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Avast! International law and piracy on the high seas

In this modern day and age, more and more people are associating the term "piracy" with the illegal reproduction and selling of copyrighted works such as digital movies and music, and also software programs. Law enforcement authorities say that such piracy is a worldwide problem which has deprived copyright holders of billions of dollars in revenues. But fewer people realize that the original activities related to piracy—such as robbery carried out on the high seas since times of antiquity—actually remain a problem today in many parts of the world. What parts of the world are affected by piracy and how are countries responding to it? Is there an international treaty that addresses this still nagging problem, and has it been effective?

The problem of piracy

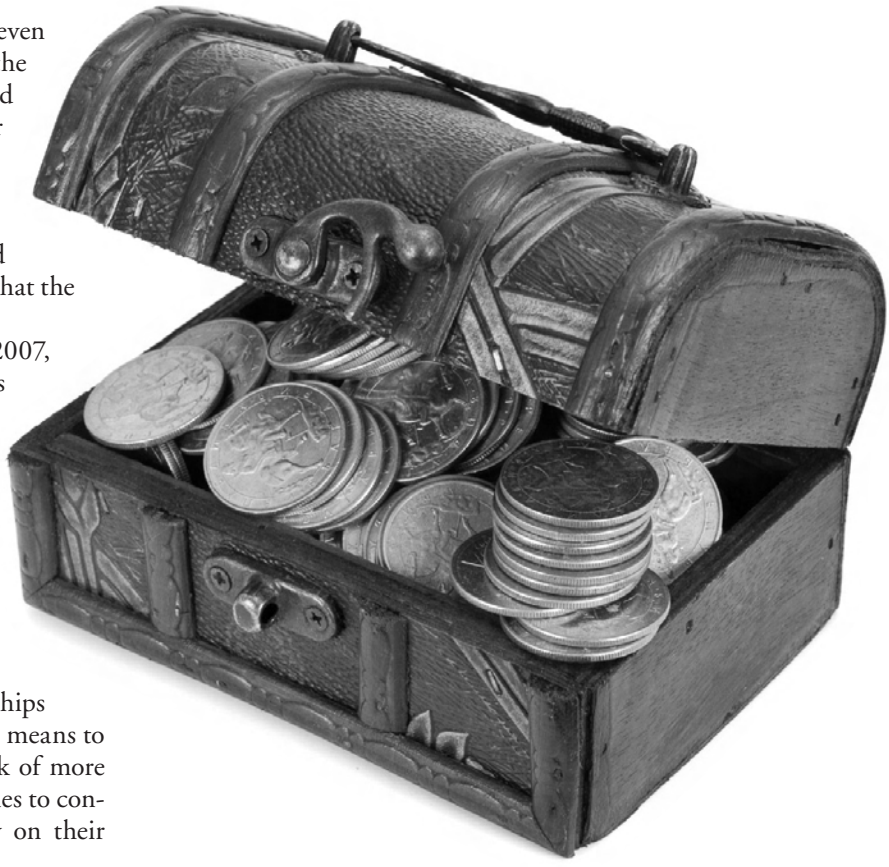
For those who travel the seas—whether as commercial sailors or as leisurely yachtsmen—piracy has always remained a real concern. The International Maritime Bureau (or IMB) reported that, after three consecutive years of steady declines, incidents of piracy had increased by10 percent in 2007. In real numbers, the IMB reported a total of 263 actual and attempted acts of piracy for 2007. During the first quarter of this year, it reported 49 incidents, a number on par with the same period last year. Some maritime experts believe that shipping companies and owners of other private vessels underreport the number of piracy incidents to prevent insurance companies from increasing premium rates. An insurer, Lloyd's of London, had once described the Straits of Malacca (which is between Indonesia and Malaysia) as a "war zone" due to the high rates of piracy in that area.

Piracy causes substantial losses. Analysts note that even with the advent of globalization and the heavy use of the Internet in conducting global commerce, the world economy still depends on maritime shipping to deliver goods. Approximately 90 percent of the world's cargo is transported by ships, according to several reports. When pirates board ships, they steal personal property, cargo, sometimes even entire vessels, and hold crews hostage in exchange for ransom. Experts believe that the costs of piracy total $13–16 billion annually.

While worldwide piracy incidents did increase in 2007, the IMB report attributed this increase to activities occurring mainly near the coasts of Nigeria (with 42 incidents) and Somalia (with 31 incidents). Other pirated areas of the world include Indonesia/Malacca Straits (which constituted 19 percent of worldwide incidents) and India/Bangladesh (at 10 percent). Piracy activities in Nigeria made up almost 16 percent of worldwide incidents in 2007, while Somalia/Gulf of Aden/Red Sea regions constituted 16.75 percent.

The IMB noted that pirates are attacking more ships because they are better armed, organized, and have the means to attack vessels further out at sea. Furthermore, the lack of more vigorous law enforcement measures allows these activities to continue, said the report. Believing that they can carry on their activities with impunity, pirates are increasing their use of violence as well. "The nature of the attacks," said the IMB 2007 annual piracy report, "indicates that the pirates/robbers are better armed and they have shown no hesitation in assaulting and injuring the crew." Some recent pirating incidents as reported by IMB and several news media include the following:

- In September 2008, pirates hijacked a Ukrainian ship (containing weapons such as tanks) almost 200 miles off the coast of Somalia and demanded a $20 million ransom. U.S. warships surrounded the hijacked vessel and are currently in a standoff with the pirates.
- In March 2008, pirates hijacked *Le Ponant*, a 32-cabin French-owned luxury yacht, off the coast of Somalia and demanded a ransom for the return of the ship and its 30-member crew. French military helicopters launched an attack after the pirates had accepted a $2 million ransom and fled to Somalia. Soldiers captured some of the pirates who were later taken to France to stand trial.
- In June 2008, pirates in four speedboats fired on the *MV Hereford Express*, a cattle transport ship sailing in Indonesian waters, for two hours. The ship eventually evaded its attackers. No injuries were reported during the incident, though the ship suffered damage from gunfire.
- In June 2008, heavily-armed pirates ambushed a Cameroonian military patrol along the Nigeria-Cameroon border, injuring many soldiers and abducting several others. Officials say that the pirates continue to hold their hostages.



The legal framework for governing the world's oceans

How have nations addressed incidents of piracy on the world's seas and oceans in contemporary times? Legal experts say that they have mostly turned to the United Nations Convention on the Law of the Sea (or the "Convention"), which has served, since 1994, as the most comprehensive international agreement setting forth the rights and obligations of its signatory states concerning various aspects of the use of the world's oceans. Some of these rights and obligations vary according to a specified location on the world's waterways.

For example, under Articles 2 and 3, a coastal State may exercise its sovereignty (i.e., it may enforce its laws and regulations) over its "territorial sea," which, under the Convention, extends 12 nautical miles (or 13.81 miles) from its coastline. So a State could, for instance, pursue a foreign ship within its territorial waters "when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State," according to Article 111. (Foreign ships are those sailing under the flag of a different country.) Also, if a ship's crew engages in criminal activity on its vessel within the territorial waters of another state, that state may (under Article 27) exercise criminal jurisdiction "if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea."

