competitive disadvantage. A spokesperson for the Business Roundtable said that the President’s proposals will “cripple growth, reduce the competitiveness of U.S. companies overseas, and destroy jobs.”

In addition to these efforts, the U.S. Department of Justice recently pressured UBS (the world’s largest private bank, which is based in Switzerland) to disclose the names of tens of thousands of American clients whom it had recruited through a marketing campaign to open secret accounts that the bank now acknowledges was an effort to promote tax evasion. During negotiations to obtain these names, the IRS noted that “scores” of Americans had been signing up for its voluntary disclosure program which offers reduced penalties for failing to report undisclosed overseas accounts and assets. In August 2009, the Justice Department announced that UBS had agreed to “ultimately disclose names and account details for more than 4,450 wealthy Americans suspected of tax evasion.” The media reported that these accounts held around \$18 billion. But analysts note that it could take over a year for Swiss authorities to reveal the identities of every account because their owners will be allowed to appeal such a decision to a Swiss court.

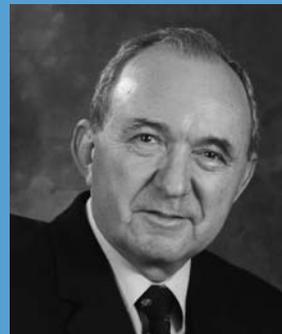
Despite all of these efforts, many worry that the world community will lose interest in clamping down on tax havens once the global economy begins to improve. 🌐



C.V. Starr Lecture

October 20, 2009

Accountability for War Crimes: Israel and Hamas

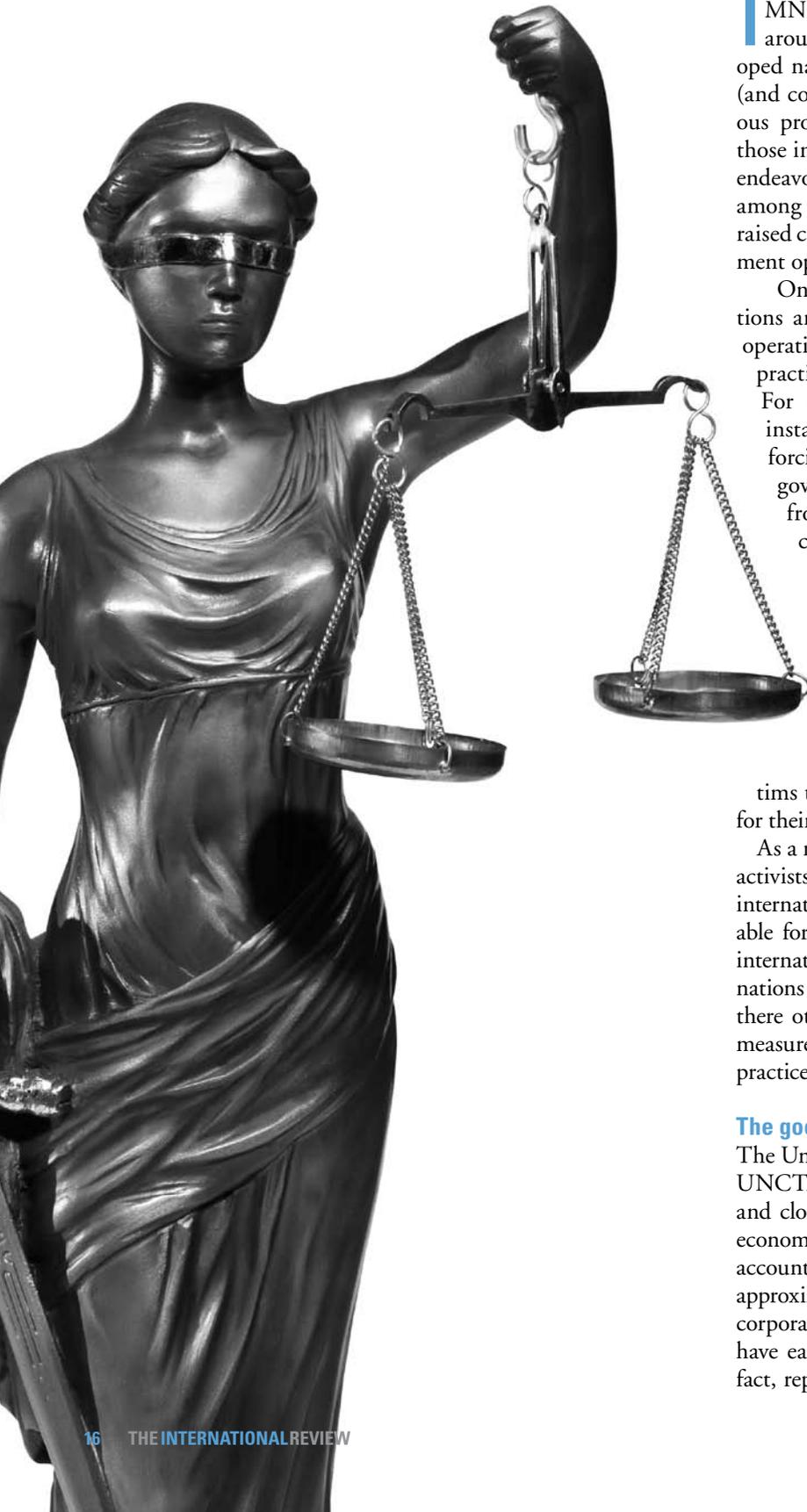


Richard J. Goldstone
Head, United Nations Fact Finding Mission on the Gaza Conflict; and former chief prosecutor, United Nations International Criminal Tribunal for the former Yugoslavia and Rwanda

Judge Richard J. Goldstone will describe the development of international criminal law over the past several decades to hold accountable those individuals responsible for war crimes. He will then discuss the main findings of the United Nations Fact Finding Mission on the Gaza Conflict, which, under his direction, investigated alleged violations of international humanitarian and human rights laws by Hamas and the Israel Defense Forces during Israel’s ground operation in the Gaza Strip from December 2008 through January 2009.

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

Global efforts to hold corporations accountable: Past efforts and current initiatives



In the last few decades, large multinational corporations (or MNCs) have expanded the scope and scale of operations around the world, especially in developing and least-developed nations. Analysts say that these companies have invested (and continue to invest) hundreds of billions of dollars in various projects within these nations, including energy projects, those involving natural resource extraction, and manufacturing endeavors that are labor intensive (such as clothing production), among many others. These investments, say supporters, have raised countless people out of poverty by providing more employment opportunities and raising their standards of living.

On the other hand, critics allege that many of these corporations and their foreign subsidiaries—while carrying out their operations—regularly violate human rights standards, fair labor practices, environmental laws, and various individual rights. For example, human rights groups claim that, in many instances, MNCs have colluded with foreign governments in forcing people to work with little or no pay. Others say that governments have also forced out entire groups of people from their homes and communities with little warning or compensation to develop a certain swath of territory.

When those who say they were injured by MNCs call on their governments to address any alleged wrongdoings, many have simply ignored these complaints, handled problems in a superficial manner, or even persecuted them. Observers say that the laws that are supposed to protect various individual and human rights in developing and least-developed countries are vague, rarely enforced, or don't even exist. The victims then have little recourse to hold wrongdoers accountable for their actions and practices.

As a result of these perceived shortcomings, a wide spectrum of activists from around the world has pressed for the creation of an international legal framework specifically to hold MNCs accountable for substantiated claims of misconduct. Are there existing international treaties which govern (directly or indirectly) how nations must address allegations of corporate misconduct? Are there other initiatives already in place? How effective are these measures in holding companies accountable for their business practices? And what is the status of the debate today?

The good and bad of multinational corporations

The United Nations Conference on Trade and Development (or UNCTAD) estimates that there are more than 79,000 MNCs and close to two million subsidiaries worldwide. Currently, the economic activities of the 500 largest MNCs (in terms of revenue) account for nearly 70 percent of trade worldwide and employ approximately 82 million people, claimed Corporation Watch, a corporate oversight group. And the earnings of many corporations have easily outperformed many state economies. One study, in fact, reported that 95 of the 150 largest economic entities in the

world (which include actual nations) are corporations.

Despite the global economic downturn, foreign direct investment (or FDI) continued to flow into the developing world, increasing 21 percent last year to \$500 billion, which, according to UNCTAD, is the highest level in history. Accounting for most of this growth are Africa, where FDI inflow reached nearly \$62 billion, and Latin America and the Caribbean, where FDI inflows totaled \$142 billion.

Some analysts say that investments by MNCs provide host governments with funds to develop strong economies and build infrastructure, including roads and schools. Such investment also creates new jobs, often with higher pay and better working conditions,

Human rights groups have long called for the creation of a global legal framework to hold multinational corporations accountable for violating fair labor practices, environmental laws, and individual rights, noting that many governments have long failed or even refused to address such alleged misdeeds.

according to the Organization for Economic Cooperation and Development (or OECD). MNCs have given back to local communities as well. Often ostracized for depleting local water sources, the Coca-Cola Company collaborated with the U.S. Agency for International Development to begin community programs to solve local water needs in countries such as Bolivia, Indonesia, Malawi, and Mali. Chiquita, one of the world's largest producers and distributors of fruits and vegetables, along with German partner REWE (a retail group), recently announced that it will donate 320 acres of wetlands to a nature preserve in Panama.

MNCs, however, have also been directly and indirectly involved in incidents and situations that have harmed people and the environment. Widely regarded as the world's worst industrial disaster, a Union Carbide chemical plant in Bhopal, India, leaked more than 40 tons of toxic gas in December 1984, killing 3,300 people and injuring 50,000. MNCs also buy cocoa beans from Côte d'Ivoire, the world's leading exporter of cocoa beans, although the U.S. Department of State believes that the country exploits and traffics children to work on its vast expanses of cocoa farms. In Ecuador, oil giant Chevron faces a \$27 billion environmental damage lawsuit claiming that the company had dumped billions of gallons of oil waste, which have allegedly caused cancer and birth defects in local communities. Human rights groups have also criticized MNCs for hiring private military and security companies to work in conflict-ridden nations who have, in turn, been accused of killing civilians, including local activists.

National governments: The first line of defense against corporate wrongdoing?

In the face of corporate misconduct, victims often turn to their national justice systems to stop any further harm, seek restitution, and hold businesses accountable for their actions. Legal scholars point out that nations have the main responsibility to protect their citizens and others under their jurisdictions from harm. According to a 2001 report issued by the International Commission on Intervention and State Sovereignty, "the primary responsibility for the

protection of people lies with the state itself."

To carry out this responsibility, nations pass domestic laws and regulations which recognize and uphold certain rights, prohibit certain actions, and regulate activities in a wide variety of fields. These laws and regulations apply not only to private individuals, but also to entities such as governments themselves and large corporations. But human rights groups say that many governments fail or even refuse to uphold their laws and provide protection and restitution to those who have suffered or are suffering harm from questionable corporate practices.

Why don't some nations prevent or address such situations? Some observers say that many countries have weak legal systems

where the rule of law is often undependable and subject to political manipulation. In addition, local officials may not have the resources to investigate allegations of wrongdoing or pursue litigation against powerful foreign corporations. Furthermore, as the influence of multinational corporations has grown substantially in recent decades, corporate misconduct often goes unpunished because doing otherwise could discourage MNCs from making more investments in the future, say analysts. Because of these and other factors, governments often turn a blind eye to allegations of corporate misbehavior.

Even nations that strictly regulate the business practices of their domestic corporations are unable to extend the same oversight to subsidiaries operating in other countries. Experts point out that the domestic laws of a country don't "follow" its citizens and companies when they establish a presence in foreign jurisdictions. Instead, these subsidiaries must comply with the laws and regulations of the host nation, which, in many cases, are much weaker and where enforcement is much more lax.

Can existing international treaties address corporate misdeeds?

So what can victims do if their governments and national systems of justice fail or refuse to address allegations of serious corporate misconduct? Some legal analysts believe that international law may offer a solution. Currently, there are many international treaties, covenants, declarations, and other instruments which require signatory nations to recognize and, in many cases, enforce certain rights within their respective jurisdictions.

For instance, the *Universal Declaration of Human Rights* (or Declaration)—adopted by the United Nations General Assembly in 1948—says that nations shall strive to recognize a wide variety of human rights for individuals, including the right to: freedom of thought, opinion, and expression; equal protection under the law; own property; and have food, clothing, and housing. Subsequent treaties spelled out these rights in further detail. The *International Covenant on Civil and Political Rights* (or

ICCPR), for example, calls on nations to pass domestic measures protecting many civil and political rights such as the right to peaceful assembly, freedom of association, and to be tried without undue delay. The ICCPR—which came into force in 1976—also forbids governments from torturing or arbitrarily arresting individuals, among many other prohibitions.

Under the *International Covenant on Economic, Social, and Cultural Rights* (or ICESCR), all state parties must pass domestic measures recognizing and protecting rights such as the right to work, the right to safe and healthy working conditions, and the right to education. (Many legal analysts have collectively referred to the Declaration, the ICCPR, and the ICESCR as the “International Bill of Rights.”)

The International Convention on the Elimination of All Forms of Racial Discrimination calls on its State Parties to recognize and protect a wide variety of individual rights without regard to a person’s race. Under the *Convention on the Elimination of All Forms Discrimination Against Women*, States Parties are legally bound to recognize and protect the rights of women in areas such as education, employment, and health, among many others.

While none of these international documents specifically mention the word “corporation,” they each contain language which implies that signatories have a legal obligation “to protect people by preventing private actors from abusing rights,” according to the views of some legal observers. For example, the Declaration (in Article 30), the ICCPR (in Article 5), and the ICESCR (again in Article 5) each contain a nearly identically worded provision which says that nothing in the agreement “may be interpreted as implying for any State, *group*, or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein . . .” [emphasis added]. The International Council on Human Rights Policy says that the word “group” could be interpreted as referring to corporations.

In addition, while the racial discrimination convention does not specifically mention corporations, Article 2(d) obligates a state party “not to sponsor, defend, or support racial discrimination by any . . . *organizations*” [emphasis added]. In a similar fashion, the convention on women and discrimination says that nations must “take all appropriate measures to eliminate discrimination against women by any person, organization or *enterprise*” [emphasis added].

Over the years, other bodies have supported the view that these treaties impose a legal obligation on states to address corporate misbehavior. For instance, the UN committee which oversees the implementation of the racial discrimination convention stated: “To the extent that private institutions influence the exercise of rights or the availability of opportunities, the State Party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.” Similarly, the UN committee overseeing the implementation of the ICCPR has “interpreted some of [that] treaty’s provisions as imposing obligations on states to stop or prevent abuses by private actors,” said the International Council on Human Rights Policy. Others observers have even implied that corporations themselves should try to follow and implement the treaty’s provisions themselves.

There is a continuing debate, however, about whether these existing international treaties and others can compel nations to address any alleged wrongdoings carried out by MNCs. Political

analysts point out that even if a country promises to carry out its obligations under, say, an international human rights treaty (such as ensuring that a group or enterprise doesn’t violate certain human rights standards within that country’s jurisdiction), it may simply do so selectively or not at all.

In addition, not all of the previously mentioned treaties are legally binding. Many legal analysts say that the Declaration, for instance, is not even a formal international treaty. Rather, it is—as its title implies—a broad “declaration” of those rights which governments should *aspire* to recognize and protect within their respective jurisdictions. And for those treaties that are legally binding (such as the ICCPR and the ICESCR), there is no effective enforcement mechanism which can compel a signatory nation to comply fully with its obligations. Although some conventions such as the ICCPR require its signatory nations to submit regular reports showing how they are implementing their obligations, they don’t contain any specific sanctions for nations that fail to do so.

Furthermore, legal experts say that private individuals and parties are neither expected to (nor can they) implement the provisions of international treaties themselves. “International law is traditionally made by states and for states,” said the International Council on Human Rights Policy. It also points out that various UN committees have “generally stressed that states are parties to [international] treaties, and that, therefore, only states are legally bound to comply with them.”