A country's sovereignty over its territorial sea is, however, not absolute. Under Articles 17-32, foreign vessels have the legal right to navigate through a State's territorial waters as long as its passage "is not prejudicial to the peace, good order, or security of the coastal State." Ships exercising this "right of innocent passage" are prohibited, under Article 19(2), from threatening or using force against the coastal State, exercising or practicing with weapons of any kind, and collecting information that is prejudicial to the defense or security of the coastal State, among other restrictions.

On the other hand, no country may claim jurisdiction over any areas of the high seas, which Article 86 defines as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea, or in the internal waters of a State . . ." Under the Convention, all nations (both coastal and even land-locked) may exercise freedom of navigation, overflight, fishing, scientific research, and other peaceful activities on the high seas "with due regard for the interests of other States." Legal experts also say that a state generally cannot claim jurisdiction over foreign vessels operating on the high seas, and, as a result, cannot board such vessels. Under Articles 95 and 96, for example, warships and those ships owned or operated by a state (and are being used for non-commercial purposes) have complete immunity on the high seas from the jurisdiction of any foreign state, though they are subject to the jurisdiction of its flag State.

The law of the sea and piracy

There are, however, a few exceptions as to when one State's vessel may board a foreign vessel on the high seas. Article 110 states that only a warship (or other ship "clearly marked and identifiable as being on government service") may board a foreign vessel on the high seas when it has reasonable grounds for suspecting that the foreign vessel is improperly flagged, or is engaged in the slave trade, unauthorized broadcasting, or piracy.

Piracy on the high seas is viewed as such a scourge to the international community that the Convention goes well beyond merely authorizing the boarding of ships engaged in piracy. Article 100 imposes a duty on signatory states to cooperate to the fullest extent possible in the repression of piracy. The Convention defines piracy as any illegal acts of violence, detention, or depredation committed for *private ends* by the crew or passengers of a *private ship* and directed against another ship on the *high seas* (or in a place outside the jurisdiction of any State). Article 105 authorizes any State to seize a pirate ship or any ship under the control of pirates and arrest the persons on board. It also says that "the courts of the State which carried out the seizure may decide upon the penalties to be imposed."

Pirates are hijacking more ships because they are better armed, organized, and have the means to attack vessels further out at sea. Furthermore, the lack of more vigorous law enforcement measures allows these activities to continue.

While these measures may seem robust, legal scholars and law enforcement authorities say that recent pirating incidents have highlighted a shortcoming. Again, under the Convention, piracy is limited to those acts committed on the *high seas* or elsewhere beyond any State's jurisdiction. But a wide variety of analysts and experts point out that "the majority of [piracy] attacks against ships take place within the jurisdiction of States" (i.e., in their territorial seas). In deference to state sovereignty, the Convention is silent on how piracy should be defined and combated in a particular State's territorial seas. The hijacking of a Danish cargo ship called the *Danika White* by pirates operating off the coast of Somalia in June 2007 illustrates this shortcoming. After receiving a ransom, the pirates turned over the ship to French authorities and fled to Somalia. An American warship chased the pirates, but ended its pursuit after the pirates entered Somali territorial waters. Under Article 111(3) of the Convention, "the right of hot pursuit ceases as soon as the ships pursued enters the territorial sea . . . of a third state."

Many countries, including the United States, have implemented their own domestic laws prohibiting acts of piracy in their territorial waters, which are enforced by legal authorities such as a coast guard. However, many nations around the world—such as Somalia, which is emerging from a long civil war—don't have an existing capability to curb piracy. In fact, officials say that piracy flourishes in exactly those areas of the world where law enforcement measures have been weak or even nonexistent. How, then, is the international community to respond?

The United Nations: A new model in fighting piracy?

The international community recently attempted to address the tension between curbing piracy and protecting state sovereignty in the case of Somalia where incidents of piracy had increased last year. According to diplomats, the Somali Transitional Federal Government, in February 2008, requested assistance from the United Nations Security Council in fighting piracy in its territorial waters. This request was supported by two UN organizations, the World Food Program (which is charged with delivering badly-needed food aid to Somalia) and the International Maritime Organization (a UN group which overseas maritime safety and pollution).

Ukrainian vessel in September 2008, the Security Council unanimously passed Resolution 1838, which calls on UN member states with "naval vessels and military aircraft operating in the area to use—on the high seas and airspace off the coast of Somalia—the necessary means to repress acts of piracy in a manner consistent with the 1982 United Nations Convention on the Law of the Sea."

But will these resolutions serve as an effective model for fighting piracy in other parts of the world? Some political analysts believe that it is highly unlikely that governments will allow other UN member states to enter their territorial waters to curb piracy. They point out that circumstances in Somalia are unique—the nation had been fighting a civil war since 1991, and is now governed by a transitional government which has difficulty in maintaining security in its own capital. Without a strong central government, Somalia has been unable to patrol its territorial waters, which then allows piracy to continue. On the other hand, nations with stronger governments will most likely guard their sovereignty and refuse assistance from the United Nations. According to media reports, several countries such as Indonesia had narrowed the scope of Resolution 1816 so that it would apply only to Somalia, and would not be used as a justification to enter the territorial waters of other countries without their explicit permission.

Others say that while Resolutions 1816 and 1838 will curb specific instances of piracy, they don't address what they believe are the causes of piracy. Humanitarian groups say that countries such as Nigeria and Somalia (both of which saw the largest increase in pirating incidents last year) share two common characteristics—both countries are plagued by political and economic instability. Rebel groups in Nigeria, for instance claim to have engaged in piracy to promote their political goals and also to force the government to distribute profits from the country's oil industry more equitably. Although the Nigerian government is more stable than its counterpart in Somalia, officials say that it has been unable to combat piracy effectively. Similarly in Somalia, many people claim that the weak central government has been unable to stop illegal fishing by foreign vessels off the coast of that country. Such illegal fishing, they say, has depleted fish populations and dramatically reduced the yields of local fishermen who, in turn, engage in piracy to support themselves.

According to the law of the sea, piracy is limited to those acts committed on the high seas only or elsewhere beyond any state's jurisdiction. But "the majority of [piracy] attacks against ships take place within the jurisdiction of states" such as their territorial seas.

In June 2008, the Security Council approved Resolution 1816, which authorized those States that are cooperating with the Somali Transitional Federal Government to "enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea" and to "[u]se…all necessary means to repress acts of piracy and armed robbery." (The phrase "all necessary measures" commonly refers to the use of force.) The resolution granted this authorization for a period of six months, after which time the Security Council will review the situation in Somalia. And in direct response to pirates who hijacked the

Responding to rising food prices: The limits of international law

Around the world, prices for basic commodities such as corn, eggs, milk, rice, and wheat have increased dramatically—in some cases, by triple digits. This situation has led to rioting in many countries and is threatening economic and political stability in others. While several governments have undertaken various policies—such as rationing and export restrictions—to address this problem, many analysts worry that some of these measures could actually hurt long-term development. Some are also calling on countries to invoke provisions in certain international treaties to help bring down prices. But others believe that the use of international law won't directly address the causes of rising food prices, and will only demonstrate the limits of using law in addressing a complex problem.

Food aid and feeding the world's poor

According to the UN Food and Agriculture Organization (or FAO), there are 850 million people across the globe who are underfed, malnourished, or face starvation. A report from the United Nations concluded that nearly six million children die from "hunger-related illness every year before their fifth birthday," and that under-nutrition itself is responsible for the deaths of half of all children under that age. The UN also noted that the number of malnourished people had increased by 12 million last year.

Although there are food aid programs administered by governments, UN agencies, and many private relief organizations, experts estimate that they reach less than a tenth (or around 73 million) of the total number of people who need food aid. The United States is currently the world's largest *provider* of food aid, supplying more than half of all aid—all of which, in compliance with that country's laws, comes in the form of actual food donations. Since 2002, Congress has allocated around $1.5 to $2 billion a year to buy surplus crops from U.S. farmers and then transport them (largely on private U.S. vessels) to needed locations around the world.

The UN's World Food Program (or WFP), on the other hand, is the world's largest *distributor* of food aid with programs in 78 countries. The WFP receives 40 to 50 percent of its food donations from the United States. Several governments and private donors also provide direct monetary donations so that WFP can buy products as needed in the recipient countries themselves.

A rise in world food prices: Causes and ramifications

The World Bank estimates that overall world food prices have risen over 40 percent during the last year alone, and over 83 percent over the last three years. Prices for individual food staples—including corn, eggs, flour, maize, milk, rice, soybeans, vegetable and cooking oils, and wheat—have increased more dramatically. For instance, the worldwide price of corn and dairy products has doubled, wheat prices have increased 181 percent (its highest level in 28 years), rice is 75 percent more expensive, maize prices are 50 percent higher, and soybeans have risen 87 percent, according to various estimates.

The rate of food price inflation also differs across various countries. It reached 18 percent in China, 13 percent in Indonesia, and 10 percent across Latin America, Russia, and India. (In the United States, food prices will rise four percent this year, said the U.S. Department of Agriculture.) Analysts at organizations ranging from the Congressional Research Service to the World Bank to the FAO point to several factors which they believe are responsible for these price increases. They cite:

- Increasing demand for food from growing economies such as China and India. Some analysts note that the populations in these countries are increasing, for example, their consumption of meat, and, as a result, they are importing more grain to feed their livestock.
- Increasing biofuel production such as corn-based ethanol, which serves as an alternative to petroleum-based products such as gasoline. In the last several years, many industrialized countries such as the United States and members nations of the European Union (or EU) have passed legislation calling for greater use of biofuels. To meet this demand, American farmers have been routing, for instance, more

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corn and maize into biofuel production, which results in a lower supply for human and animal consumption. (Neither rice nor wheat is used to make biofuels.) But experts don't agree on the extent to which biofuels have increased the price of food.

- Poor harvests due to extreme weather conditions across the globe. According to the WFP, heat waves and droughts in Australia, south Asia, Europe, and parts of Africa have slashed agricultural production by up to 98 percent. Catastrophic flooding in close to 60 countries across Asia, Latin America, and Africa has also caused a reduction in agricultural output. "Any unforeseen flood or crisis can make prices rise very quickly," said an FAO official.
- Higher oil prices, which had also reached records levels earlier in the year. Experts say that increases in fuel costs make it more expensive to transport food around the world, and that food manufacturers have passed along these rising costs to consumers. For example, a study by the Government Accountability Office said that 65 percent of the U.S. emergency food aid budget is used to pay transportation costs, and that—over the last five years—these costs "have cut the average tonnage of U.S. food aid delivered in half."
- Use of agricultural subsidy programs where mostly wealthy countries—largely the United States, the EU member states, and Japan—provide hundreds of billions of dollars in subsidies to their farmers who can then sell their products on world markets at more competitive prices. In turn, agricultural producers in developing countries—whose goods are produced at lower costs, and are, therefore, more competitively priced—must sometimes close their operations because they can't compete with subsidized crops from industrialized nations. This results in less food on the world markets, say some economists.

Contrary to popular belief that any one factor—such as biofuel production in the United States and the EU—has been primarily responsible for food price inflation, the FAO Food Outlook Program stated that "there is no one cause, but a lot of things are coming together to lead to this. It's hard to separate out the factors." Experts say that these developments will have two significant ramifications:

Less food for the hungry: The increase in food prices is reducing the amount of food aid that governments and relief organizations can buy and deliver to its recipients (whose numbers are growing around the world). The WFP, for instance, is making an urgent appeal for donations needed to cover a $755 million budget shortfall. (In other words, to buy and deliver *current* food supplies, the WFP needs an *additional* $755 million simply because food and fuel prices have increased so quickly.) One U.S. aid agency also announced that, because of a $120 million budget shortfall, it will be donating less food aid as well. As a way of comparison, the United States bought 5.3 million tons of food in 2000, but that amount dropped to 2.4 million tons last year because of rising food and fuel costs, according to the U.S. Department of Agriculture.

More economic hardship for the poor: With fewer food donations from abroad, those who need food aid must use more of their own resources to buy food. But the United Nations Development Program points out that over 1.1 billion people live on less than one dollar each day, and that increases in food prices will lower their purchasing power (hence, leaving them with less food). Demographic experts say that over 80 percent of the total number of undernourished people live in rural areas where they spend, according to some estimates, close to 70 or 80 percent of their income just to buy food. Food price inflation is even affecting urban areas in many developing countries where people spend up to 30 percent of their income on food. (On the other hand, families in the United States spend an average of 10 percent of their income on food.)

Different approaches in addressing rising food prices

These developments have, in turn, led to social and political unrest. For example, rising food prices led, in part, to the recent ouster of the president of Haiti, and almost toppled the ruling coalition in Malaysia. It also sparked riots in Egypt, Indonesia, Haiti, Mexico, Morocco, Senegal, Uzbekistan, and Yemen, causing many deaths and scores of injuries. The World Bank warned that at least 33 countries face further social unrest as food prices continue to rise.

Most countries have already responded with several short-term measures, though one commentator said that "there are few quick fixes to a crisis tied to so many factors." Some have, for instance, increased their spending on emergency food aid and widened the scope of social service programs. Nearly 20 governments have increased subsidies for basic food items. (Under such an arrangement, the government pays money to food producers to cover the increase in prices. The food producers can, in turn, sell their products for relatively the same prices. But the use of subsidies can quickly drain government revenues.)

Other countries such as Pakistan are rationing certain foods so that people will be able to buy only a certain amount during a set time period. In a World Bank survey, 58 countries are preventing the export of certain foodstuffs while lowering protective tariffs on food imports to provide the public with more food. India and Egypt have banned, for example, the exports of certain rice crops. China added a 20 percent tax to wheat exports. But economists believe that export restrictions actually increase food prices. Still others, including Russia, have frozen the price of certain items, though economists say that this measure can be sustained only if governments provide food producers with subsidies.