Efforts to create a new global legal framework to regulate MNCs

Given these shortcomings, analysts say that existing international treaties have not been effective in addressing corporate misdeeds, especially in those countries where the rule of law is weak. But the world community did undertake a few attempts to create a global legal framework specifically to hold MNCs accountable for any alleged wrongdoing. For example, in its first attempt, the United Nations, beginning in the 1980s, attempted to create the *UN Code of Conduct on Transnational Corporations* (or Code), one of whose major provisions stated that “[t]ransnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate.”

But because the Code encompassed a wide range of disparate issues—including human rights, non-discrimination, corruption, environmental issues, national sovereignty, respect for social and cultural objectives, contract negotiation, non-collaboration with racist regimes, and non-interference in political affairs—it created significant and unbridgeable divisions between industrialized and developing countries who couldn’t even agree on a definition for the term “transnational corporation.” After numerous meetings and drafts, the UN abandoned its work on the Code in July 1992.

In another attempt by the UN, an expert subsidiary group of the UN Sub-Commission on the Promotion and Protection of Human Rights began, in the late 1990s, a study on the relationship between human rights and the practices of MNCs. In August 2003, it produced the *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (or Norms), and submitted that document to what is now known as the Human Rights Council for

adoption. The Norms not only affirmed that governments have the primary responsibility for guaranteeing human rights protections under international law, but also for “ensuring that transnational corporations and other business enterprises respect human rights.” Going beyond the role of the state, the Norms further stated that “within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of, and protect human rights recognized in international as well as national law.” Supporters said that because corporations wielded great power and influence domestically and abroad, they could help implement and enforce human rights pro-

But critics argue that the Guidelines do not adequately address questionable corporate practices. They point out, for instance, that adherence to the Guidelines are voluntary. The OECD also does not have any legal authority to enforce them. Moreover, the Guidelines don’t extend far beyond the OECD member states (which consist of industrialized countries) to include developing and least developed nations where corporations are more likely to escape accountability.

In 1977, the International Labor Organization (or ILO) adopted its *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (or MNE Declaration), which contains non-binding recommendations on how MNCs

When UN efforts to create a global legal framework to hold multinational corporations accountable for their wrongdoings fell to the wayside, it “marked a shift away from a regulatory approach” to more voluntary ways in shaping corporate conduct, say legal analysts.

tections in cases where states were unable to do so.

But the Norms created immediate controversy. Organizations such as the International Chamber of Commerce and the U.S. Council for International Business protested that only states are responsible for protecting and enforcing human rights obligations. They also noted that the Norms did not, for instance, provide any criteria that would guide transnational corporations in carrying out its provisions. The UN eventually set aside the Norms in April 2004, briefly noting that the document had no legal standing.

Voluntary initiatives undertaken by intergovernmental organizations

Legal observers said that the failure of these UN initiatives “marked a shift away from a regulatory approach” to more voluntary approaches in regulating corporate conduct and accountability. In fact, in addition to these previous UN efforts, the world community had already begun simultaneous (though disparate and largely uncoordinated) efforts to create voluntary standards and guidelines to increase corporate accountability.

The OECD, for example, developed its *Guidelines for Multinational Enterprises* (or Guidelines) in 1976, which are recommendations on how MNCs can carry out responsible corporate practice in areas such as employment relations, competition, the environment, human rights, and taxation, among many others. The Guidelines say, for instance, that enterprises should “contribute to the effective abolition of child labour.” In the area of consumer interests, the Guidelines recommend that enterprises should “ensure that the goods or services they provide meet all agreed or legally required standards for consumer health and safety.”

The Guidelines also require each member state to establish a National Contact Point (NCP) to promote the recommendations and manage complaints concerning corporations which may not be adhering to them. If an NCP fails to mediate a complaint, it simply releases a statement recommending how the corporation can better implement the Guidelines in the future.

should address wages, benefits, working conditions, health, and safety, among other issues. (The ILO is the leading international organization where governments, employer organizations, and unions come together to discuss international labor standards.) The MNE Declaration states, for instance, that “[a]ll parties should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations.” However, analysts point out that the ILO can neither enforce the terms of the MNE Declaration nor can it provide remedies for victims of corporate misconduct.

The UN Global Compact and other voluntary government initiatives

The UN also began to promote its own voluntary efforts to increase corporate accountability. In 2000, it launched the UN Global Compact (or Compact) where companies and other organizations would *voluntarily* develop and carry out their own business practices based on 10 principles which set baseline standards in areas such as human rights, labor, the environment, and anti-corruption. Principle 2, for example, says that when businesses carry out their operations anywhere, they should “make sure that they are not complicit in human rights abuses.” In the area of environment, Principle 8 calls on them to “undertake initiatives to promote greater environmental responsibility.” And Principle 10 says that “businesses should work against corruption in all its forms, including extortion and bribery.”

Supporters say that the Compact is now the world’s leading voluntary “corporate citizenship initiative” with a broad range of over 6,700 participant businesses—including British Petroleum, Coca-Cola, CVS/Caremark, Credit Suisse, eBay, General Electric, Hewlett-Packard, HSBS, Johnson & Johnson, L’Oreal, Microsoft, Nestle, Nissan Motor, Pfizer, and Yahoo!—and even members drawn from civil society, academic institutions, and business associations. These participants then form local networks where they meet periodically to learn from each other’s

business practices through workshops and training sessions.

Analysts point out that the Compact is not an international treaty whose signatories are actual governments which are legally bound to comply with its provisions. Its participants are individual companies and other entities who join the Compact by completing “Letters of Commitment” expressing support for its principles. They must also make annual financial contributions toward the operations of this initiative.

To encourage compliance, the Global Compact requires a company to submit an annual report—known as the Communication on Progress (or COP)—describing the practical activities and policies it had undertaken to implement the 10 principles, and providing information on how the company measures its success in carrying out the principles. The UN will downgrade a company as “non-communicating” if it misses a COP deadline, and then remove its name from the Compact altogether if the company fails to submit a COP within a year after the initial downgrade.

Critics point out that the Global Compact is not nearly as global as its name—around 5,200 of the world’s 79,000 (and 150 of the 500 world’s wealthiest) corporations participate in that initiative. Additionally, others say that compliance with the Global Compact’s principles is neither binding nor enforceable. Furthermore, some analysts question the Compact’s effectiveness in holding companies accountable for any alleged misconduct. They say that because participants are responsible for setting their own targets and goals in carrying out the Compact’s principles, they will be able to claim compliance with minimal effort. Even the UN acknowledges that “the initiative was not designed . . . to monitor or measure performance.”

Some also worry that the Compact could actually decrease corporate accountability. A company, for instance, may hope that by virtue of its participation in the Compact, human rights groups will reduce scrutiny of its operations. A report released by OECD Watch (an activist group) claimed that various parties had filed complaints against 22 Compact participants for violating OECD Guidelines. It noted that one participant, BHP Billiton, had received a Compact award for its COP even though an OECD complaint accused the company of forcibly relocating villagers in Colombia.

More recently, a large coalition of civil society organizations filed a complaint against a subsidiary of the China National Petroleum Corporation (or CNPC), which is the largest investor in Sudan’s oil industry. A group called Human Rights First claims that Sudan uses 70 to 80 percent of its oil revenues to support its armed forces and militias in carrying out a genocidal civil war against several ethnic groups in the Darfur region of that country, which has claimed hundreds of thousands of lives. While CNPC is not a Compact participant, its subsidiary—PetroChina—is a member of that initiative. An independent research firm reported in 2007 that “investors should treat CNPC and PetroChina as if they were a single entity” because the two entities shared significant financial interests. Because of these ties, the complaint accused PetroChina of complicity in the alleged Darfur genocide—again, Principle 2 states that businesses should “make sure that they are not complicit in human rights abuses”—and asked the Global Compact to remove PetroChina from its participant list.

In addition to the Compact, nations have created other voluntary efforts in specific industries. Among the more well-known is the *Kimberley Process Certification Scheme* (or KPCS), which is an international agreement where member countries agree to create minimum standards (through domestic legislation) in certifying that its exports and imports of rough diamonds do not include those diamonds that have been sold by, say, rebel groups to finance insurgencies against legitimate governments. Under the KPCS, which came into force in 2003, its 75 member countries have committed themselves to trade diamonds only with each other, and also to issue certificates which certify that their diamonds shipments are “conflict-free.” But nations belonging to the KPCS say that the agreement is neither an international organization nor a legally-binding treaty which has any enforcement mechanism.

Under the *Extractive Industries Transparency Initiative*, participating governments must voluntarily reveal all payments made by oil, gas, and mining companies to them, and also all revenues received by governments from these companies. Records of these payments and revenues also have to undergo an audit using international standards. Supporters say that publicly revealing this information will increase the likelihood that governments will use revenues and payments from the energy sector for legitimate uses. But this initiative is a voluntary effort without any enforcement mechanisms.

Private sector initiatives to promote corporate accountability

Alongside international efforts in promoting corporate accountability, a wide variety of businesses have been creating scores of initiatives and best practices for their respective economic industries and sectors. Observers say that the creation of these various initiatives reflects a growing awareness by corporations that their practices in developed and least-developed countries could attract unfavorable attention and, ultimately, hurt their reputations and flows of revenue.

For instance, signatories to the *Principles for Responsible Investment*, which include investment managers, pension funds, and other investment organizations, commit to make investment decisions and practices based on principles that uphold environmental, social, and corporate governance issues. The *Business Leaders Initiative on Human Rights*, whose six-year mandate



ended in March 2009, was a business-led organization that tried to develop practical ways for companies to carry out principles under the Universal Declaration of Human Rights.

Under the *Voluntary Principles on Security and Human Rights*, the extractive and energy industries collaborated with governments and nongovernmental organizations to create voluntary principles to “assist companies in maintaining the safety and security of their operations within a framework that ensures respect for human rights.” Parties to this agreement developed these guidelines after human rights groups accused several companies of wrongdoing by using heavy-handed security measures in conflict areas.

Despite growing expectations that corporations must face some minimum level of accountability even in countries where the rule of law may be weak, critics point out that all of these initiatives are voluntary in nature, and that their terms are unenforceable. Also, legal experts don’t consider these agreements to be actual international treaties. Furthermore, one political analyst said that many corporations had probably initiated these accountability efforts themselves to preempt any future effort by civil society and governments to create binding legal standards.

Other legal mechanisms in holding multinational corporations accountable

Because current efforts to hold MNCs accountable for their alleged misdeeds are largely unenforceable and lack substantive remedies, many injured parties have been turning to one particular measure to provide them with compensation and restitution. They have been filing civil lawsuits in the United States against alleged perpetrators of human rights violations under its Alien Torts Claims Act (or ATCA), which simply states: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

The ATCA grants jurisdiction to an American court to hear only *civil* cases filed by a *foreign* plaintiff who claim that the defendant had injured him through a particular act that is prohibited by international law (such as murder and torture) which was committed *outside* of the United States and that has no connection to that country or any of its nationals. (A plaintiff doesn’t need approval from the U.S. government to file such a claim.) In such cases, the plaintiff can seek only financial compensation and punitive damages from the defendant for those injuries. Since the 1980s, many foreign nationals have filed ATCA lawsuits in American courts mainly against foreign government officials for violations of international law.

In recent years, plaintiffs have also filed scores of ATCA lawsuits against corporations that were or are now working in conjunction with host governments on certain investment projects. A majority of these lawsuits has claimed that a corporate defendant had knowingly provided financial and logistical support to the security forces of a host government to carry out certain abuses against the plaintiffs. Because the corporate defendants were complicit in these abuses, reasoned the plaintiffs, they should also be held legally responsible for them.

Legal analysts point out that plaintiffs and defendants have already settled many ATCA cases. For instance, in June 2009, Royal Dutch Shell settled a case alleging conspiracy in the assassina-

tion of local activists for \$15.5 million. But experts point out that winning an ATCA case is extremely difficult because plaintiffs have to show some link between a corporation’s policy and the alleged abuse. Given this difficulty, no plaintiff has yet claimed a *jury* victory in an ATCA lawsuit against a corporate defendant, and analysts say that it is unlikely that victims of alleged corporate misconduct will depend on the ATCA to correct corporate wrongs.

Clarifying the debate on corporate accountability and human rights

There is still no political consensus among different nations in creating any global legal framework to hold MNCs accountable for alleged misconduct. Some say that civil society groups, international organizations, and businesses are actually making it more difficult to hold MNCs accountable for their actions because they are promoting competing proposals and initiatives—each with its own conflicting terminology, standards, and principles—in a largely uncoordinated fashion.

In 2005, the UN appointed a “Special Representative on business and human rights” to clarify existing standards relating to business and human rights, elaborate on state regulation overseeing the conduct of MNCs, and research the impact of these standards on businesses.

In his *2006 interim report*, the Special Representative (Dr. John Ruggie of Harvard University) discussed how states, international organizations (including the UN), and businesses responded to current human rights issues using existing standards and practices. The *2007 report* provided a comprehensive overview of “evolving standards, practices, gaps, and trends,” and also focused on international and soft law instruments in holding corporations accountable for alleged misconduct. To guide the business and human rights debate, the Special Representative, in his *2008 report* (called “Protect, Respect and Remedy: A Framework for Business and Human Rights”), offered a “conceptual and policy framework” composed of three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies” for victims.

In April 2009, Dr. Ruggie released his fourth report (“Business and human rights: Towards operationalizing the ‘protect, respect and remedy’ framework”) where he acknowledged that states were primarily responsible for the promotion and protection of human rights, but noted a growing belief that companies now have a “responsibility to protect [that] exists independently of state duties and variations of national law.” The report continued: “There may be situations in which companies have additional responsibilities,” such as cases where they have to protect employees in conflict-affected areas.

The Special Representative will confer with businesses and civil society organizations in October 2009 to discuss “ways and means” to convert the framework in the fourth report into practical steps. But political analysts believe that—given its past failures and the wide gulf between those who support greater corporate accountability and those who advocate a much more cautious approach—it is unlikely that the UN will create a new binding legal framework for corporate accountability. 

Reform of the UN internal justice system: Meeting the expectations of its own standards

Since the end of World War II, the world community has turned to the United Nations and its various agencies to address problems that transcend national borders. While the UN may be best known for its peacekeeping efforts around the world, it has undertaken a wide variety of other initiatives, including those promoting public health, arms reduction, education, and better governance.

During the last decade, the UN itself had undertaken an extensive effort to reform its own internal practices and operations to “strengthen accountability, increase transparency, and improve management,” according to the UN Office of Public Affairs. These efforts have included the creation of a whistle-blower protection policy, an ethics office, and rules on financial disclosure for UN officials. In its most recent effort, the UN reformed its system of administrative (or internal) justice where UN staff members and management try to resolve employment disputes involving disciplinary measures, job termination, misconduct, and sexual harassment.

Observers generally say that the previous system lacked transparency and independence, and, as a result, denied UN staff members a legitimate means to resolve their disputes. The UN and its supporters hope that a newly-implemented system of administrative justice will correct those previous shortcomings. What are some of the features of the new system of justice? What were some of the weaknesses of the previous system? How did the UN begin to change the way it addressed employment disputes? And are there any criticisms of the new system?

The old system of administrative justice: Inefficient and unjust?

According to recent statistics, the UN employs more than 34,500 permanent staff members at its New York headquarters alone along with 13,671 non-permanent staff such as volunteers, consultants, individual contractors, and daily paid workers. It also employs more than 57,000 permanent and non-permanent staff members outside New York in its various funds and programs around the world, along with thousands of more volunteers.