The United States government recently proposed that Congress give Executive branch agencies the legal authority to use at least 25 percent of the nation's food aid budget "to buy food in poor countries near hunger crises rather than buying only U.S.-grown food that [has] to be shipped across oceans," which can take months to deliver. "We prefer cash donations as they offer us greater flexibility," said a WFP official. "With cash donations, we can purchase locally . . . and also speed things up." But, according to one commentator, Congress has opposed this idea for the last two years, noting that "agribusiness and shipping interests" would not benefit from such a shift in funds.

Other officials and advocates are urging long-term measures to address rising food prices. For example, some have argued that governments should encourage their farmers to start growing more crops on idle land. (To avoid the overproduction of certain crops, which could lead to lower prices, some governments pay their farmers not to grow on their land.) While this won't bring down food prices immediately, some economists believe that it could relieve price pressures in the long term. Others have called on industrialized countries to scale back their production of ethanol so that more corn and maize will be available for human consumption. But there is still a debate as to whether this approach will actually work. Some analysts point out that food manufacturers are passing along the costs of rising fuel prices to consumers, which could then offset any reduction in food prices through decreases in ethanol production.

In another approach, development agencies such as the World Bank are calling on the world community to help developing countries (especially those in Africa) increase and sustain their own agricultural sectors by using a combination of agricultural technology, funding, and techniques (in a self-described "green revolution"). As part of this plan, the International Fund for Agricultural Development said that it will provide $200 million to help farmers in developing countries increase their agricultural output. The World Bank also introduced a plan to increase food productivity (called a "New Deal on Global Food Policy") by doubling agricultural lending to Sub-Saharan Africa to $800 million.

Still others, including many government officials, have called on industrialized countries to reduce the extent to which they subsidize their agricultural sectors. Doing so, they believe, will allow farmers in developing countries to compete on a more equal footing in world markets and also give them more incentive to increase their agricultural output. The member nations of the World Trade Organization (or WTO) did hold negotiations to reduce the use of agricultural subsidies. But the WTO recently suspended these talks after its member nations were unable to reach agreement in other areas of trade.

International law: An effective way to fight food inflation?

In addition to the previous approaches, some humanitarian advocates have called on the international community to enforce an existing principle called the "right to food," which they hope will push governments to take legal measures in addressing rising food prices. There is currently no international treaty or stand-alone legal doctrine that deals solely with a right to food, say legal analysts. For instance, the Universal Declaration of Human Rights mentions, among many other rights, 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 . . ." But legal experts note that this document—adopted by the United Nations General Assembly in 1948—is not an international treaty with legally binding commitments. Rather, the declaration simply lists those rights which its signatory nations should aspire to establish and protect within their respective jurisdictions.

Humanitarian advocates have called on the international community to enforce an existing principle called the "right to food," which they hope will push governments to take legal measures in addressing rising food prices.

Instead, the term "right to food" is largely associated with an existing treaty called the International Covenant on Economic, Social, and Cultural Rights (or the "Covenant"), which calls on its signatory nations to recognize and protect a variety of rights within their own jurisdictions (including the right to work in safe conditions, form trade unions, and receive social insurance, primary education, and parental leave, among other rights) through the passage of legislative measures. In relation to food, Article 11(1) of the treaty requires its signatory nations "to recognize the right of everyone to an adequate standard of living for himself and his family, including *adequate food*, clothing, and housing," and that they "take the appropriate steps to ensure the realization of this right."

The UN Committee on Economic, Social, and Cultural Rights (or the "UN committee"), which currently monitors the implementation of the Covenant, said that the phrase "right to adequate food" encompasses more than just a "minimum package of calories, proteins, and other specific nutrients" needed by individuals for normal development. Instead, it said that this term includes the extent to which food is economically and physically available to people. Food is economically accessible if the financial costs for obtaining food do not threaten or compromise "the attainment and satisfaction of other basic needs." Food is considered physically accessible if it is available to a wide range of people, including those with disabilities.

According to an interpretation published by the UN committee, signatory nations have three obligations under Article 11. First, they must not undertake "any measures that result in preventing" access to adequate food. Second, nations must ensure that "enterprises or individuals do not deprive [other] individuals of their access to adequate food." Third, states must "pro-actively engage in activities intended to strengthen people's access" to adequate food, which could include efforts by governments to provide direct food aid in the case natural disasters, for instance. (Under the Covenant—

which has been in force since 1976—countries are not expected to safeguard the right to food outside of their boundaries.)

According to the UN committee, a violation of Article 11 occurs when a state takes deliberate actions which it knows could deny people the right to adequate food. Some activities carried out by states which could violate the right to adequate food include, but are not limited to, the following:

- "prevention of access to humanitarian food aid in internal conflicts or other emergency situations;
- "adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to the right to food;
- "failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others; and
- "food embargoes or similar measures which endanger conditions for food production and access to food in other countries."

If a signatory country violates the right to adequate food, the UN committee said that individuals and groups "should have access to effective judicial or other appropriate remedies," and that such victims should also receive "adequate reparation." As of September 2008, 149 countries have ratified the Covenant, meaning that their legislatures have formally agreed to abide by its terms. While the United States did sign the Covenant in 1977, it has not yet ratified that document.

Limits of international law in addressing rising food prices

Analysts say that the use of international treaties such as the Covenant can play some role in addressing those factors and policies which have contributed to an increase in the price of foods (and over which people have some degree of control). While these measures may not bring down prices quickly, it could lower the rate at which they have increased in recent years.

In the case of government-supported ethanol production, for instance, many advocacy groups have argued that the diversion of certain crops to make ethanol has quickly increased food prices, thus making it more difficult for consumers to have access to food. Such ethanol production could, under the Covenant, be viewed as a violation of a country's obligation not to undertake measure preventing access to food. To come into compliance with the Covenant, governments can—through the passage of legislation—modify or reduce those incentives which have encouraged the production of ethanol. "It is one area where a reversal of government policy could help take pressure off food prices," said one commentator.

Many have also argued that the use of agricultural subsidies by industrialized nations violates the right to food by discouraging domestic crop production in developing countries, which, in turn, decreases the supply of and access to food (and could then be viewed as a possible violation of the Covenant). One way for these countries to come into compliance with their obligations under the Covenant, say opponents of subsidies, is to reduce the use of agricultural subsidies through negotiations taking place at the WTO. But, as mentioned before, the WTO recently suspended those negotiations.

Still others believe that food aid programs which require beneficiary nations to accept direct food (instead of monetary) donations could violate the Covenant. According to an interpretation of the Covenant issued by the UN committee, "food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food self-reliance of the beneficiaries." Some experts believe that food aid programs administered by the United States, for example, prevent the development of self-sustaining agricultural sectors in the recipient countries by forcing them to accept only direct food donations, which can then compete directly with domestically-grown products. In order to comply with the terms of the Covenant, the United States would have to restructure its food aid program by allowing more monetary donations, which can, in turn, help to increase food production in beneficiary nations (in the views of some advocates).

What are some of the shortcomings of using the Covenant to help lower food prices? First, the provisions of the Covenant are unenforceable. The United Nations, for instance, does not impose penalties on countries that do not comply with their obligations under that treaty. While the Covenant calls on countries to recognize a right to food and to create some judicial mechanism to enforce that right, many have simply not taken this step. One human rights group pointed out that only a "few states specify [this right] within their own constitutions." The FAO currently lists only 20 countries (all of which are developing nations) that mention a right to food in their national constitutions. But one scholar said that, even in these cases, "there is practically no elaboration in detailed statutes of distinct nutritional rights, and no legal enforcement."

Second, the Covenant itself doesn't provide any numerical criteria or explicit standards to determine whether a certain policy violates the right to food. So while there is, for example, general agreement that the diversion of maize to ethanol production has contributed to an increase in the price of that commodity, there is no standard in the Covenant showing at what point the diversion of maize had violated the right to food. (One political analyst argued that it would be almost impossible to reach a consensus among the various signatory countries in setting such standards and criteria.)

The use of international treaties such as the Covenant can play some role in addressing those factors and policies which have contributed to an increase in the price of foods . . . But contrary to popular belief, no one factor has been primarily responsible for food price inflation.

C.V. Starr Lecture

October 15, 2008

Atrocity, Punishment, and International Law

Mark A. Drumbl,
Class of 1975
Alumni Professor; and
Director, Transnational Law Institute, Washington and Lee University School of Law

In the last few decades, large-scale atrocities in Bosnia, Kosovo, Rwanda, and now Darfur have claimed the lives of over a million people. Through the development of international criminal law, the world community has prosecuted many individuals for carrying out these atrocities. But Professor Mark Drumbl will challenge the notion that the punishment of extraordinary international crimes should uncritically adopt the methods and assumptions of ordinary criminal law. Crimes such as genocide, he believes, are simply not the same as common crimes.

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

Third, there are some practical difficulties in fully implementing the Covenant. For example, under that treaty, states must "*pro-actively* engage in activities intended to strengthen people's access" to food. But a political analyst said that it would be difficult to vet what could be a mountain of disparate (and even unrelated) government programs to determine whether they are

The Department of Agriculture recently announced that "U.S. consumers should brace for the biggest increase in food prices in nearly 20 years in 2008, and even more pain next year" when they are expected to rise by almost five percent.

in compliance with (or even unintentionally violate some aspect of) the right to food. Others also believe that it will be politically difficult for a country to implement the right to food without implementing a host of other heavily demanded rights such as a right to education and housing, among others. And implementing these particular rights—through the creation of new programs—could strain the limited resources for most countries.

Many other international forums have also tried to address questions concerning food and hunger. For instance, the UN issued its Millennium Declaration in 2000 which called on its member states "to halve, by the year 2015, the proportion of the world's people whose income is less than one dollar a day and the proportion of people who suffer from hunger . . . ," among other laudable goals. To complement various international efforts, the FAO, in 2004, issued a report on what measures nations should undertake to implement the right to adequate food. Some include raising awareness of proper nutrition and establishing food safety nets for vulnerable populations. In May 2008, the Human Rights Council—which is the UN body charged with promoting human rights and investigating their abuses—called on governments "to take all necessary measures to ensure the realization of the right to food." The UN also sponsored a Food Security Summit in June 2008 where delegates urged greater assistance for developing countries. But these guidelines and declarations were largely voluntary.

Given the complexity behind food price inflation, some simply hope that world markets and crop production will eventually adjust themselves to bring prices back down. In fact, prices for some commodities such as rice and wheat have decreased in recent months, though they are still higher than last year's prices. Also, in August 2008, the U.S. Department of Agriculture announced that the United States was going to produce its second largest yield of corn and its fourth largest soybean crop. Many also believe that extreme weather patterns will not persist throughout the world, and that normal crop production should resume once again. Despite these encouraging developments, the Department of Agriculture recently announced that "U.S. consumers should brace for the biggest increase in food prices in nearly 20 years in 2008, and even more pain next year" when they are expected to rise by almost five percent.

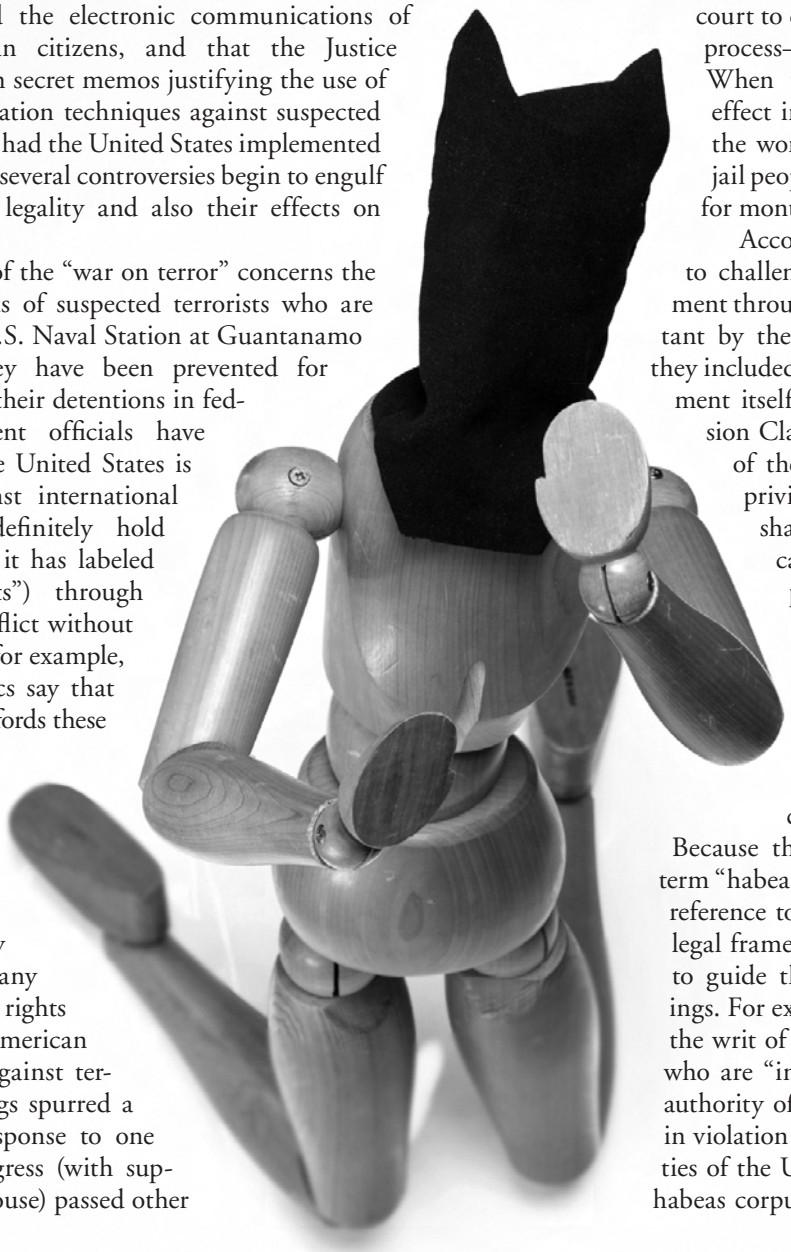
Upholding a safeguard in the "war on terror": The right to challenge government detention

Since the 9/11 attacks carried out by the terrorist network Al Qaeda, the United States has employed a variety of measures to fight international terrorism. It has, for instance, deployed its military firepower by invading Afghanistan, which Al Qaeda had used as a base of operations. The United States is also using financial tools to curb terrorism. It currently restricts uncooperative banks with weak anti-money laundering laws from accessing the U.S. financial system. The United States has also employed a broad array of legal measures.