Just like any large organization, the UN must address a wide range of employment disputes, including claims of wrongful termination, accusations of sexual harassment and gender discrimination, and challenges to disciplinary measures. To resolve these disputes and others, the UN created a system of admin-

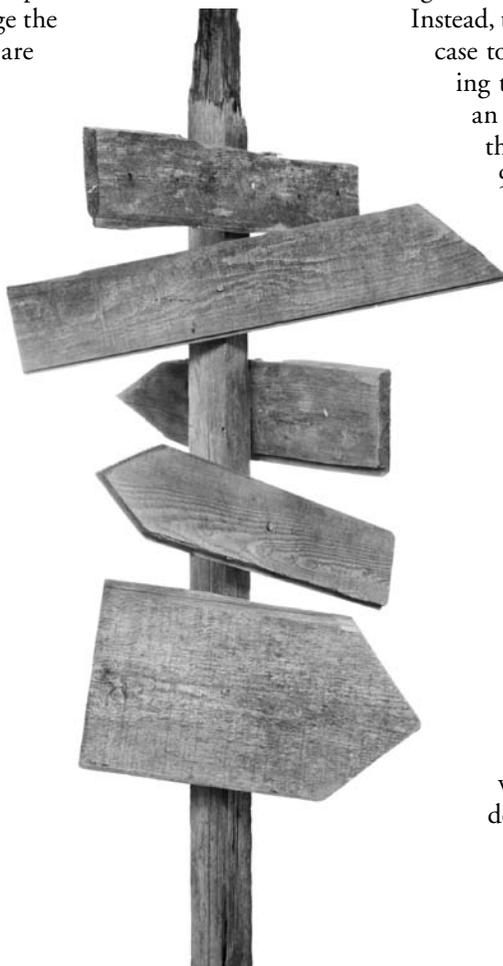
istrative (or internal) justice in 1946 where only permanent staff members can contest a certain “administrative decision” issued by managers and other officials, including those which fired people from their positions or did not renew their employment contracts. From August 2007 to July 2008 (the last period for which information is available), the UN reported that its staff filed 670 new cases, or nearly 56 every month.

Under the *Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations* (which was signed in 1947), the United Nations has the legal authority (under Section 8) to make all regulations for its headquarters “necessary for the full execution of its functions,” including those for a system of justice to resolve employment disputes. While this agreement also says that “the federal, state and local courts of the United States shall have jurisdiction over acts done and transactions taking place in the headquarters district,” it goes on to state that “no federal, state or local law or regulation of the United States which is inconsistent with a regulation of the United Nations authorized by this section shall . . . be applicable within the headquarters district.” As a result of this agreement, legal experts generally say that staff members must rely on UN regulations to resolve employment disputes rather than filing cases with local tribunals such as a New York court.

While the UN internal justice system addresses a wide range of disputes, it does not address criminal matters.

Instead, the Secretary-General may decide to refer a case to a country’s domestic authorities (including the New York City Police Department) if an investigation reveals criminal conduct on the part of a UN staff member. But Section 9 of the agreement also states that “Federal, state or local officers or officials of the United States, whether administrative, judicial, military or police, shall not enter the headquarters district to perform any official duties therein except with the consent of and under conditions agreed to by the Secretary-General.”

Critics had described the UN system of administrative justice as a complex maze of confusing, inefficient, and non-transparent procedures that left staff members unsatisfied with its final outcomes, and where, some say, wrongdoing and incompetence went unpunished. They said that the system of internal justice had not kept pace with both the tremendous growth of UN operations and changes in workplace norms and behavior in the decades since its creation.



UN staff members were able to contest an administrative decision—for example, by asking the UN to review its legality or suspend its implementation—through an informal and formal dispute resolution process, both of which are primarily carried out at UN headquarters in New York, although some disputes were also handled in Geneva, Switzerland. But it was difficult for many staff members to pursue their complaints because more than 75 percent of these individuals worked outside of New York. Many have said that going to New York to adjudicate their claims would impose an undue financial burden and take away time from work.

The informal dispute resolution process: Though not mandatory, the UN encourages staff members to use its informal dispute resolution process primarily through the *Office of the Ombudsman*, which has the authority “to consider conflicts of any nature related to employment by the United Nations,” and was supposed to serve as an independent and impartial mediator in resolving disputes. But because that office didn’t have the power to award damages, reinstate staff members, or make other binding decisions, observers have described the informal dispute resolution process as an interim step that inevitably led to formal dispute resolution.

The informal dispute resolution process also includes what analysts have described as a largely dormant *Panel on Discrimination and other Grievances*, which has the authority to consider “all

to adjudicate employment disputes. Additionally, many JAB members were UN staff members who simply volunteered their time and service.

Under previous UN rules, the Secretary-General should have accepted and ultimately approved recommendations issued by the JAB (usually in the form of a report) concerning a particular dispute unless “there [was] a compelling reason of law or policy not to do so.” But critics claimed that, in practice, he usually ignored them and ruled in favor of the UN management. As a result, one commission said that the JAB was not “operating as an independent justice mechanism, just as a body that advises management.” Others noted that the parties to a dispute rarely saw the actual JAB reports along with their findings, none of which were legally binding on the disputing parties anyway.

A staff member could appeal a JAB report to the *United Nations Administrative Tribunal* (or UNAT). But many of the officials who reviewed the appeal to the UNAT were the same individuals who had participated during the JAB process, which critics say undermined the impartiality of the UNAT whose final judgments were not binding on the Secretary-General.

Legal representation during dispute proceedings: In 1984, in an effort to provide UN staff with legal assistance and representation during internal justice proceedings, the UN created a *Panel of*

Critics had described the UN system of administrative justice—where staff members try to resolve a wide range of employment disputes—as a complex maze of confusing, inefficient, and non-transparent procedures where wrongdoing and incompetence went unpunished.

types of staff grievances,” such as those involving discrimination, harassment, and other workplace problems. But critics said that the seven-member panel appointed by the Secretary-General for a two-year term lacked sufficient power to summon documents or persons during its deliberations. Because this panel’s findings were inadequately substantiated, analysts point out that even the UN Office of Human Resources had rarely implemented its recommendations.

The formal dispute resolution process: If informal means failed to resolve a dispute, then staff members had to begin formal dispute resolution procedures, which many had described as a clumsy, complicated, and drawn-out adversarial process administered by the *Joint Appeals Board* (or JAB) under the authority of the Office of Under-Secretary-General for Management. Under UN rules, the formal process comprised up to 15 stages of reviews and investigations (most of which involved different offices sending reports and recommendations to each other), and usually required up to 27 to 37 months to complete. During this long period of time, staff members would have to find employment in other workplaces. Others pointed out that in cases of sexual harassment or gender discrimination, the accused party would leave his or her position or retire to avoid accountability.

Others questioned the competence and professionalism of the JAB in carrying out its duties by noting that its members often didn’t have any legal training or suitable professional backgrounds

Counsel composed of volunteer counsels drawn from the UN staff. But critics questioned the extent to which these volunteers would assist staff members who filed complaints against the very same high level officials who would later review their own employment contracts. A staff member who did not use a volunteer counsel would then have to hire a lawyer on his own expense. In contrast, lawyers in the Department of Management and the UN Office of Legal Affairs provided free and professional legal assistance to high-level UN officials during administrative justice proceedings.

Early steps in reforming the UN system of administrative justice

As early as 1990, the UN General Assembly—which, among its many duties, oversees the rules and daily operations of the UN and its staff—attempted to reform the system of administrative justice. For example, a 1990 resolution (45/239B) requested the Secretary-General “to continue with reforms in the administration of justice in the Secretariat,” and also “to establish by 1991 an effective system for informal settlements of staff grievances as well as a well-functioning disciplinary system.” But three years later, these efforts fell to the wayside.

In a 1995 report (A/C.5/50/2), the Secretary-General described ways to reform the administrative system of justice, but the United Nations did not follow through on these measures. Some observers speculate that there wasn’t any political will in the General Assembly and its various committees to implement any

reforms, even though a later resolution (55/258) admitted that the “present system for the administration of justice at the United Nations is slow and cumbersome.”

But throughout this period, the media reported several situations—many of which centered on sexual harassment—that highlighted the apparent deficiencies in the UN’s system of internal justice, and that also tarnished the reputation of the UN itself. In a 1991 case which attracted considerable attention, a staff member, Catherine Claxton, complained that an assistant secretary general had sexually harassed her. The UNAT refused to investigate the matter, but a report issued by the Panel on Discrimination and Other Grievances and another one issued by an outside judge concluded that the allegations were true. But the UN Secretary-General at that time refused to release the judge’s report, saying that it wouldn’t serve “the best interests of the organization.” When Ms. Claxton tried to sue her harasser in New York State Supreme Court, media sources reported that the UN had blocked the case by citing diplomatic immunity. In the meantime, the assistant secretary general had left the country and never faced disciplinary measures. The UN later settled the case with Ms. Claxton by paying her more than \$200,000.

In a 2002 case, the United Nations Development Program report found evidence of sexual harassment against a female staff member. But the UN was unable to take any disciplinary measures because the alleged perpetrator had already resigned from his position. The staff member later received a token monetary award for her troubles. Another staff member complained in a 2004 case that the head of a UN agency in the Gaza Strip has sexually harassed her. The UN claimed that it couldn’t substantiate her claims, and refused to give her a copy of its investigative report. But a leaked copy indicated otherwise, saying that an investigation had found evidence “that tends to support a finding that . . . [she] was sexually harassed.” The UN did not take any disciplinary action against the accused because he had retired from his position.

Confirming the shortcomings of the old system

After several false starts and in the face of growing media publicity, the General Assembly in June 2005 passed a resolution (59/283) which called on the Secretary-General to form a panel of independent and outside experts—which included judges, experts in dispute resolution, academics, and senior officials with substantial management experience—whose main task was to “propose a model for a new system for resolving staff grievances in the United Nations that is independent, transparent, effective, efficient and adequately resourced, and that ensures managerial accountability.” (Up to this point, the UN had always conducted its own internal reviews.) And rather than reforming certain components of the internal system of justice, the General Assembly called for its complete replacement.

Confirming the shortcomings in the current system of justice: In July 2006, this independent Redesign Panel issued its “Report of the Redesign Panel on the United Nations System of Administration of Justice” (A/61/205) where it confirmed that “the system of administration of justice as it currently stands is extremely slow, under resourced, inefficient and, thus, ultimately ineffective.”

Because the system of justice would usually take more than a year to resolve employment and disciplinary cases (not even

including an appeals process that could last up to three years), the Redesign Panel said that the entire system “[enjoyed] neither the confidence nor the respect of staff, management, or Member States.” It also concluded that the dispute proceedings themselves “generally [lacked] transparency and [failed] to satisfy minimum requirements of the rule of law,” such as guaranteeing “the right to a competent, independent, and impartial tribunal in the determination of a person’s rights, the right to appeal, and the right to legal representation.” Many observers had long noted that while the UN created many programs that promoted the rule of law in other nations, and also sponsored many treaties that called on nations to recognize and protect a broad spectrum of rights, the organization itself had fallen short of these goals in its own operations. “The standards of justice that are now generally recognized internationally and [which the UN] pursues in its programmatic activities are not met within the Secretariat or the funds and programs themselves,” said the report.

A new system of informal and formal justice: To address these various shortcomings, the Redesign Panel issued several recommendations. For example, when creating a new informal system of administrative justice, the Redesign Panel said that the UN should abolish ineffective bodies, including the Panel on Discrimination and Other Grievances, and replace them with a new and decentralized Office of the Ombudsman exercising stronger mediation mechanisms. For the formal system of justice, it proposed a new two-tiered disciplinary system. A first-tier tribunal called the *United Nations Dispute Tribunal* (or UNDT) would have the power to issue binding decisions and also order a party to pay compensation and damages or carry out specific performance such as returning an employee to his or her position in lieu of compensation. It would also have to release its judgments publicly. And a *United Nations Appeals Tribunal* (or UNAT) would review decisions issued by the UNDT.

New legal representation: The Redesign Panel also determined that the volunteer counsel who “[did] not have permanent appointments [in the UN were] sometimes reluctant to serve,” worried that their services would “pit them against a management that [had] to review their employment contract.” In addition, it noted that “an overwhelming majority of individuals serving as counsel . . . [lacked] legal qualifications.” To rectify this situation, the Redesign Panel proposed the creation of a professional Office of Counsel staffed by “persons with legal qualifications—at the minimum, qualifications recognized by the courts of any Member State.” It also urged the UN to guarantee “equality of arms” by providing *all* UN staff members with “access to professionalized and decentralized legal representation.”

In a report released in February 2007 (A/61/758), the Secretary-General accepted these various recommendations, though it did not mean that the UN would implement them exactly as they were laid out in the Redesign Panel’s report. Instead, the General Assembly in December 2007 passed a resolution (62/228) establishing a framework (i.e., the basic elements) of a new system of internal justice, and called on the Secretary-General to fill in the actual operational details.

For the new informal system of justice, the General Assembly—largely following the recommendations of the Redesign Panel—decided to “create a single integrated and decentralized Office of the Ombudsman” with a division providing formal

mediation services. The formal system of justice would consist of a UNDT which would be the first body to hear and adjudicate any disputes, and an appeals body (the UNAT) to review its decisions.” These new offices would completely replace existing bodies such as the JAB.

Unlike their predecessors, the resolution said that these new bodies would be staffed by qualified judges serving non-renewable seven-year terms, and would be appointed by the General Assembly on the recommendation of an *Internal Justice Council*, a body that would also draft a code of conduct for the judges. The resolution also emphasized that individuals who “have access to the current system of administration of justice shall have access to the new system.”

The General Assembly adopts a new system of administrative justice

In December 2008, the General Assembly passed a resolution (63/253) formally adopting a new system of administrative justice, which became operational on July 1, 2009. It also called on the Secretary-General to “ensure that information concerning the details of the new system of administration of justice, in particular options for recourse, is readily accessible by all persons covered under the new system, and stresses that the information

ment, promotion, or termination, they may provide compensation instead of voiding a contested administrative decision.

Under the UNAT statute, that body—which also has three judges—may hear appeals only in cases where disputing parties believe that the UNDT had exceeded its jurisdiction, erred on a question of law or fact, or committed a procedural error. The UNAT may affirm, reverse, or remand such decisions, and all rulings issued by the UNAT will be final and cannot be appealed to another body. According to observers, the Secretary-General must submit a review of the new system of administrative justice to the General Assembly during its 65th session (2010–2011).

Current status of handling internal disputes

Several analysts have criticized the new system of administrative justice. For example, while the Redesign Panel suggested independent internal groups at the UN (such as different committees and staff groups) should help write the statutes for the new tribunals, the Office of the Secretary-General largely carried out this function. They say that, as a result, many procedures did not take into account the views of different groups and concerns.

In addition, several critics noted that the new system of administrative justice did not implement what they say were important measures recommended by the Redesign Panel. For instance,

While the UN created many programs that promoted the rule of law in other nations, and also sponsored many treaties that called on them to recognize and protect a broad spectrum of rights, that organization itself had fallen short of these goals in its own operations, say observers.

should clearly explain the roles of the various elements in the new system, as well as the process for bringing complaints.”

Under the new informal system of justice, the Office of the Ombudsman has more resources to provide its mediation services not only in New York but also in other UN offices worldwide. The resolution also called on the Ombudsman to submit a yearly report on how it is working to identify and address a wide range of human resource issues in the UN such as those relating to promotion and contractual arrangements.

For the formal system of administrative justice, the resolution adopted the statutes for both the UNDT and the UNAT, which describes the roles and procedures of those bodies in resolving contractual disputes concerning employment and appointments, imposing disciplinary measures, and enforcing agreements and decisions. Under its statute, the first instance UNDT—which will be governed by three full-time judges working in Geneva, New York, and Nairobi—would have the authority to order parties to turn over certain documents, call on individuals to make personal appearances before its proceedings, and order temporary relief from certain administrative decisions (except those concerning job appointments, promotions, or terminations). The judges must also issue to each disputing party their binding judgments in writing where they must state the reasons, facts, and law on which the judgment was based. While UNDT judges cannot award punitive damages in cases that concern appoint-

ment, promotion, or termination, they may provide compensation instead of voiding a contested administrative decision. According to the Government Accountability Project, an outside group that promotes the accountability of government organizations, the exclusion of non-permanent staff “rejects the [Redesign Panel’s] recommendations, and violates several Universal Declaration of Human Rights articles that guarantee everyone . . . the right to equal recognition before the law, legal protection, and a fair hearing by an impartial tribunal.”