Under the PATRIOT Act, for instance, the government implemented enhanced surveillance practices, new immigration procedures, and stronger criminal laws to thwart terrorist attacks. It also acknowledged that the National Security Agency had secretly monitored the electronic communications of thousands of American citizens, and that the Justice Department had written secret memos justifying the use of highly coercive interrogation techniques against suspected terrorists. But no sooner had the United States implemented these measures than did several controversies begin to engulf them concerning their legality and also their effects on civil liberties.

Another component of the "war on terror" concerns the legal rights of hundreds of suspected terrorists who are being detained at the U.S. Naval Station at Guantanamo Bay, Cuba, where they have been prevented for years from challenging their detentions in federal court. Government officials have argued that because the United States is currently at war against international terrorism, it can indefinitely hold these detainees (whom it has labeled as "enemy combatants") through the duration of the conflict without having to charge them, for example, with a crime. But critics say that the U.S. Constitution affords these detainees certain rights such as challenging their detentions.

Beginning in 2004, the United States Supreme Court had issued several noteworthy decisions which, in many instances, upheld certain rights of people held in American custody in the battle against terrorism. But these rulings spurred a legal tug-of-war. In response to one particular ruling, Congress (with support from the White House) passed other measures continuing to restrict their rights. This, in turn, spurred further legal challenges and ultimately drew in the involvement of the Supreme Court again. In its most recent decision, the Supreme Court ruled that detainees held in Guantanamo Bay had a constitutional right to habeas corpus, and that a law which prohibited federal courts from ruling on the legality of these detentions was unconstitutional.



Habeas corpus at home: A cornerstone of justice

When individuals are detained by government authorities *within* the United States, they may challenge their detentions by filing a petition for a "writ of habeas corpus," which is simply a judicial order to bring a prisoner before a court to determine—through an established process—the legality of his detention. When the U.S. Constitution came into effect in 1789, many governments around the world (and even several today) would jail people, particularly political opponents, for months or years without charges.

According to legal historians, the right to challenge one's detention by the government through a court was considered so important by the framers of the Constitution that they included this right in the body of that document itself. Popularly known as the Suspension Clause, Article I, Section 9, Clause 2, of the Constitution simply reads: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Today, said one legal expert, "judicial review of executive detention is not limited to common law jurisdictions. This principle is enshrined in the constitutions of nearly every country in the civilized world."

Because the Constitution doesn't define the term "habeas corpus," and makes no other direct reference to it, the U.S. government created a legal framework (embodied in 28 U.S.C. 153) to guide the writ's application and proceedings. For example, 28 U.S.C. §2241 states that the writ of habeas corpus extends to prisoners who are "in custody under or by color of the authority of the United States" or "in custody in violation of the Constitution or laws or treaties of the United States." Though the right to habeas corpus is viewed as a cornerstone in the

fair administration of justice, a legal commentator noted that the Supreme Court had upheld laws that provided "alternatives to habeas corpus as long as those alternatives are 'both adequate and effective,'" and also if these substitutes "offered remedies commensurate with those that prisoners could receive from a traditional writ."

Habeas corpus abroad: On uncertain ground

Although analysts broadly agree that individuals (whether they are American citizens or even foreigners) may challenge the legality of their detentions by government authorities *within* U.S. territory, there is a running debate in legal circles as to whether non-citizens detained by American authorities *outside* of U.S. borders have a right to file a habeas corpus petition to challenge their detentions.

Soon after it had invaded Afghanistan, the U.S. armed forces captured and detained thousands of individuals whom they believed were foreign fighters and terrorists. After labeling these detainees "enemy combatants," U.S. military officials transferred them to Guantanamo Bay where the United States maintains a naval station. (Under the terms of a lease signed with Cuba in 1903, that country retains "ultimate sovereignty" over the base simply because it owns the underlying territory.)

Military experts say that, during times of international armed conflict, warring parties have historically seized and detained enemy combatants until the end of hostilities. They say that these measures serve essential military objectives such as collecting intelligence about future enemy operations and preventing enemy soldiers from taking up arms again. Very few people have called on warring states to provide captured enemy combatants (held in or near active combat zones) with lawyers to challenge their detentions. But many note that Guantanamo Bay is different from other military detention centers because it is far away from any battlefields.

The U.S. government said that it would indefinitely hold these foreign detainees through the duration of what it described as a "war on terror." Neither international law nor the Constitution "[guaranteed] captured enemy combatants an automatic or immediate right of access to counsel" to contest their detentions, it argued. Doing so, said one official, would "interfere with the military's compelling interest in gathering intelligence to further the war effort."

In July 2002, relatives of several Guantanamo Bay detainees tried to challenge the legality of their detentions by filing habeas corpus petitions in federal court. They argued that these particular detainees were not terrorists fighting against American forces in Afghanistan, and that they were, in fact, accidentally captured *en masse* during military operations in that country. But the government challenged their right to file these petitions, arguing that federal courts did not even have jurisdiction under existing statutes to consider habeas petitions filed by non-citizens outside of sovereign U.S. territory (in this case, Guantanamo Bay, Cuba).

But critics responded that existing federal statutes at the time (such as 28 U.S.C. §2241) seemed to extend that right to aliens under U.S. custody even outside of its borders. For example, §2241(c)(1) states, in part, that habeas corpus extends to a prisoner if "he is in custody under or by color of the authority of the United States." So although the detainees were physically located outside of the United States, critics note that they were still being held under the full authority of that country's government whose powers are regulated and limited by the Constitution and various statutes.

In June 2004, the United States Supreme Court ruled (in a 8-1 decision called *Rasul v. Bush*) that federal courts did have jurisdiction—under particular *statutes* that had existed at the time of the decision—to consider habeas corpus petitions filed by the relatives of the foreign detainees held in Guantanamo Bay. In other words, the petitioners had a statutory right to habeas corpus. (The Supreme Court, on the other hand, did not examine whether the foreign detainees at Guantanamo Bay had a *constitutional* right to that writ.)

> According to legal historians, the right to challenge one's detention by the government through a court was considered so important by the framers of the Constitution that they included this right in the body of that document itself.

Eliminating habeas corpus in the "war on terror"?

In response to the Supreme Court's decision, Congress (with support from the Executive branch) passed a series of laws which explicitly restricted the ability of the federal courts to consider habeas corpus petitions filed by foreign detainees under American custody outside of U.S. borders who were allegedly captured in the "war on terror."

Detainee Treatment Act (or the DTA): This law, passed in December 2005, amended the habeas corpus statute so that a court would no longer have jurisdiction to consider a habeas corpus petition filed specifically by detainees in Guantanamo Bay. The amended law stated that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba."