The Redesign Panel had also recommended that the different tribunals should have the legal authority to hear broader claims of rights’ violations within the UN organization and also breaches of staff rules. But, under the new system of justice, bodies such as the UNDT may only adjudicate disputes concerning specific administrative decisions issued by the UN. One government watchdog group said that this would limit the ability of staff members to contest abuses not covered in an administrative decision.

Others point out that the new operating statutes “fail to provide staff members with professional legal counsel.” While the UN had abolished the Panel of Counsel, it replaced that body with an *Office of Staff Legal Assistance* which, like its predecessor, provides legal assistance by *volunteers*. While the General Assembly is studying proposals for a *staff-funded* legal assistance plan, staff representatives say they oppose such a plan. 

Human trafficking: What role for international law for a still growing problem?

While much of the public is familiar with drug trafficking and also the trafficking of weapons within countries and across national borders, many express surprise about the existence of human trafficking. Also known as trafficking in persons, human trafficking is generally described as the commerce and trade of people for the sole purpose of exploiting them. Human rights groups say that such trafficking affects almost every country in the world, and that this practice entraps more and more victims every year.

How pervasive is human trafficking? How many people are trafficked every year and how are they exploited by their perpetrators? How are nations trying to stop this growing phenomenon? Are there existing international treaties which address human trafficking, and have they been effective in their stated goals? What more can the world community do to stop human trafficking?

Human trafficking: Perpetuating slavery to modern times

Human traffickers recruit their victims—often through deception (such as the promise of employment) or the threat and use of physical force, among many other tactics—and then transport them to other locales or even countries where they are forced to work as prostitutes; laborers in farms, mines, restaurants, and sweatshops; or indentured servants—all against their will and without any monetary compensation. Human rights activists point out that traffickers also remove body organs from their victims, and sell them to others. Recent media stories reveal that human trafficking remains a major problem today:

- Last year, in a case sensationalized by the tabloid press, a federal court sentenced an affluent American couple in Long Island to several years in prison for the forced labor and involuntary servitude of two women from rural Indonesia.

Prosecutors say that the couple had subjected the women to “beatings, threats, and confinement” for several years.

- In 2005, in what activists say was one of the largest trafficking cases in the United States, a federal court sentenced several individuals to long prison terms for trafficking 69 Peruvian immigrants for forced labor in Suffolk County, Long Island. Since 2003, “the United States Department of Justice had identified Long Island as one of 21 regions across the country where trafficking in human beings . . . is rampant,” according to *The New York Times*.
- In a recent nationwide crackdown, police in prosperous coastal cities in China targeted trains arriving from poor provinces to capture suspected human traffickers and rescue their victims, many of whom were children whose ages ranged from 3 months to 8 years of age. News reports said that gangs had trained the older children to become beggars, and then later sold them to other buyers for US\$1,000–\$5,850.
- In June 2009, the police arrested 34 suspects in Italy, France, Germany, Greece, the Netherlands, Spain, and San Marino of trafficking women for sex across Europe. “The victims were subject to continued intimidation and violence, aimed at guaranteeing a daily income and to ensure their compliance,” said the European Police Agency.
- In a report issued last year, the U.S. General Accountability Office—a nonpartisan federal agency which oversees how the government spends taxpayer funds—said that foreign diplomats serving in the United States widely used trafficking victims as domestic servants, and that it had identified as many as 42 allegations.

Analysts say that the general public is largely unaware of the existence of these victims because traffickers keep them com-



pletely isolated from view. They also prevent their victims from escaping and calling law enforcement authorities by confiscating their passports, visas, and other forms of identification, and also by threatening and using physical force.

Given the totality of these circumstances, law enforcement officials and human rights activists from around the world now largely view human trafficking as modern-day slavery. “We’re not talking about sweatshops where people are treated horribly at work, but then they can go home at night,” said Jolene Smith, Executive Director of Free the Slaves, an anti-slavery group. “We’re talking about people held against their will, under threat of violence, and paid nothing.”

Human trafficking is not equivalent to smuggling where people *voluntarily* request a smuggler’s services to be transported from one region to another for a particular fee, and then is set free upon arrival at their destination. In the case of human trafficking, traffickers enslave their victims. Experts also say that there is a misperception that victims initially consent to the pre-

Law enforcement and human rights officials from around the world largely view human trafficking as modern-day slavery where victims are forced to work as prostitutes, laborers, or indentured servants—all against their will and without any monetary compensation.

liminary stages of trafficking. They argue that this consent is invalid because victims are misled or deceived by traffickers with phony job offers, false promises, feigned love, or are even kidnapped outright.

Traffickers usually concentrate their efforts in countries that are politically and economically unstable and where people lack employment opportunities or face social discrimination, say humanitarian groups. In fact, human trafficking generally flows from the less developed nations in the southern hemisphere to their industrialized counterparts in the north. Most victims are vulnerable and powerless minorities from the poor regions of their respective countries where opportunities are severely limited. Recent UN statistics indicate that women and children are the most vulnerable in becoming trafficking victims because they make up two-thirds of the 2.5 billion people who live on less than US\$2 a day.

Annual estimates of the number of trafficked individuals vary widely “due to the covert nature of the crime, the invisibility of victims, and high levels of under-reporting,” said the Polaris Project, a leading anti-trafficking organization. Still, analysts say that they all underscore the magnitude of the problem. The U.S. Department of State, for instance, estimates that more than 800,000 people are trafficked across international borders every year. But other reports say that nearly 2.5 million men, women, and children are trafficked annually. (Of this number, about 1.2 million children are trafficked for sex each year.) The United States Department of Justice notes that, every year, traffickers bring approximately 50,000 women and children into the United States.

Analysts believe that human trafficking is probably worth tens of billions of dollars every year for those who take part in this

industry, though reliable figures are unavailable. The ILO reported that 43 percent of victims are involved in commercial sexual exploitation (of which 98 percent are women and girls), 32 percent become forced laborers (of which 56 percent are women and girls), and 25 percent are used in a combination of forced labor and commercial sexual exploitation. These activities, says the ILO, generate roughly \$32 billion globally, of which \$28 billion comes from sexual exploitation. Some studies estimate that, after drug trafficking, the trafficking of humans is not only the largest revenue generating industry in the world, but also the fastest growing source of profits for organized criminal enterprises. According to a documentary on human trafficking, “an ounce of cocaine, wholesale, [costs] \$1,200. But you can only sell it once. A woman or a child [costs] \$50 to \$1,000, but you can sell them each day, every day, over and over and over again.”

The number of successful prosecutions and convictions for human trafficking, say experts, probably represents only a small fraction of the actual number of cases that are never discovered

or go unreported. For example, from January 2007 to September 2008, the Bureau of Justice Statistics reported 1,229 alleged incidents of human trafficking in the United States even though the federal government acknowledges that there are tens of thousands of trafficking victims in the United States.

International treaties that directly address human trafficking

While human trafficking has been gaining much more attention in recent years, observers point out that the world community has actually been fighting *some form* of this practice for many decades. In fact, several existing international treaties (some stretching back over 100 years) call on nations to address human trafficking. The earliest mention of trafficking dates back to 1904 with the passage of the *International Agreement for the Suppression of the “White Slave Traffic,”* which calls on governments to “undertake to have a watch kept . . . for persons in charge of women and girls destined for an immoral life.” Analysts say that this agreement described trafficking as the abduction of Caucasian women for the purpose of prostitution (though it doesn’t explicitly mention that term), and called on nations to help victims return to their countries of origin. But it did not call on governments to punish the perpetrators of such activities.

To make up for this particular shortcoming, the League of Nations in 1933 passed the *International Convention for the Suppression of the Traffic in Women of Full Age*, which required signatory nations to punish a person who has “procured, enticed, or led away—even with her consent—a woman or girl of full age for immoral purposes [i.e., prostitution] to be carried out in another country.” In 1949, the United Nations adopted the *Convention for the Suppression of the Traffic in Persons and the Exploitation of*

the Prostitution of Others, which called on its state parties to punish an individual who “procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person,” and to make such activities an extraditable offense. (Unlike previous treaties, this one actually uses the term “prostitution.”) The 1949 convention also calls on governments to punish any person who operates a brothel or knowingly rents accommodations for purposes of prostitution.

Despite these early efforts, analysts say that these agreements have many shortcomings. For example, none of these treaties provides any explicit definition for the term “trafficking,” and they associate that term with prostitution only. (Former UN Special Rapporteur Radhika Coomaraswamy said that the 1949 convention views women as “vulnerable beings in need of protection from the ‘evils of prostitution.’”) They also don’t address the broader aspects of contemporary human trafficking which encompasses

Under the *Convention on the Rights of the Child* (or CRC), which entered into force in 1990, state parties must recognize and protect a broad range of rights for children (such as the right to freedom of expression, the right to retain one’s identity, and freedom of religion) within their respective jurisdictions, and also protect them from discrimination and exploitation. The convention mentions trafficking only once in Article 35, which says: “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale or traffic in children for any purpose or in any form.” It also contains other provisions which call on them to protect children from economic and sexual exploitation.

But critics say these conventions have many shortcomings. First, none of these treaties was created for the sole purpose of addressing human trafficking. It is just one of many issues within a broader treaty competing for the world’s attention. Second,

While human trafficking has been gaining much more attention in recent years, the world community has actually been fighting some form of this practice for many decades. In fact, several existing international treaties (some stretching back over 100 years) call on nations to address human trafficking.

forced labor and involuntary servitude, among other activities.

Furthermore, these treaties don’t provide explicit legal protections for victims of trafficking such as protection from the accused perpetrators, say anti-trafficking groups. The 1949 convention, for example, calls on nations to take unspecified measures “for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution.” Moreover, these agreements don’t contain any enforcement mechanism to ensure that their state parties fully and faithfully comply with their obligations.

Other international agreements and their applicability to human trafficking

In addition to those treaties which directly address only certain aspects of trafficking, there are other agreements which observers say could provide a legal basis for countries to take action against trafficking.

For example, the *Slavery Convention*—which was signed in 1926 and entered into force in 1955—calls on its state parties to undertake measures to prevent the slave trade, “bring about the complete abolition of slavery in all its forms,” and “prevent compulsory or forced labor from developing into conditions analogous to slavery.” The *Convention on the Elimination of All Forms of Discrimination against Women* (or CEDAW), which entered into force in 1981, calls on its 185 state parties to prohibit discrimination against women in employment, education, and participation in government (among many other areas of life) by protecting their rights through domestic legislation. This convention mentions trafficking once in Article 6, which says: “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”

these agreements have terms and provisions which are either undefined or very broad in scope. Not a single convention, for instance, defines terms such as trafficking, and economic and sexual exploitation. As a result, nations have wide latitude in interpreting their obligations. In another example, the *Slavery Convention* calls on nations to impose “severe penalties” on individuals who violate its terms, but doesn’t specify whether these penalties should be civil, criminal, or both.

Third, some political analysts believe that these treaties—negotiated decades ago during a particular period of time when trafficking took on a different meaning—were not intended to address the evolving aspects of trafficking. So while the *Slavery Convention* may seem like an ideal instrument to fight human trafficking, it mentions that term once in the context of “putting an end to the traffic in African slaves.” Fourth, these agreements are largely unenforceable. Under CEDAW, for instance, an individual may submit a complaint to the UN about a country’s failure to address trafficking. But that agreement simply calls on the UN to “invite that State Party to cooperate in the examination of the information and, to this end, to submit observations with regard to the information concerned” [emphasis added].

Some activists are hoping that the *International Criminal Court* (or ICC), the world’s first permanent international criminal tribunal established in 2002, could address human trafficking. The ICC has jurisdiction to prosecute individuals for committing genocide, crimes against humanity, war crimes, and the crime of aggression—but only when nations are unable or even unwilling to do so themselves. Crimes of humanity include murder, extermination, torture, and enslavement. Under Article 7(2)(c), the Rome Statute (which created the ICC) defines enslavement as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of

such power in the course of trafficking in persons, in particular women and children.” But this single reference to trafficking remains undefined.

The ICC has not yet prosecuted any cases of human trafficking primarily because many nations are doing so themselves (though human rights groups question that commitment). One observer also said that it is unlikely that the ICC will ever prosecute individuals for human trafficking because the Rome Statute requires allegations of human rights violations to meet a certain threshold of “specific gravity” (or seriousness) to initiate an investigation. Given its limited resources, the ICC said that its “chief prosecutor must devote his resources to the most serious situations.” So in comparison to its current investigations of the mass killings of tens of thousands of people in Africa, one political analyst said that it is unlikely that the ICC will investigate cases of human trafficking.

There are also specific regional efforts in combating human trafficking. The *Inter-American Convention on International Traffic in Minors* enacted a system in 1997 where its 11 member nations (all of whom are in the Western Hemisphere) provide one another with legal assistance in preventing and punishing international trafficking in minors. In 2002, the South Asian Association for Regional Cooperation (or SAARC) established the *SAARC Convention on Preventing and Combating Trafficking in Women and Children from Prostitution*, which calls on its member states to criminalize the trafficking of women and children for prostitution and to make it an offense under which a country can extradite a suspect to another jurisdiction.

While experts say these agreements, to their credit, provide a specific definition for trafficking, their provisions apply to their specific regions and deal only with certain aspects of trafficking such as prostitution or the protection of minors rather than its broader components and victims.

A landmark human trafficking treaty

As the number of human trafficking cases began to increase around the world, one political analyst said that it reflected, in part, the ineffectiveness of existing treaties to curb that phenomenon. In response, the United Nations concluded negotiations on its *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children* (or the UN Protocol) in 2000.

Officials and human rights groups have described the UN Protocol as a landmark treaty because it directly addresses the modern-day aspects of human trafficking, and also contains the first universally accepted description of “trafficking in persons,” which is the recruitment, transportation, transfer, harboring, or receipt of persons through the threat or use of force, coercion, abduction, fraud, deception, abuse of power, or vulnerability . . . for the purpose of exploitation, which includes (at a minimum) prostitution, sexual exploitation, forced labor, slavery or similar practices, and the removal of organs. Analysts say that, with a single and comprehensive definition for trafficking, nations will have less flexibility in ignoring practices which they—in the past—did not view as trafficking.

In addition, the UN Protocol states that—in identifying trafficking cases—the consent of a person shall be “irrelevant” if a trafficker used any of the previously stated means to lure a victim. Unlike many other treaties addressing trafficking, the UN



Protocol also explicitly requires its state parties to prosecute cases of human trafficking as *criminal* offenses under their domestic laws, which could include the possibility of imprisonment. Furthermore, it established a framework allowing countries to help each other conduct investigations, prosecutions, and extraditions of those engaged in the practice.

The UN Protocol—which came into force in 2003 and whose implementation is administered by the United Nations Office on Drugs and Crime (or UNODC)—also requires its state parties to give certain protections to trafficking victims. For example, trafficked persons are “entitled to confidentiality and have some protection against offenders . . . when they provide evidence or assistance to law enforcement or appear as witnesses in prosecutions or similar proceedings.” As of August 2009, 132 countries have ratified the UN Protocol. (The United States ratified the agreement in 2005.)

Despite these apparent improvements, some analysts point out what they say are shortcomings. For instance, negotiators of the UN Protocol did not define several terms, including “exploitation of the prostitution of others” and “sexual exploitation,” which could allow various countries to interpret them differently (and, as a result, create loopholes for traffickers to exploit to their benefit). But others point out that this was done to reach a final agreement between nations that criminalized prostitution and those that did not. In the Netherlands—where the government has legalized the operation of brothels—the term “trafficking” is used to refer to *forced* prostitution only.

Some critics also say that the UN Protocol’s provisions regarding the protection of victims’ rights are weak. It stipulates, for instance, that a state party shall undertake measures to help trafficking victims “in appropriate cases and to the extent possible under its domestic law,” but doesn’t call for specific measures. Others point out that, while the UN Protocol requires countries

to prohibit the trafficking of children (who are defined as any person under the age of 18 years), several state parties—including Brazil, Chile, Costa Rica, Croatia, Ecuador, Germany, Greece, Mexico, Portugal, Romania, and Sri Lanka—have instituted different age thresholds, ranging from 12 to 16 years of age. Critics worry that traffickers could focus their recruitment efforts in those countries with age limits under 18.

Despite these criticisms, several regional organizations have used the UN Protocol to supplement and strengthen their own efforts to curb human trafficking. For example, in 2003, the Organization for Security and Cooperation in Europe (or OSCE)—a 56-member nation organization that deals with a wide range of security-related issues, including arms control, human rights, and economic activities—passed its *Maastricht Ministerial Council Decision No. 2, Combating Trafficking in Human Beings*, which not only adopted the definition of trafficking under the UN Protocol, but also passed a series of non-binding recommendations on how its members can help each other investigate, prosecute, and prevent human trafficking, and also protect its victims.

In 2005, the Council of Europe adopted the *European Convention on Action against Trafficking in Human Beings by the Council of Europe*, which analysts describe as the first European treaty to focus specifically on the protection of trafficked victims and their rights as well as preventing trafficking and prosecuting its perpetrators. The convention requires its signatory states to protect the identities of trafficking victims, provide assistance (such as medical treatment, translation services, counseling, and free legal aid), and issue renewable resident permits under particular circumstances. (The convention defines trafficking using the same language as the UN Protocol.)

The UN Protocol: An effective response against human trafficking?

In February 2009, the UNODC published its *Global Report on Trafficking in Persons*, which formally reviewed the effectiveness of the UN Protocol (five years after it came into force), and also offered what it described as “the first global assessment of the scope of human trafficking and what is being done to fight it.” After gathering and analyzing data from 155 countries and territories, the UNODC issued several conclusions:

- **More and more countries are passing domestic legislation to comply with their obligations under the UN Protocol:** Before 2003 (the year in which the UN Protocol came into force), 35 percent of surveyed countries had domestic legislation which specifically addressed human trafficking while 65 percent did not. As of November 2008, 80 percent of countries had legislation addressing the issue. Still, it noted that many countries, “particularly in Africa” where trafficking is a problem, did not yet have such legislation in place.
- **But even with the passage of domestic anti-trafficking legislation, the number of convictions for human trafficking did not increase in proportion to the probable number of cases worldwide:** The UNODC report stated that, while the number of reported convictions had increased among surveyed countries, “most convictions [took] place in only a few countries.” In fact, in 2007–08, about 40 percent of the surveyed nations did not record a single conviction for human trafficking. (One analyst said that the conviction rate

for trafficking is about 1.5 per 100,000 people, which is the same ratio for rare crimes in Western Europe such as kidnapping.)

- **Women are disproportionately involved in human trafficking:** The UNODC said that while women and children are still the main targets for trafficking, 42 percent of traffickers were actually women. (Its report was the first ever to document this fact, said UNODC.) “Female offenders have a more prominent role in present-day slavery than in most other forms of crime,” it stated.
- **Nations as a whole need to collect better information concerning human trafficking:** The UNODC report said that while some countries could cite “the number of victims or offenders,” it had no data “on the gender, age, or citizenship of these people.”

Even with the passage of numerous international agreements, including the UN Protocol, many analysts argue that doing so won’t stop human trafficking unless individual countries comply with their obligations under these treaties by passing domestic legislation to prosecute and punish offenders, and by assisting their victims. “One of the most fundamental things we can do to actually help vulnerable people around the world,” said Gary Haugen, President of International Justice Mission, “is to assist them with the intensely practical task of securing the regular enforcement of their own laws—laws that are meant to protect them as citizens, laws that are on the books currently, but that are meaningless if not enforced.”

In many cases, even if a nation passes legislation, a lack of political will to stop human trafficking could hamper its effectiveness. The UNODC report had mentioned that only a few countries accounted for most of the human trafficking convictions—“some of which were wealthy and some of which were not.” It concluded that “this suggests that progress against human trafficking is not necessarily determined by income levels, but is essentially a product of individual national initiative.”

Other individual UN agencies such as the United Nations Children’s Fund, the International Labor Organization (or ILO), and the United Nations Human Rights Council (or the Council) have undertaken separate campaigns to fight human trafficking. In 2004, the Council appointed a UN Special Rapporteur on trafficking in persons. (Special rapporteurs are independent experts who are appointed by the United Nations to carry out fact-finding missions concerning particular issues.) In March 2009, the Special Rapporteur, Joy Ngozi Ezeilo, submitted her first report where she urged states to ratify and integrate the UN Protocol in their domestic legislation and urged stronger efforts against human trafficking.

How does the United States address human trafficking?

Even before the UN Protocol came into force, the United States had, in 2000, taken a major domestic initiative to address human trafficking by passing the *Trafficking Victims Protection Act* (or TVPA), which was the first comprehensive federal statute that made human trafficking a federal crime in all 50 states, the District of Columbia, Puerto Rico, and several U.S. territories, including the U.S. Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands. (Legal analysts say that the United States had largely enacted many of the provi-

sions of the UN Protocol even before that international agreement came into force.)

Legal analysts point out that the United States already had many federal laws which separately addressed several different *components* of human trafficking. For example, the 13th Amendment of the U.S. Constitution (ratified in 1865) outlawed slavery and involuntary servitude. The Child Sexual Abuse Prevention Act of 1994 and the PROTECT Act of 2003 prohibit the sexual abuse of and illicit sexual conduct with children at home and even abroad. But these laws did not address human trafficking directly and comprehensively.

Among its many provisions, the TVPA increases prison terms for traffickers from 10 to 20 years, and allows life imprisonment in trafficking cases which involve the death, kidnapping, or aggravated sexual abuse of the victim. In addition, the statute

The passage of numerous international agreements won't stop human trafficking unless individual countries comply with their obligations of passing domestic legislation to prosecute and punish offenders. In many cases, a lack of political will and resources has hampered efforts to stop this practice.

includes official definitions for terms such as sex trafficking, commercial sex act, involuntary servitude, and coercive measures (which are comparable to those found in the UN Protocol). Furthermore, the TVPA provides protection and assistance programs to trafficking victims such as helping them return home or allowing victim family members to come to the United States.

Since its enactment, Congress has not only reauthorized the TVPA (in 2003, 2005, and 2008), but it added several amendments to strengthen its provisions. Trafficking victims may, for instance, file federal civil suits against traffickers for actual and punitive damages. Another amendment requires the U.S. government to terminate contracts with overseas contractors who are involved in some form of human trafficking. The federal government may also expand its criminal jurisdiction to hold accountable U.S. military personnel, U.S. officials, and contractors involved in trafficking crimes abroad.

The TVPA also calls on the Department of State to submit an annual Trafficking in Persons (or TIP) Report to Congress, which not only outlines global human trafficking trends, but also profiles the efforts of 170 countries in fighting that problem. (Some observers say that the TIP report provides the most regularly updated and comprehensive overview of human trafficking.) The report ranks nations in different tiers depending on their efforts to prosecute traffickers, prevent trafficking, and protect its victims. The United States may also withhold non-humanitarian financial assistance to countries that fail to address human trafficking.

Despite these provisions, the TVPA has its share of critics. For example, the Heritage Foundation (a conservative think tank) argued that the TVPA “trivializes the seriousness of actual human trafficking by equating it with run-of-the-mill sex crimes—such as pimping, pandering, and prostitution,” though federal officials deny this. It also said that the fight against trafficking could be

carried out by state and local authorities, but that, instead, the TVPA imposed further burdens on a federal government with limited resources. “Fighting crimes as common as prostitution, pimping, and pandering would place significant demands on the Federal Bureau of Investigation, the 94 U.S. Attorneys, and other federal law enforcers that would distract them from the truly national problems that undeniably require federal attention, such as the investigation and prosecution of foreign espionage and terrorism,” it said. It notes that while 665 federal judges preside over criminal trials, more than 1,500 state judges preside over criminal trials in California alone.

In addition to federal efforts, individual states have taken their own initiatives against trafficking. A Polaris Project survey noted that 43 states have enacted anti-trafficking criminal provisions, 19 have provisions to protect trafficking victims, 13 have estab-

lished statewide task forces on trafficking, and nine have implemented laws requiring law enforcement training in trafficking. Despite these efforts, anti-trafficking groups say that the police, prosecutors, and the general public still often fail to recognize trafficked victims, and that, when they do, their perpetrators are prosecuted for sexual assault rather than trafficking.

What else needs to be done to fight trafficking?

Even with all of these efforts, human rights groups believe that trafficking could become worse in the years ahead. They argue that continuing problems in the global economy will increase levels of unemployment, which, in turn, could make more people vulnerable to trafficking. “The severe downturn in the world economy will push more migrants into the hands of [traffickers] as they seek better lives abroad,” said Australian Prime Minister Stephen Smith. The ILO estimates, for example, that more than 100 million people in Asia alone could become unemployed this year. And the World Bank noted in March 2009 that migrants working abroad have remitted less money to their home countries, and predicted a decline of 8.8 percent this year.

Several organizations also believe that many governments are still not devoting sufficient domestic resources to address human trafficking. In its 2008 TIP report, the State Department noted that, in 2007, there were 5,682 prosecutions and 3,427 convictions for trafficking throughout the world. (For every 800 trafficked victims, law enforcement authorities convicted only one trafficker, added the OSCE). The latest TIP report released in June 2009 noted 5,212 prosecutions and 2,983 convictions in 2008, which is a drop from the previous year. “Many governments are still in denial [on human trafficking],” said Antonio Maria Costa, the Executive Director of UNODC. “There is even neglect when it comes to either reporting on, or prosecuting cases of, human trafficking.” 

International Law News Roundup

COMPARATIVE LAW

An international right to any name?

For the past several years, the media have been reporting more and more stories from around the world where governments have stopped parents from registering the birth of a child until they gave that child what the government considered an appropriate name. In many cases, these parents challenged their governments' orders in various courts. Do parents have a right to name their children without any restrictions whatsoever from governing authorities? Are there any existing treaties which address this issue?

Most parents give their children names which accord with long-standing usage and national traditions. "Ivan," for instance, is one of the most popular names for boys in Russia, while parents in Mexico prefer "Alejandro." Last year, "Jacob" was the most popular boy name in the United States. Still, many others have bestowed more unique names on their children, ranging from Google (after the Internet company) to Lego (a popular band of toy blocks), and have even used names which could be considered offensive to other people.

Many people express surprise when they learn that various governments have passed and enforce what are generally described as "name regulations," which require parents to use a list of approved names (along with many other requirements) when they register the births of their children. There are currently no known studies on the number of nations which have name regulations. But a sampling of cases from around the world reveals the extent to which some nations regulate the names given to people in their respective jurisdictions.

Under Germany's name regulation law, for instance, a civil registration office called the *Standesamt*—which records all births, marriages, and deaths—uses a privately-published guidebook called the *Internationales Handbuch der Vornamen* (or International Book of Forenames, which contains more than 65,000 first names) to decide whether a proposed name for a child is acceptable. The regulation also requires a name to reflect a child's gender, and that it won't endanger his or her well-being in any way. If the government rejects a particular name, parents may appeal that decision.

According to Denmark's name regulation—called the "Law on Personal Names"—the Ministry of Ecclesiastical Affairs and the Ministry of Family and Consumer Affairs must approve a child's first and last names from an official list containing around 3,000 boys names and 4,000 girls names, most of which have Western and English origins.

In China, the Public Security Bureau has been replacing all handwritten identity cards with those which can be read by a computer. But because government computers can only read 32,252 of 55,000 Chinese characters, people whose names contain unique or obscure characters must replace them with more common ones.

Supporters of name regulations say that they help to preserve traditional names, and also prevent misguided parents from giving their children offensive, even embarrassing, names which

could then expose them to harassment and bullying from their peers. So under Sweden's 1982 *Namnlag* (or Name Law), its government cannot approve first names which "can cause offense or can be supposed to cause discomfort for the one using it, or names which for some obvious reason are not suitable as a first name." According to Argentina's name law, parents may choose first and last names which are not "extravagant, ridiculous, contrary to [Argentinean] customs, or expressions tending to signify politics or ideologies," or which don't lead to misunderstandings regarding the person's gender.

But some opponents argue that these laws represent antiquated methods to prevent non-noble families from giving their children aristocratic names as well as deny individuals what they claim is a right to personal expression.

While many countries have strict name regulations, others are lenient in comparison. Though New Zealand, for example, allows creative names, it doesn't allow names which are offensive, contain 100 characters or more, include titles or military rank, or use punctuation marks or numbers. In the United States, there is no federal law regulating how parents name their children. Instead, individual states regulate the registration of names. Recently, both the North Dakota and Minnesota Supreme Courts ruled against parents who wanted to include numbers in their children's names. In Ohio, a court prevented an individual from renaming himself "Santa Robert Clause" because it feared that this widely-recognized name would mislead children within his community. Many states also prevent parents from using racial slurs and symbols when naming their children. New Jersey, on the other hand, allowed parents to name one of their children "Adolf Hitler Campbell."

Many governments have passed and enforce what are generally described as "name regulations," which require parents to use a list of approved names when they register the birth of their children.

But as more people travel around the world and mixed-nationality couples become increasingly common, analysts expect more court cases which challenge a government's authority to regulate names. In *Carlos Garcia Avello v Belgian State*, authorities in Belgium insisted on giving surnames to the children of a Belgian-Spanish couple which were different from the ones originally recorded in Spain. The European Court of Justice in 2003 decided against Belgium, arguing that the couple had a right under European Union laws "not to suffer discrimination on grounds of nationality in regard to the rules governing their surname."

But this decision did not address the question of whether a parent has a fundamental right to name a child without interference from a government. In fact, existing international treaties don't address this issue. Rather, they address whether a child has a fundamental right to have a name. For example, under Article 24(2) of the *International Convention on Civil and Political Rights*, nations must ensure that "every child shall be registered immedi-

ately after birth and shall have a name.” In a similar fashion, the Convention on the Rights of the Child, under Article 7, protects the right of a child “to a name from birth.”

According to the United Nations Children’s Fund (or UNICEF), the right to have a name and to have access to a legal process to register that name with a government is “one of the most fundamental human rights.” It notes that children who are not registered “do not officially exist” in government records, which could, as a result, “complicate enrollment in school and expose them to illegal adoption, trafficking, exploitation as cheap labor, or involvement in prostitution and criminal activities.” UNICEF also points out that a government cannot effectively help at-risk children if they are not allowed to register their names, which is a particular problem for children born to refugees. A host government that does not register these children can deny them benefits and also certain protections under human rights laws.

In the meantime, observers say that governments will mostly likely continue to regulate *how* parents name their children. 🌐

COMPARATIVE LAW

An Independent Supreme Court for the United Kingdom

For the first time in its modern history, the United Kingdom created an independent Supreme Court, which held its first session on October 1, 2009. For more than 100 years, the highest court in the United Kingdom—called the Appellate Committee of the House of Lords—was part of the legislative branch of government called Parliament, which is composed of the House of Lords and the House of Commons. The 12 judges on the Appellate Committee of the House of Lords, known as the Law Lords, were also members of the House of Lords, though legal analysts say that they rarely voted on legislation.

The government decided to replace the Appellate Committee of the House of Lords with a separate and independent Supreme Court when it passed the *Constitutional Reform Act 2005*. Officials said that doing so would increase not only the independence of the justices, but also public confidence that Parliament is not unduly affecting the decisions made by the judiciary. One analyst said that the House of Lord’s previous role as both a legislature and judiciary was contrary to the principles of separation of powers. Others worried that because the House of Lords had both legislative and judicial functions, a losing defendant may challenge the legitimacy of its decisions in the European Court of Human Rights by arguing that he didn’t receive a fair and impartial trial.

The new Supreme Court is housed in a separate building called Middlesex Guildhall across from the houses of Parliament, which is meant to “[emphasize] the independence of the judiciary, clearly separating those who make the law from those who administer it,” said the President of the Supreme Court who plays a role similar to the Chief Justice of the U.S. Supreme Court. Still, one commentator said that the creation of a new Supreme Court was largely a symbolic move because the independence of the Law Lords “was not in question.”