In place of a habeas corpus review traditionally carried out by a court, the DTA created "Combatant Status Review Tribunals" (or CSRTs), which would "determine, in a fact-based proceeding, whether the individuals detained . . . [were] properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation." But unlike a habeas proceeding, a detainee who challenges his designation during tribunal proceedings couldn't be represented by a lawyer or submit new evidence. And while a detainee may appeal a tribunal's ruling to the U.S. Court of Appeals for the District of Columbia Circuit, that court

must still "defer to the tribunal's factual findings," according to the DTA's provisions. Once a detainee loses his appeal, American authorities say that they will hold him at Guantanamo Bay as an enemy combatant until the end of hostilities.

In creating the tribunal and its procedures, a spokesman said that the government "did not suspend habeas corpus [per se], but instead provided a new way for it to be exercised." Another spokesperson, in describing these new procedures, said: "The government is saying, 'Look, we're not denying anyone's chances to get habeas. We're just providing a different way.'"

Military Commissions Act (or the MCA): The MCA, passed in October 2006, made further changes to the federal habeas corpus statutes. While the DTA removed the jurisdiction of federal courts to consider habeas corpus applications filed by non-citizens detained at Guantanamo Bay only, the MCA (specifically §7) removed the jurisdiction of federal courts in considering habeas corpus applications submitted by *all* aliens designated as enemy combatants who were in American custody *anywhere* in the world. (Legal experts say that the term "aliens" even included non-citizens within the United States such as legal permanent residents.)

Although Congress had amended the habeas corpus statutes in direct response to the earlier Supreme Court decision, that court would soon review the legality of those changes.

Boumediene v. Bush

In October 2001, authorities in Bosnia apprehended Lakhdar Boumediene (at his home) and five other individuals after believing that they were going to bomb the American embassy in Sarajevo. They denied those allegations and also any involvement with Al Qaeda or any other terrorist organization. Although a Bosnian court later released Mr. Boumediene and the other men for lack of evidence, the police handed them over to U.S. military officials in January 2002 who designated them as enemy combatants subject to indefinite detention until the end of the "war on terror." The men—who were soon transferred to Guantanamo Bay—were also never charged with committing any crimes or other offenses.

Lawyers for Mr. Boumediene and the other men challenged their detentions, arguing that they had a constitutional right to habeas corpus, and that the CSRT process under the DTA did not provide an adequate substitute for that right. In February 2007, an appeals court concluded that, under MCA §7, it did not have jurisdiction to hear the case. It also ruled that the plaintiffs did not have a constitutional right to habeas corpus. As a result, it would not even decide whether the DTA and CSRT proceedings provided an adequate substitute for habeas corpus. The petitioners appealed this decision to the Supreme Court, which decided in June 2007 to hear the case.

Arguments made by the petitioners: Because Guantanamo Bay is operated under the "complete jurisdiction and control" of the United States (as quoted from the majority opinion in the Supreme Court decision *Rasul v. Bush*), the petitioners said that the Constitution applied to them, including its various protections such as the right to habeas corpus. (So even though the government had amended its habeas corpus *statutes* specifically to prevent the petitioners from even challenging their detentions

in a court of law, the Constitution—which is "the supreme law in the land"—still afforded them that particular right anyway.)

The petitioners then argued that by eliminating the jurisdiction of federal courts to review their petitions, MCA §7 had wrongly taken away their constitutional right to habeas corpus, which—according to the Constitution—Congress may suspend only in cases of rebellion or invasion. Neither situation had existed before their confinement to Guantanamo Bay, said the petitioners. And after having taken away that writ, argued the petitioners, Congress did not provide them with an adequate substitute to challenge their detentions. Habeas review, they said, usually provides "core procedures and remedies" such as an opportunity to present and rebut evidence, the power for a tribunal to order a release from unlawful detention, and the right to counsel. The CSRT process in the DTA did "not provide [these] essential protections," and, hence, was an inadequate substitute for habeas corpus, the petitioners claimed.

Establishing a constitutional right to habeas corpus: The majority opinion first rejected the government's argument that the Constitution did not apply to Guantanamo Bay simply because, under the terms of the 1903 lease, Cuba retained "ultimate sovereignty" over that territory. It concluded that, in actual *practice*, the United States exercised sovereign control over Guantanamo Bay, and that such control could, therefore, entail the application of certain Constitutional provisions to that territory. The majority noted that the United States had historically extended the reach of the Constitution to various territories it had acquired overseas (though it had *not* done so automatically).

The majority then argued that, in order to maintain the separation of powers (which prevents one branch of government from gaining too much power), it alone had power to decide whether the right of habeas corpus extended to the petitioners detained at Guantanamo Bay. "The Constitution,"

Congress passed a series of laws which explicitly restricted the ability of the federal courts to consider habeas corpus petitions filed by foreign detainees under American custody outside of U.S. borders who were allegedly captured in the "war on terror."

Arguments made by the government: The government argued that the petitioners did not have a constitutional right to habeas corpus because they were foreign nationals who were detained outside of American borders. (The government had made the same argument in *Rasul v. Bush* where it argued that foreign nationals detained outside the country by American authorities did not have a right under existing *statutes* to habeas corpus. That case, though, did not examine whether the petitioner had a *constitutional* right to habeas corpus.)

The government said that even if the petitioners could prove historically that they had habeas corpus rights, "Congress has afforded them a constitutionally adequate [legal system] for challenging their detentions" as embodied in the provisions of the DTA. In fact, the petitioners "enjoy[ed] more procedural protections than any other captured enemy combatants in the history of warfare," claimed the government. It also said that this substitute for habeas corpus represented "an effort by the political branches to strike an appropriate balance between the need to preserve liberty and the need to accommodate 'the weighty and sensitive governmental interests in ensuring that those who have, in fact, fought with the enemy during a war do not return to battle against the United States.'"

The Supreme Court's decision

In June 2008, the Supreme Court ruled, in a 5-4 decision, that the petitioners in Guantanamo Bay had a constitutional right to habeas corpus. "We hold that [habeas corpus] has full effect at Guantanamo Bay," declared the majority opinion. While it was aware that the United States faced a grave threat from international terrorism, the Court maintained that "the laws and Constitution are designed to survive, and remain in force, [even] in extraordinary times."

it said, "grants Congress and the President the power to acquire, dispose of, and govern territory [including Guantanamo Bay], not the power to decide when and where its terms apply," which is a function belonging to the courts. It also warned that "the test for determining the scope of [habeas corpus] must not be subject to manipulation by those whose power it is designed to restrain."

In determining whether the Guantanamo Bay detainees had the specific constitutional right of habeas corpus, the Court considered the following factors—(i) the status of the detainees and the adequacy of the process which determined their status, (ii) the nature of the detention site, and (iii) "practical obstacles" which would prevent the application of habeas corpus. After considering these factors, it determined that the Guantanamo detainees did have a constitutional right to habeas corpus.

It first noted that both their status as "enemy combatants" and even the adequacy of the CSRT proceedings were in dispute. Second, while the site of their detention was outside of the United States, the Court determined that the American government exercised "absolute and indefinite control" over that territory. "In every practical sense," ruled the Court, "Guantanamo is not abroad; it is within the constant jurisdiction of the United States." Finally, the court said that while it was sensitive to the possible financial and administrative costs of applying habeas corpus to a military detention center abroad (which could "divert the attention of military personnel from other pressing tasks"), it concluded that the government presented "no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims." The detainees, noted the Court, were "contained in a secure prison facility located on an isolated and heavily fortified military base" far from any combat zones.