While all of the currently serving Law Lords had joined the Supreme Court as “justices” (and will also retain their member-

ship in the House of Lords), they won’t be able to “sit and vote” in that body at all. And once there are vacancies on the Supreme Court, an independent selection committee will appoint new justices rather than automatically filling its ranks from the House of Lords. In fact, “all new judges appointed to the Supreme Court after its creation will not be members of the House of Lords,” according to the Ministry of Justice, which administers the justice and court systems in the United Kingdom, and also helped to establish the new Supreme Court.

The new Supreme Court will have the same function as the Appellate Committee of the House of Lords—to serve as the final court of appeal for all civil cases in the United Kingdom (which is composed of England, Scotland, Wales, and Northern Ireland), and also criminal cases originating in these jurisdictions except Scotland. But the Supreme Court itself said that it would concentrate on “cases of the greatest public and constitutional importance.” Unlike its counterpart in the United States, the UK Supreme Court cannot strike down laws of Parliament as “unconstitutional” because the United Kingdom doesn’t have a constitution. Instead, it can only “prompt lawmakers to call for reforms,” said one legal analyst.

The Appellate Committee of the House of Lords made its last decision on July 30, 2009, when it ruled that British prosecutors must “clarify the circumstances under which they will prosecute someone for [assisting] a suicide,” which is illegal in the United Kingdom. On October 5, 2009, the UK Supreme Court issued its first decision, where it decided that the plaintiffs (a group of news organizations) can print the full name of a defendant—a British citizen who is also a suspected financier of terrorism—who had challenged the government’s authority to freeze his assets and closely monitor his financial activities.

Legal observers noted that lower courts had prevented the media from revealing the defendant’s full name, which the plaintiffs argued prevented them from properly educating the public about the effects of anti-terrorism measures, and also violated the principle of “open justice” because the lower courts had not explained why they were protecting the anonymity of the defendant. 🌐

INTERNATIONAL HEALTH

Swine flu, pandemics, and international law

Starting in Mexico in March 2009, a new strain of the influenza virus had spread so quickly to nearly every continent and even remote locations around the world (including the battlefields of Afghanistan and parts of the Amazon rain forest) that the World Health Organization (or WHO) in June 2009 declared a flu pandemic, the first in 41 years. For the last several months, many governments have taken several measures to contain the spread of the new virus (popularly known as the “swine flu”), which is expected to affect more countries in a second wave this fall and winter. Is there anything that international law can do to address such pandemics? Are there existing treaties which address international health matters? And are they effective?

Although scientists were unable to pinpoint its actual origin, they believe that the swine flu is a mutation of several components of influenza already found in humans, birds, and swine. The virus spreads only by human-to-human transmission

through coughs and sneezes, and also by touching infected surfaces, according to the Centers for Disease Control and Prevention (or CDC). To dispel the mistaken belief that people could contract the new virus by coming into contact with live pigs or by consuming pork products (such as bacon and ham), the WHO and other international organizations have urged the media to refrain from using the term “swine flu” in favor of the virus’s technical name, which is Influenza A virus subtype H1N1 (or simply the H1N1 virus).

As of September 2009, the H1N1 virus had killed over 2,800 people worldwide, and the WHO estimates that it could infect as many as two billion people by the end of the year. But many nations have reported that most cases have produced only mild symptoms usually associated with seasonal flu (including high fevers, headaches, runny nose and sneezing, vomiting and diarrhea, and aching muscles), and that most people recover within one week without medical treatment. The CDC said that well over one million people in the United States have been infected with the H1N1 virus, but that the total number of confirmed deaths was 263 as of August 2009. In comparison, 15 million to 60 million Americans catch (and roughly 36,000 die from) the *seasonal flu* each year.

As of June 2009, the media reported that 23 people in New York City have died from the new flu. On the other hand, up to 2,000 New Yorkers die each year from the seasonal flu. One local paper reported that “swine flu may be scary, but 250 times as many die from regular flu.” And according to one area physician: “You never hear about the many people who die of regular seasonal flu because it doesn’t get as much media attention.” But unlike the seasonal flu where the elderly and those with weakened immune systems make up many of the fatalities, young and middle aged people who had been previously healthy have made up nearly a third to one-half of all reported severe and fatal H1N1 cases.

Nations around the world have instituted a wide variety of measures to prevent the spread of the virus. For example, many have been producing hundreds of millions of doses of vaccines specifically to prevent or reduce the severity of H1N1 infections. (Existing vaccines for the seasonal flu don’t protect against the new strain.) Others have instituted quarantines. China, for instance, had imposed seven-day quarantines on visitors arriving at its airports and seaports with flu-like symptoms. Japan quarantined 47 airline passengers from Canada in a hotel for one week after several other passengers on the same flight tested positive for the H1N1 virus. Australia ordered a cruise ship with 2000 passengers to stay at sea because of suspected cases of H1N1 infections. And health officials in Egypt said that they would quarantine all returning pilgrims after the H1N1 virus had appeared in Saudi Arabia.

Some lawmakers in nations such as the United States have proposed closing their borders to all outside visitors and trading partners. However, President Barack Obama and the Secretary of Homeland Security Janet Napolitano described such measures as “pointless” because the virus had already spread to the United States. A WHO official added: “Containment is not a feasible operation. Countries should now focus on mitigating the effect of the virus.” Others said that “closing the border would have done nothing more than wreak economic havoc on [nations’] economies.” Dr. Michael Osterholm, director of the Center for Infectious Disease Research and Policy at the University of Min-

nesota, noted that many goods needed to protect people in a pandemic are made abroad, including most masks, gowns and gloves, electrical circuits for ventilators and communications gear, and

During the swine flu pandemic, the WHO called on countries to carry out their responsibilities under an international agreement providing guidelines on how they must respond to infectious disease outbreaks.

pharmaceutical drugs. “You cut those off and you cripple the health care system,” he said.

Several countries such as Kazakhstan, the Philippines, Thailand, Ukraine, and the United Arab Emirates, have banned the import of pork products as a response to the flu outbreak. China, the world’s largest pork consumer, banned imports of live pigs and pork products from Mexico, California, Kansas, and Texas. The Egyptian government also ordered the mass slaughter of 300,000 pigs in what officials described as a precautionary measure against the new flu strain.

Legal experts say that while international trade rules do allow countries to restrict or ban imports of goods for health and safety reasons, such measures must be backed by scientific evidence. In response to these imports bans, the Office of the U.S. Trade Representative said that “restrictions on U.S. pork or pork products or any meat products from the United States resulting from the recent outbreak do not appear to be based on scientific evidence and may result in serious trade disruptions without cause,” though it did not threaten any legal action.

What role has international law played in efforts to contain the spread of the H1N1 virus and mitigate its effects? The WHO is the main global agency that handles international health matters. Some of its responsibilities include monitoring and assessing health trends, providing technical support to nations to stop the spread of chronic diseases, and coordinating the responses of its 194 member nations on global health matters. The WHO neither manufactures vaccines nor has any legal authority to regulate a nation’s health policies or health care system.

In response to the outbreak of the H1N1 virus, the WHO launched its pandemic influenza alert system—which it created in 2005 in response to an outbreak of avian flu in East Asia years earlier—to track the speed at which a virus traveled to other countries so that nations would be able to prepare for an outbreak on their own territories. Phase 4, for example, indicates sustained human-to-human transmission of a virus while Phases 5 and 6 indicate a pandemic. (Unlike an epidemic where an infectious disease affects many people in a wide geographic area, a pandemic is essentially an epidemic which has reached global proportions and sometimes strikes in successive waves over a period of time, say experts.)

In June 2009, the WHO raised its alert for the H1N1 virus to Phase 6 (the highest level). But that agency noted that a certain pandemic level did not correlate with the number of actual H1N1 cases and fatalities. Instead, a Phase 6 designation depends on the number of countries where a virus has appeared, regardless of the number of people who have been infected in a certain nation.

The WHO also called on countries to carry out their responsibilities under an international agreement called *International*

Health Regulations (or IHR) 2005, which provides guidelines on how nations are to report and respond to the outbreak of infectious diseases and other public health events. Specifically, Article 2 states that “the purpose and scope of these Regulations are to prevent, protect against, control, and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.”

Under IHR 2005, which is administered by the WHO, a nation must report to that agency all cases of smallpox, poliomyelitis due to wild-type poliovirus, SARS, and human influenza caused by a new subtype such as H1N1. It must also notify the WHO of any “public health emergency of international concern” (or PHEIC), which it defines as an extraordinary health event that can pose a public health risk to other nations and requires a coordinated international response. (Notifying the WHO of a possible PHEIC enables that agency to alert other nations so that they can begin to take measures against a pandemic.) To determine whether a certain health event constitutes a PHEIC, a nation uses several criteria, including the seriousness of its public health impact, any unusual or unexpected characteristics of the event, and its potential to spread internationally.

In the case of Mexico, the first country where the H1N1 virus began to infect people, some critics have claimed that the government was slow in responding to the outbreak of the new flu virus. They noted that many patients had begun to experience symptoms as early as March 2009, but that the Mexican government did not alert the WHO until the following month. WHO officials said that Mexico had been fully cooperating with the agency, and also noted that the country was already “in the middle of [its] flu season” when the H1N1 outbreak occurred, which could explain why Mexico did not alert the WHO sooner.

After making such a PHEIC assessment, a nation must undertake various measures such as inspecting visitors at various points of entry, including airports, seaports, and ground crossings, and also implementing WHO recommendations—all in an effort to prevent the spread of a disease. While the WHO provides technical advice to member nations during a public health event, it does not take control of a government’s operations or send personnel to guard a country’s borders. IHR 2005 also contains guidelines on how nations should treat international travelers when undertaking certain measures. For example, when a nation quarantines or isolates international travelers, it must treat them with courtesy and respect; provide them with food, water, and accommodations; and take into consideration their gender, sociocultural, ethnic, and religious concerns. Mexico had complained that other nations, including China, had unfairly singled out its citizens at airports for quarantine. But those countries responded that they had treated those individuals well by providing hotels rooms and adequate food. The WHO may also recommend travel and trade restrictions under IHR 2005.

Observers note that IHR 2005 is an improvement over its predecessor, IHR 1969, which required nations to report only cases of cholera, plague and yellow fever. The WHO had updated IHR 1969 by broadening the types of diseases which nations must report to that agency after officials in China had unsuccessfully tried to conceal the outbreak of the SARS (or severe acute respiratory syndrome) virus in 2003, which spread to almost 40 coun-



C.V. Starr Lecture

October 28, 2009

Legal Logic and Its Limits: An International Perspective



James C. Raymond,
President, International
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Reasoning, and Professor
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While IHR 2005 obligates nations to report certain health events so that other nations can begin preparations to handle a possible outbreak, it doesn't contain an enforcement mechanism. The WHO cannot, for example, impose economic sanctions on member nations who don't carry out their responsibilities. Instead, the WHO believes that "peer pressure" will push nations to comply with IHR 2005, stating that "the consequences of non-compliance may include a tarnished international image, increased morbidity/mortality of affected populations, unilateral travel and trade restrictions [imposed by neighboring countries], economic and social disruption, and public outrage."

Still, nations may still try to hide the extent of a certain disease outbreak. The media have reported, for instance, that Russia had been deliberately undercounting the number of H1N1 cases on its territory, though its government has dismissed those stories as fabrications. Analysts say that the WHO can do little to prevent such actions, and that the effectiveness of any international agreement such as IHR 2005 depends ultimately on the extent to which a signatory nation carries out its obligations.

While governments could skirt their obligations under IHR 2005, other existing international treaties seem to impose a legal obligation on them to safeguard the health of people under their jurisdiction. For instance, Article 25 of the *Universal Declaration of Human Rights*, says, in part, that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care. . ."

Under the *International Covenant on Civil and Political Rights*, state parties must guarantee "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" through the "prevention, treatment, and control of epidemic, endemic, occupational and other diseases." But observers point out that these agreements are not legally enforceable, and that nations have not relied on them to address pandemics. Also, they don't provide any details as to how a nation must handle a public health event such as a pandemic.

In another approach, one legal scholar, Renee Dopplick, said that—under an emerging UN doctrine called the "responsibility to protect"—the world community could intervene in the internal affairs of a country which can't or won't protect its citizens from, say, human rights abuses without its explicit permission. She says that this doctrine could also extend to those nations which aren't addressing the spread of infectious diseases. But others believe that the international community has not reached a consensus as to when exactly and under what circumstances a group of countries may intervene in the affairs of another nation.

One indication that the world community may not yet view a health crisis as a compelling reason to intervene in the affairs of another country without its permission is the decision by the UN Security Council not to issue any statements addressing the H1N1 outbreak (though the UN Secretary-General Ban Ki-moon did urge that body to join the international community to fight the spread of that virus). One analyst pointed out that the UN Security Council rarely involves itself with health crises, and mainly addresses matters concerning international peace and security. But others counter that global health crises could threaten peace and security. 

Global efforts to stop human organ trafficking

For many years, unscrupulous individuals and even criminal organizations have been taking organs and other body parts by force or deception from unsuspecting and unwilling victims and then selling them to recipients willing to pay a high price, often in the tens of thousands of dollars and even more. Human rights groups believe that this phenomenon—known as organ trafficking—is increasing, and sees no sign of abating. What is the international community doing to address organ trafficking? Are there any existing international treaties that can curb this problem? And what is the status of the debate today?

For over the past 50 years, technological advances have allowed living and non-living persons to donate their organs such as bones, intestines, kidneys, and livers to hundreds of thousands of recipients. Experts say that the demand for organs is huge. As of August 2009, over 80,000 people in the United States were on the waiting list for a kidney and 16,000 for a liver. In contrast, the supply of organs is much smaller. Donors in 2009 have so far given 5,594 kidneys and 2,967 livers. Given these disparities, potential organ recipients have to wait an average of five years for a kidney; the waiting time for a liver (311 days) is much shorter.

In the United States, the *Uniform Anatomical Gift Act*, passed in 1968, formally gave people the right to donate organs, eyes, and tissue. It also allowed states to regulate donations by enacting their own laws. Congress later passed the *National Organ Transplant Act* in 1984, which created a more uniform regulatory structure of organ donation and transplantation for states. That law also outlawed the sale of human organs in the United States. Many other countries also prohibit the commercial sale of human organs.

Some analysts claim that these restrictions have contributed to the high disparity between the supply and demand of organs. In most countries, organ donation is a voluntary process (largely involving altruism) where people must explicitly choose to donate their organs. But critics say that altruism—and its corresponding programs such as organ donor cards and reimbursing donor costs without providing any further compensation—have not significantly encouraged people to donate or register to donate their organs upon their death. So hundreds of thousands of people die every year and are interred with their organs intact.

To help increase the availability of organs, 10 countries have passed laws where people are presumed to be organ donors upon death unless they explicitly revoke their consent. Media reports say that after Austria had passed such a law in 1982, donations had quadrupled. By 1990, the number of kidney transplants in that country was nearly equal to the number of people on the waiting list. But some political analysts say that passing such a law will be difficult in other countries where people are long accustomed to a system of voluntary donation.

In the United States, some members of Congress have introduced the *Organ Trafficking Prohibition Act of 2009*, which, if passed, will allow states to "explore ways of increasing the availability of transplantable organs by incentivizing their donation," but which cannot include direct cash payments to the donor. However, critics believe that such a bill could eventually lead to the commercial sale of organs, which, they believe, will mainly encour-

age financially struggling individuals and the poor to donate their organs. They note that in Kuwait and Saudi Arabia, which allow for financial compensation for organs, “donations have almost unanimously been from non-national laborers of the Indian subcontinent rather than national Kuwaitis and Saudis.”

Others say it will be difficult to “completely regulate a market in organs domestically when, as with other commodities, global prices/rewards would vary.” So if potential recipients in other countries were willing to pay much higher prices for organs, it could reduce the supply in home nations. Commercial organ donation could also reduce the availability of organs which are donated for altruistic purposes, say other commentators.

But as individual countries continue their debate on how to increase the availability of organs, the demand for organs still far outstrips the supply for them. This, in turn, has given rise to what experts have called “organ trafficking” where organs are taken by force, coercion, deception, or some combination of these tactics from living people, and then offered for sale to others—often individuals desperate for transplants—who are willing to pay for them. The World Health Organization (or WHO) estimates that about 10 percent of the 63,000 kidneys transplanted worldwide each year “have been bought illegally.” Experts also believe that nations such as China, Pakistan, and the Philippines harvest organs from executed prisoners.

In recent years, potential recipients have also been traveling to poorer countries (sometimes under the pretext of tourism) to obtain organs. A study in the *American Journal of Transplantation* estimated that from 2004 to 2005, 700 nationals from Saudi Arabia, 450 from Taiwan, 131 from Malaysia, and 124 from South Korea went abroad for a commercial kidney transplant. In India last year, police discovered over 500 illegal transplants, most of which involved wealthy Indian nationals or foreigners paying \$2,500 for a kidney.

What has been the role of international law in the areas of organ donation and organ trafficking? In 1991, the WHO issued its *guiding principles on human organ transplantation*, which say that human organ removal and transplantation should be carried out under certain conditions. For example, guiding principle 1 states that medical personnel should remove organs from a deceased person only if that person had either expressly given his consent or if there were no reason to believe that he would have objected to organ removal. To avoid conflicts of interest, another principle says that physicians who determine donor health should neither be involved in the removal of an organ nor should they be in a position to receive them. The principles also state that “the human body and its parts cannot be the subject of commercial transactions. Accordingly, giving or receiving payment (including any other compensation or reward) for organs should be prohibited.”

But observers say that these principles don’t address organ trafficking or transplant tourism. For instance, none of the principles even mentions those terms. And while guiding principle 7 says that physicians should not transplant an organ “if they have reason to believe that the organs concerned have been the subject of commercial transactions” (such as those conducted through organ trafficking), it doesn’t provide any further guidance on what a nation should do. But as organ trafficking began to increase, the WHO issued a statement in 2004, calling on its member states to “protect the poorest and vulnerable groups from

transplant tourism and the sale of tissues and organs, including attention to the wider problem of international trafficking in human tissues and organs.”

On the other hand, the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, which came into force in 2003, says that nations must criminalize acts of human trafficking, including cases where perpetrators forcibly remove the organs of their victims. Yet the Protocol neither defines the term “organ trafficking” nor explicitly requires countries to undertake any particular actions to stop it.

In 2004, the Council of Europe issued a recommendation (*Rec(2004)7*) calling on all member states of the European Union to “take all possible measures to prevent organ trafficking,” which it defines, in part, as the “transportation of a person to a place for the removal of organs or tissues without his or her valid consent.” Specifically, it says that member states should create a domestic legal framework which “strictly forbids any kind of commercialization of the body,” and also pass domestic laws which prohibit “financial gain from the human body or parts of the body intended for transplantation.” In addition, it recommends that countries should punish as a criminal offense individuals who make payments to organ donors which constitute financial gain. But analysts noted that the Council of Europe’s recommendations apply primarily to countries in Europe and not to other parts of the world where organ trafficking may be prevalent.

To address some of these shortcomings, over 150 representatives of scientific and medical organizations, and government officials, among others, held a summit in Istanbul, Turkey, in May 2008 where they issued the *Declaration of Istanbul on Organ Trafficking and Transplant Tourism* (or Istanbul Declaration), which is the first global agreement specifically calling on countries to address organ trafficking and transplant tourism. Unlike previous agreements, the Istanbul Declaration provides the first internationally agreed upon definition of organ trafficking, which it defines as “the recruitment, transport, transfer, harboring or receipt of living or deceased persons or their organs by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability . . . for the purpose of exploitation by the removal of organs for transplantation.” It also defines terms such as “transplant commercialization” and “transplant tourism.”

The Istanbul Declaration says that states should prohibit organ trafficking and transplant tourism by punishing individuals engaged in those acts, and also by banning all types of advertisements concerning transplant tourism. It also says that nations should create a “legal and professional framework to govern organ donation and transplantation activities,” and that organs should be “equitably allocated within countries” without regard to a potential recipient’s “gender, ethnicity, religion, or social or financial status.”

Observers note that, while the Istanbul Declaration has created minimum standards that nations should implement to address organ trafficking and transplant tourism, its terms are voluntary and unenforceable. In addition, they point out that the agreement, which is not considered an international treaty that has signatory nations and a specific enforcement date, doesn’t provide any specific guidance on how nations should punish individuals who engage in organ trafficking and transplant tourism.

Despite these efforts on the part of the international community, analysts say that organ trafficking is still a growing problem, and that, ultimately, any effort to curb organ trafficking will rely on the extent to which individual nations carry out their responsibilities under international agreements addressing that problem. In New York City, for instance, federal authorities in August 2009 discovered a 10-year old organ trafficking operation where traffickers had bought kidneys in Israel for \$10,000 and then sold them to patients in the United States for over \$150,000 each. Experts said that “the charges, if true, would be the first documented case of organ trafficking in the United States.”

Given the shortcomings of existing measures and the continuing growth of organ trafficking, the United Nations and the Council of Europe, on October 13, 2009, called for the creation of a legally-binding international treaty where all nations would have to pass domestic legislation prohibiting people from financially benefitting from organ transplants, among other proposals. 

INTERNATIONAL INVESTMENT

Uneven progress in global efforts to fight bribery

A recent report says that bribery—which is a practice where one individual offers another person an incentive to grant him a personal favor or even give him an unlawful advantage—continues to be an extensive problem throughout the world, and that many of the most powerful nations are not doing enough to combat this long-standing custom. What have countries done to curb bribery? Why does bribery still continue unabated?

Bribery has existed for thousands of years, and its effects still harm public welfare while enriching a select few. Analysts say that unscrupulous companies may, for instance, use money to bribe public officials to win lucrative public contracts, but then carry out subpar work, resulting in poorly built bridges and other infrastructure which can injure unsuspecting victims. In the private sector, bribery increases the cost of goods and services for both consumers and companies alike. For example, a buyer working for a large distributor may help a company which had offered him a bribe by choosing its higher-priced, yet lower-quality goods over better quality products manufactured by more reputable companies at reasonable prices. Public servants may also demand bribes from private businesses to process licenses and other operating permits.

Bribery even occurs in various other settings such as schools where parents may bribe teachers to give their children unearned higher grades or situations where people may bribe law enforcement authorities to ignore criminal activities. Many experts say that, ultimately, unchecked bribery erodes the public’s trust of their leaders and systems of governance.

In recent years, the media have reported many instances of bribery around the world. In 2008, Siemens, the German engineering conglomerate, settled charges with American and European regulators of routinely using bribes to secure business by agreeing to pay a \$1.6 billion fine. Also in 2008, a former chief executive of KBR (a subsidiary of energy-service provider Halli-

burton) pled guilty to charges that he conspired to pay \$182 million in bribes to Nigerian officials in exchange for contracts to build a \$6 billion liquefied natural gas complex. Furniture manufacturer IKEA announced this year that it was suspending additional investment in Russia due to wide-spread corruption and bribery demands.

Many countries have been taking steps at the domestic level to combat bribery. Recently in China, the government convicted and executed a former chairman of a state-owned company on charges of bribery and also embezzling more than \$14.6 million. But political analysts say that many governments undertake such crackdowns on bribery only when an outraged public demands action, and that smaller cases of bribery go unpunished. In the United States, the 1977 Foreign Corrupt Practices Act prohibits Americans from offering bribes to foreign officials. A few months ago, the media reported that a California equipment manufacturer for oil and nuclear plants pled guilty of carrying out bribery in 36 countries for over a decade, and agreed to pay an \$18.2 million fine.

While many countries have their own domestic laws to combat bribery, analysts point out that, in the past, the exact definition of bribery had differed from one nation to the next, which, in turn, made it difficult to curb that practice on a global level. To address such disparities, the Organization of Economic Cooperation and Development (or OECD)—an intergovernmental organization of 30 industrialized nations whose aim is to increase cooperation on a wide variety of economic issues—adopted the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (or OECD Convention), which provides an official definition for bribery and calls on its member nations to criminalize the bribery of foreign officials.

Specifically, the OECD Convention states that “each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official . . . in order to obtain or retain business or other improper advantage in the conduct of international business.” In addition to its own member states, many other countries have ratified the OECD Convention, including Argentina, Brazil, Bulgaria, China, Estonia, Israel, and South Africa. While observers point out that the terms of the OECD Convention are not enforceable, they note that it mostly includes those nations which have the financial resources to offer bribes.

Other international efforts to fight bribery include the *UN Convention Against Corruption*. Coming into force in 2005, this convention requires its 136 State Parties (which include not only the most industrialized nations, but also developing countries) to implement domestic measures to curb various aspects of corruption such as embezzlement and money-laundering, among others. In the area of bribery, it urges State Parties to criminalize bribery of national public officials, foreign public officials, and public organization officials. Like the OECD Convention, this UN agreement is not legally enforceable. And because it encompasses a wide range of issues and not just bribery, some have questioned its effectiveness.

In September 2009, one of the world’s most active anti-corruption organizations—Transparency International (or TI)—re-

leased a progress report which uses a new three-tier ranking system to determine the extent to which the 38 nations belonging to the OECD Convention were carrying out and enforcing their obligations under that agreement. To be listed under the category of “active enforcement,” a nation must be prosecuting at least 10 bribery cases “of which at least three were initiated in the last three years, and at least three were concluded with substantial sanctions.” Under the category of “moderate enforcement,” a nation must be prosecuting at least one major bribery case in addition to carrying out some bribery investigations. Nations which are prosecuting only minor bribery cases or even none at all are listed under “little or no enforcement.”

The TI report concluded that current enforcement of the OECD Convention was “extremely uneven.” Using the three-tier system, it determined that only four countries—Germany, Norway, Switzerland, and the United States—are actively enforcing their measures against foreign bribery. On the other hand, 11 countries are only moderately enforcing the OECD Convention while 21 have done little or nothing at all.

In its report, TI listed several reasons why progress has been so uneven in combating bribery among the OECD and other nations. It noted, for instance, that 23 nations did not provide the public with information on bribery cases and investigations, which could be used to deter bribery in the future. It also determined that 25 countries have statutory or other legal obstacles which could hinder a bribery investigation. Canada, for example, allows its government to take economic and foreign policy interests into account when deciding whether to investigate and prosecute bribery cases. Furthermore, TI reported that 12 countries provided their residents with what it says are unsatisfactory complaint procedures and whistle-blower protection laws to report suspected cases of bribery, and that another 12 had weak accounting and auditing systems to prevent bribery.

Other analysts say that the uneven progress in implementing and enforcing the OECD Convention is not unique to that agreement itself, but extends to all other international agreements whose effectiveness largely depends on the extent to which a ratifying country complies with and enforces its legal obligations. 🌐

LAWS OF WAR

Are Taliban fighters obeying the laws of war?

As the United States debates whether it should increase or decrease troop levels in Afghanistan in the fight against the Taliban, the media have reported the existence of an actual field manual for fighters of that organization, which seems to call on them to respect the laws of war such as those listed in the *Geneva Conventions* (or Conventions). But others say they that it is highly unlikely that the Taliban, which regularly carries out suicide bombings, will commit itself to the laws of war in its fight against technologically superior, but overstretched, NATO forces in Afghanistan.

In May 2009, International Security Assistance Forces (which is the name of the NATO operation in Afghanistan) announced that they had discovered a small bound manual for Taliban fighters which “preaches a style of warfare based on Islamic law and aimed at winning the hearts and minds of the Afghan people.”

Among other guidelines, “it advises Taliban fighters to avoid civilian casualties, limit suicide attacks to high-value targets, and establish good relationships with the local people.” The manual, which, according to the ISAF translation, is entitled “Taliban 2009 Rules and Regulations Booklet,” also contains information on the aims and organizational structure of the Taliban, which had ruled over large parts of Afghanistan for several years while providing a sanctuary for Osama bin Laden (the chief of terrorist network Al Qaeda) before being ousted by U.S. military forces after the September 11 terrorist attacks.

In another translation provided by news agency Al Jazeera, the 2009 manual states that “whenever any official, soldier, contractor or worker of the slave [i.e., the current] government is captured, these prisoners cannot be attacked or harmed.”

Completed in 1949, the four Geneva Conventions remain the most comprehensive set of laws governing the treatment of armed combatants, prisoners-of-war, and civilians during times of international conflict. Almost every nation in the world, including the United States, has ratified—and is, thus, bound to comply with—these treaties.

The Conventions prohibit its signatory states from carrying out “at any time and any place whatsoever” certain acts against detainees captured in a conflict such as murder, mutilation, cruel treatment, torture, and humiliating and degrading treatment. The Conventions also forbid them from carrying out trials and then executing people “without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

In 2002, the United States said that the protections of the Conventions would apply to captured fighters of the Taliban (which it considers an insurgent group), but not to terrorist organizations such as Al Qaeda. But the U.S. Supreme Court decided in 2006 that the Conventions provide “some minimal protection” even to non-state actors such as Al Qaeda, which, according to some government officials, had renounced the Conventions.

Analysts believe that the 2009 Taliban field manual is an updated version of others issued in 2007 and 2006, all of which claim Mullah Omar, the Taliban’s leader, as their author. The 2007 manual, for instance, is a “minutely detailed ‘how to’ book on subjects ranging from tactics and weapons to building training camps and spycraft,” said the Daily Telegraph, which had translated that particular version and refers to it as “Military Teachers—for the Preparation of Mujahideen.” While most of the manual’s 10 chapters cover basic military skills and “is illustrated with simple formulas for the preparation of explosives, pictures, and diagrams of light and heavy weaponry, ammunition, and communication equipment,” it also contains a 30-point code of conduct for commanders and fighters. A translation of the 2006 version obtained by CNN also contains the 30-point code of conduct.

While these manuals call on Taliban fighters to adhere to certain standards when fighting against adversaries, experts generally don’t believe that they will adhere to them. They note that the Taliban had escalated their attacks against civilians and aid workers, among other groups, in the buildup to the recent Afghan presidential elections, which is in direct violation of the Conventions, say observers. 🌐

United States joins Human Rights Council

Garnering the votes of over 85 percent of all UN member states in May 2009, the United States—for the first time—became a member of the UN Human Rights Council. While human rights groups welcomed the U.S. decision to join the Council, they noted that many other nations with poor, even deplorable, human rights records will sit with the United States on that body. Others also question whether U.S. participation in the Council will even enhance the protection of human rights.

Created by the UN in 2006, the Council is responsible not only for promoting universal respect of all human rights and fundamental freedoms, but also for addressing situations of gross and systematic human rights violations, among many other tasks. While the Council may recommend how the UN should respond to these violations, it is not required to do so.

The 47-member Council replaced the Commission on Human Rights, which was also entrusted with reviewing and investigating human rights practices and violations. But critics argued that some of the worst human rights offenders—including the governments of China, Libya, Sudan, and Syria—had joined the Commission to deflect attention away from their own abuses or simply to criticize others for political reasons, which tarnished that body's credibility.

The Council exists apart from other existing UN bodies that deal with human rights. For example, the Office of the High Commissioner for Human Rights is a department within the UN Secretariat responsible for coordinating activities among a score of other human rights offices and committees within the United Nations. The UN Human Rights Committee, on the other hand, is a “body of [18] independent experts that monitors the implementation of the International Covenant on Civil and Political Rights” by UN member nations. The Council, in contrast to these two groups, has a much broader mandate, and its membership consists only of UN member governments who set the agenda and priorities for the group.

While there are no strict criteria for joining the Council—an aspiring member simply needs the support of at least 96 (or half) of all UN member countries—the UN encouraged, but did not require, nations to take into account the human rights practices of countries wishing to join the Council before casting their ballots. Many had hoped that this would discourage governments with poor human rights records from even running.

But as in the case of its predecessor, such nations still continued to win seats on the newly created Council. Political analysts cite two reasons. First, rather than holding elections where countries with the most number of votes become members, analysts such as those at the Heritage Foundation (a conservative think tank) note that the 47 seats on the Council are divided proportionately among five areas of the world—“13 for Asia, 13 for Africa, 8 for Latin America and the Caribbean, 7 for Western Europe and Other States (or WEOG, which includes the United States), and 6 for Eastern Europe.” Because the largest concentration of countries that are considered “not free,” according to groups such as Freedom House, and which also have poor human rights records are all located in the Asia and Africa groups, the Council will most likely have such nations sitting in its ranks at any given time, say political analysts.

Second, observers say that a lack of competition for open seats on the Council allows nations with poor human rights practices to join that body. Governments within each regional group, they claim, decide among themselves which countries will run for election. (A country may decide not to seek Council membership if other nations promise to support its candidacy in another UN body.) So, in many instances, “the number of candidates [in a particular region] was equal to the number of open seats,” noted groups such as Human Rights Watch. In fact, during the last competition in May 2009, “only 20 nations [had] competed for 18 open seats.” Even the United States was certain to win membership to the Council because only three nations (including the United States) had decided to run for the three open seats in the WEOG regional group.

The United States had voted against the creation of the Council in 2006, though it did attend meetings as an “observer” nation. As recently as June 2008, the United States said that the Council had a “rather pathetic record” in protecting human rights. It also pointed out that many Council members had garnered enough support to pass resolutions aimed only at Israel and its treatment of Palestinians while ignoring or downplaying other serious human rights situations around the world.

But the United States in 2009, under a new administration, decided to join the Council. It acknowledged that the Council was a “flawed body that has not lived up to its potential,” but concluded that it was necessary to work “from within [rather than outside] . . . to strengthen and reform the Human Rights Council and enable it to live up to the vision that was crafted when it was created.” Opponents of the Council responded that it “seemed destined to repeat the dismal record of its last three years, even with the U.S. possessing a seat at the table” because current membership standards still allow countries with poor human rights records to join that body.

Still, others hope that another feature of the Council called the Universal Periodic Review (or UPR) will pressure nations to respect human rights. Under the first UPR, which began in 2008 and will continue through 2011, the Council will review the extent to which every UN member nation is carrying out its human rights obligations under the UN Charter, the Universal Declaration of Human Rights, and other human rights treaties. It will do so by examining reports and information submitted by a certain nation under review, and also from independent human rights experts and even nongovernmental organizations.

At the end of a review, the Council issues an “outcome report” to provide comments and recommendations on how a nation can improve its human rights practices. The Council doesn't impose sanctions or other penalties on a government whose outcome report is unfavorable. Some observers claim that such a development could cause embarrassment. The Council will carry out a review of U.S. policies in 2010.

In one of its first official acts, the United States, along with Egypt, sponsored a resolution in September 2009 which called on the Human Rights Council to reaffirm “the right of everyone to hold opinions without interference, as well as the right to freedom of expression.” The resolution also called on all nations to enact measures which would protect these rights and provide remedies to victims whose rights are violated, and also to “respect freedom of expression in the media and broadcasting.” 

United States signs gay rights declaration

Reversing the policy of the previous administration, the United States in March 2009 signed the first statement ever issued by the UN General Assembly concerning gay rights. Sponsored and introduced by France and the Netherlands in December 2008, the “Statement on Human Rights, Sexual Orientation, and Gender Identity” calls on countries to decriminalize homosexuality. Specifically, the non-binding statement (known as a declaration) urges UN member states to “take all the necessary measures, in particular, to ensure that sexual orientation or gender identity may, under no circumstances, be the basis for criminal penalties, in particular executions, arrests, or detention.”

The declaration also says that human rights—such as those specifically listed in the 1948 *Universal Declaration of Human Rights*, the 1966 *International Covenant on Civil and Political Rights*, and the 1966 *International Covenant on Economic, Social, and Cultural Rights*—should apply to all people “regardless of sexual orientation or gender identity.”

Groups such as Human Rights Watch say that lesbians, gays, bisexuals, and transgender (or LGBT) people all over the world face discrimination, and also threats of violence and execution in the almost 80 countries where homosexuality is illegal. Even LGBT people living in countries which have laws protecting them still encounter harassment.

The Bush administration said that it was “opposed to any discrimination, legal or politically,” but claimed that signing the December 2008 declaration could have legally committed the federal government to override individual state laws concerning issues such as gay marriage and other controversial matters. But a review by the Obama administration concluded that “supporting this [UN] statement commits [the United States] to no legal obligations.” One commentator, Prof. Margaret McGuinness of the University of Missouri School of Law, said that the previous government had used federalism as an “excuse” to avoid signing the declaration.

As a general matter, declarations issued by the United Nations are mostly aspirational statements on how nations should address a certain issue which is not specifically covered by a formal international treaty or agreement. Contrary to popular belief, many experts note that the 1948 declaration is an aspirational document which doesn’t have the force of law.

Still others believe that the adoption of a declaration by a large number of nations could, in the future, help lay the groundwork for the negotiation of an actual treaty on a particular subject. For instance, while the 1948 declaration provides an overview of those broad rights which nations should aspire to recognize and respect, the UN member states spelled out specific rights when they negotiated the 1966 covenants. “In the long run,” according to Mark Leon Goldberg, an analyst at the UN Dispatch, “these kinds of [declarations] do help to foster the genesis of new legal norms and new human rights.”

But many expect a long and uphill battle on extending certain human rights protections specifically to LGBT persons. Although the UN High Commissioner for Human Rights, Navi Pillay, claimed that anti-gay laws are “increasingly becoming recognized as anachronistic and inconsistent both with international law

and with traditional values of dignity,” observers point out that, as of October 2009, only 67 of the UN’s 192 member nations had signed the 2008 declaration.

Even within sympathetic nations, public opinion is still divided on the extent to which the government should extend certain rights to LGBT people. The U.S. government, for instance, recently issued a presidential proclamation designating the month of June as Lesbian, Gay, Bisexual, and Transgender Pride Month. In 1998, it issued an executive order prohibiting employment discrimination in federal agencies based on a person’s sexuality and gender identity. But one commentator noted that “there is no federal law to protect gays or lesbians from workplace discrimination” outside of the federal government. 

Racial discrimination review conference: Making a difference?

As part of a decades-long effort, the United Nations in 2001 held a conference in Durban, South Africa, where its member nations discussed ways to fight the scourge of racial discrimination around the world. But a raucous debate about whether conference participants should publicly denounce specific nations, among other controversial matters, overshadowed the proceedings of the Durban conference. Just a few months ago, the UN convened another global meeting where delegates reviewed their progress in fighting racial discrimination since the last conference. What did delegates accomplish at the Durban review conference? Were there any controversies? And what next steps will the UN take in addressing racial discrimination?

Experts say that, since ancient times, racism has led to discriminatory policies and practices where governments and even societies deny groups of people certain rights and protections solely on the basis of their race, color, or national and ethnic origins. Many note that racial discrimination prevents people from obtaining certain jobs, receiving government benefits, living in certain neighborhoods, and fully participating in a nation’s political and cultural activities such as casting a vote or even visiting a park. Such discrimination, historians point out, has often led to racial tensions and conflicts, which threatened not only a nation’s internal stability but also its relations with other countries.

Since the creation of the United Nations in 1945, nations around the world have tried to address racial discrimination. For example, the UN in 1948 unanimously adopted the *Universal Declaration of Human Rights* (or Declaration), which calls on its member states to recognize and observe many broad rights and freedoms. Article 7, for instance, states that everyone is “entitled to equal protection against any discrimination.” But legal experts say that the Declaration is not considered a legally-binding international treaty, and that it also doesn’t provide specific guidance on how nations must prevent racial discrimination.

In the following decades, the UN adopted actual treaties which require nations to recognize and protect specific rights. For example, under the *International Convention on the Elimination of All Forms of Racial Discrimination* (or Convention), which came into force in 1969, a State Party must eliminate racial discrimination within its jurisdiction and promote racial under-



C.V. Starr Lecture

November 4, 2009

The Goldstone Report and the Laws of War: Raising the Bar Too High?



Yuval Shany,
Hersch Lauterpacht Chair in
International Law, Hebrew
University of Jerusalem

Prof. Yuval Shany will discuss the recent report issued by the United Nations Fact Finding Mission on the Gaza Conflict, which, under the direction of Judge Richard Goldstone, investigated alleged violations of international humanitarian and human rights laws during the Gaza conflict last year. He will argue that the report reveals some of the problems in extending the human rights discourse to armed conflict situations. It also illustrates the desire of what he describes as international legal elites to combine international human rights and the laws of war.

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standing through a variety of measures. It must, for example, ensure that its officials and institutions do not practice racial discrimination, and also pass domestic laws which prohibit racial discrimination by any persons, groups, or organizations. In addition, it must amend or revoke existing laws which create or perpetuate racial discrimination.

Furthermore, a State Party must guarantee various rights within its jurisdiction—including equal treatment before the law, political rights, civil rights, the right to marriage, the right to own property, the right to freedom of expression, religion, and thought, and the right to education, training, and housing—without taking into account a person's race, color, or national or ethnic origin. Every two years, a State Party must submit a progress report to the UN on its efforts to implement the Convention.

While the world community generally hailed the passage of the Convention, the UN was well aware that its effectiveness would depend on the continuing efforts of individual nations to carry out their duties in fighting racial discrimination. To carry on its work against racial discrimination, the UN hosted a World Conference to Combat Racism and Racial Discrimination in 1978 and 1983 where government delegates continued their discussions on addressing that problem.

Despite these efforts, the UN said it realized that instances of racism and ethnic violence seemed to be increasing around the world. Long-standing racial animosities had, in part, fueled genocidal conflicts in the former Yugoslavia and Rwanda during the 1990s, claiming the lives of over one million people. It also noted that the use of new technologies such as the Internet helped to disseminate racist materials quickly all over the world, which, in turn, perpetuated racist beliefs and other forms of intolerance. The UN soon concluded that it needed “new tools” to combat racism.

In 1997, the UN General Assembly adopted Resolution 52/111, which called on its member nations to convene a World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance where they would review the progress of global efforts in fighting racism since the adoption of the Declaration and the Convention.

The conference participants in August 2001 produced the *Durban Declaration and Programme of Action* (or DDPA), which was a comprehensive framework of new proposals to combat racism. (The DDPA is not an international treaty which is legally binding on the UN member states nor does it represent an annex to or extension of existing treaties addressing racial discrimination.) It first called on more nations to ratify the Convention and other human rights instruments addressing racism, and also reaffirmed that the primary responsibility in combating racial discrimination remained with the state. It then encouraged them to develop national action plans and take specific measures to fight racism and racial discrimination by “strengthening education, fighting poverty, securing development, [and] improving the remedies and resources available to victims of racism,” among other activities.

Specifically, one provision under the DDPA urged states to use public investments to end poverty, and also encouraged the private sector to increase capital lending in underserved and disadvantaged areas. Another provision called on states to “eliminate the phenomenon popularly known as racial profiling” where law enforcement officers would make a decision to investigate an

individual for, say, criminal activity largely based on his race, color, descent, or national or ethnic origin. The DDPA also called on states to create and implement laws to prevent acts of racism against certain groups of workers, including migrants.

But political observers say other matters had largely overshadowed these efforts and dominated the media coverage for the Durban Conference. For example, while early versions of the DDPA called for monetary compensation for colonialism and reparations for slavery, delegates dropped such language after opposition from the United States and countries in Europe. Instead, the final document stated: “We acknowledge that slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity . . . and further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade . . . and that . . . victims of these acts continue to be victims of their consequences.”

Several governments belonging to the Organization of the Islamic Conference also wanted the DDPA to single out only Israel and denounce its handling of issues concerning the Palestinian people. But the United States and Israel protested these efforts and walked out of the conference. The remaining delegates ultimately dropped such language. Instead, the final DDPA recognized “the inalienable right of the Palestinian people to self-determination and to the establishment of an independent State,” but also affirmed “the right to security for all States in the region, including Israel.” And despite these controversies, the conference delegates adopted the DDPA by consensus.

Others noted that a contentious side conference of several hundred non-governmental organizations (not officially a part of the United Nations) also drew unfavorable media attention when it produced an “NGO Forum Declaration” which alternatively labeled Israel “as a racist, apartheid state,” while also expressing concern “with the prevalence of anti-Zionism and attempts to delegitimize the State of Israel through wildly inaccurate charges of genocide, war crimes, crimes against humanity, ethnic cleansing and apartheid . . .” Analysts point out that Mary Robinson, who was head of the UN Office of the High Commissioner on Human Rights (which organized the Durban Conference), refused to endorse it.

While officials and policymakers generally endorsed the DDPA, others noted that the September 11 terrorist attacks (which occurred three days after the end of the conference) drew the world’s attention away from issues concerning racial discrimination and focused them on counterterrorism efforts.

In February 2006, the UN General Assembly decided to convene a conference to “assess and accelerate progress” on implementing the DDPA, and also to evaluate and address modern forms of racism, racial discrimination, xenophobia, and related intolerance. But as in the case of the 2001 Durban Conference, several political controversies overshadowed the results of this review conference, which took place in April 2009, in Geneva, Switzerland.

Countries belonging to the Organization of the Islamic Conference wanted the final document for the review conference to call on states to prohibit what they broadly described as the “defamation of religion” where individuals strongly criticize or attack different faiths such as Islam. (Analysts say that, since the Sep-

tember 11 terrorist attacks, Muslims and the Islamic faith have become the target of scorn in many nations.) But other countries such as the United States argued that any broadly-worded restrictions could undermine freedom of speech, which is a right guaranteed by several international agreements and also the domestic laws of many nations. Nine countries—Australia, Canada, Germany, Israel, Italy, the Netherlands, New Zealand, Poland and the United States—ultimately declined to attend the review conference due to concerns that the meeting would be used as a platform for anti-Semitic speech and anti-blasphemy laws.

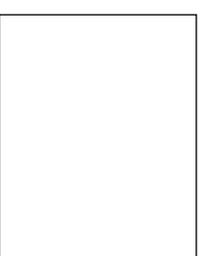
In its explanation, the U.S. Department of State said: “[The review conference] document being negotiated has gone from bad to worse, and the current text of the draft outcome document is not salvageable.” Several commentators argued that attending the review conference would have given legitimacy to the extreme views of some nations. (During the conference itself, many delegates walked out during remarks given by the president of Iran who said that Israel and other nations had “established a completely racist government in the occupied Palestinian territories.”)

On the other hand, conference supporters argued that the presence and efforts of the boycotting nations could have helped to “mitigate unwarranted and unfair language” from the final conference document, and also keep the Conference focused on its main objectives. Navi Pillay, the UN High Commissioner for Human Rights, said in a press release that it was essential to discuss racial discrimination “at a global level, however sensitive and difficult they may be.”

At the end of the review conference, the remaining delegates removed all references to the defamation of religion, and unanimously adopted an “Outcome document,” which contains non-binding and voluntary recommendations on how nations should continue their efforts to fight racial discrimination. Just like the DDPA, it calls on all UN member states to ratify the racial discrimination convention, and also to “punish violent, racist, and xenophobic activities by groups that were based on neo-Nazi, neo-Fascist, and other violent national ideologies.” (But civil liberties groups in the United States have argued that doing so could violate the U.S. Constitution.)

The Outcome document also urges member nations to take specific measures to address racial discrimination such as making “new investments in health care, public health, education, employment, electricity, drinking water, and environmental control to communities of African descent and indigenous peoples.” It also called on states to ensure that “any measures taken in the fight against terrorism are implemented in full respect of all human rights, in particular the principle of non-discrimination,” among many other recommendations.

Despite the efforts of the review conference, political analysts doubt that it alone will help to stop racial discrimination. Some noted that the review conference did not discuss discrimination on the basis of sexual orientation and downplayed the issue of women’s rights. Others said that while some governments had singled out Israel and the Palestinian issue, no one had mentioned the ongoing civil conflict in Sudan between an Arab-dominated north and the non-Arab (and mostly African) south, or the discrimination faced by groups such as migrants, stateless individuals, and caste-based individuals. 



UPCOMING EVENTS

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