Deciding an issue not addressed by the appeals court: After determining that the petitioners at Guantanamo Bay did have a constitutional right to habeas corpus, the Court said that it would have normally remanded the case back to the appeals court which would then decide whether the DTA and CRST proceedings provided an adequate substitute for habeas corpus, but only after a petitioner had gone through an entire DTA proceeding. (Again, the appeals court did not make that determination in February 2007, arguing that the petitioners did not even have a constitutional right to habeas corpus. Also, none of the petitioners had yet gone through an entire DTA process. In fact, the majority opinion stated that "in other contexts and for prudential reasons, this Court [had] required the exhaustion of alternative remedies [including a process embodied in the DTA] before a prisoner can seek federal habeas relief.")

Instead, because many of the petitioners had waited for as long as six years to challenge their detentions, and because a further review at an appeals court could take many more years, the majority deemed the current case "exceptional" and said that it would decide the adequacy of the DTA and CRST process as a substitute for habeas corpus. "To require these detainees to complete DTA review . . . would be to require additional months, if not years, of delay," said the Court.

Declaring the Military Commissions Act §7 unconstitutional: In its decision, the Court determined that provisions in the DTA did not (in its view) provide the current petitioners with an "adequate and effective substitute for the habeas writ." The Court argued that its past decisions addressing habeas substitutes "were attempts to streamline habeas relief, not to cut them back." It noted that the statutes in question in those previous cases "included savings clauses to preserve the habeas review as an avenue of last resort."

But in the current case concerning the DTA and MCA, the Court determined that it was the intent of Congress to limit habeas review proceedings by the courts "as is evident from the unequivocal nature of MCA §7's jurisdiction-stripping language," and from the "DTA's text limiting the Court of Appeals' jurisdiction . . ." It also pointed out that "there has been no effort to preserve habeas corpus review as an avenue of last resort. No savings clause exists in either the MCA or the DTA."

Given these initial findings, the Court said that the CSRT faced a "considerable risk of error" in reviewing the enemy combatant status of a detainee, and that "the consequence of error may be detention for the duration of hostilities that may last a generation or more." Such a risk, said the Court, was "too significant to ignore." So it decided to undertake a review of the DTA and CSRT process. (In other words, even though not a single petitioner had yet gone through an entire CSRT process, the Court said that—on its face—the proceedings seemed prone to error, and, hence, merited a review.)

While the Court did not "endeavor to offer a comprehensive summary of the requisites for an adequate habeas substitute," it said that such a substitute must have, among other powers, "the means to correct errors that occurred in the CSRT proceedings," "the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding," and the authority to issue "an order directing the prisoner's release."

Upon closer examination, the Court determined that the DTA and CSRT review process did not provide an inadequate substitute for habeas corpus for the Guantanamo detainees. It agreed with the petitioners that, under the existing process, a detainee "[had] limited means to find or present evidence to challenge the Government's case, [did] not have the assistance of counsel, and [wouldn't] be aware of the most critical allegations that the Government relied upon to order his detention."

As a result, MCA §7—which again was the most recent legislation that prevented the federal courts from reviewing the petitioners' habeas corpus petitions—was unconstitutional. Not only did the government take away the newly-affirmed habeas corpus rights of the petitioners under circumstances which did not exist (in cases of rebellion or invasion), its alternative was an inadequate substitute. The Court then said that, given the inadequacy of the DTA and CSRT proceedings, the petitioners in the current case were entitled to file a habeas corpus petition immediately with a federal district court to challenge their detentions.

Upholding the DTA and CSRT proceedings: Although it had decided that the DTA and CSRT proceedings were an inadequate substitute for habeas corpus in the case of the Guantanamo detainees only, the majority opinion did not strike down the proceedings themselves as unconstitutional since no one petitioner had even gone through an entire proceeding. (Again, the Court believed that the Guantanamo case was exceptional because, in its view, the petitioners' had faced "undue delay" in challenging their detentions.) The Court said that, at this time, "both the DTA and the CSRT process remain[ed] intact," and that it made "no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards . . ."

Moreover, the Court said that "the Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition," and that the "federal courts should refrain from entertaining an enemy combatant's habeas corpus petition at least until after the [Defense] Department, acting via the CSRT, has had a chance to review his status." But once a future petitioner has gone through CSRT proceedings, it would be possible for later courts to determine whether those proceedings had truly provided an adequate substitute for habeas corpus.

The dissenting opinion

In its dissent, the minority opinion said that an appeals court (and not the Supreme Court itself) should have first determined the adequacy of the DTA process as a substitute for habeas corpus, noting that an appeals court had not yet even ruled on that issue. "Remarkably, this Court does not require petitioners to exhaust their remedies under the [DTA] statute; it does not wait to see whether those remedies will prove sufficient to protect petitioner's rights," it said. And the only way to assess whether the DTA provided an adequate substitute for habeas corpus, it believed, was to allow the proceedings to run its course first. "The only way to know [whether the CSRT proceedings are sound] is to require petitioners to use [those] alterative procedures," argued the minority. "Our precedents have long counseled us to avoid deciding such hypothetical questions of constitutional law."

The minority opinion also criticized the Court for finding that the Constitution gave the Guantanamo petitioners a right to habeas corpus even before it had determined whether the CSRT proceedings provided an adequate substitute for that right. "It rushes to decide the fundamental question of the reach of habeas corpus when the functioning of the DTA may make that decision entirely unnecessary," it said.

It also criticized the majority opinion for determining that the CRST process did not provide an adequate substitute for habeas corpus, yet leaving it in place. The minority opinion asked, for instance: "What, for example, will become of the CSRT process?" and also "To what deference, if any, is that CSRT determination entitled?"

Implications of the decision

Upon the release of the Court's opinion, many human rights and civil liberties advocates expressed hope that the petitioners would, for example, be released right away and that other detainees in American custody around the world would soon follow their paths.

But legal analysts point out that the Court's decision applied only to the petitioners at Guantanamo Bay who had filed habeas corpus petitions (which currently number around 250), and not to other detainees possibly designated as "enemy combatants" in other locations worldwide. Even in its majority opinion, the Court said that "in cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody." In addition, the Supreme Court's decision did not say whether the Guantanamo Bay detainees were entitled to other specific protections afforded by the Constitution beyond the newly-affirmed right to habeas corpus.

Furthermore, the decision does not immediately free the petitioners being held at Guantanamo Bay. A federal district court will now—on a case-by-case basis—consider whether the government is legally justified in holding a particular detainee. One legal expert said: "Habeas is not a 'get-out-of-jail' card. It just provides a fair, legitimate, and independent sorting process to determine who should and should not be held."

Analysts further note that this decision doesn't affect a controversy concerning the use of special military commissions (or tribunals) by the United States. Guantanamo Bay detainees who are ultimately confirmed as enemy combatants will be held on that territory until the end of hostilities in the "war on terror" or until the United States determines that they pose no security risk. On the other hand, detainees who have been accused of committing war crimes (which number around 60 individuals) could be tried in special military commissions explicitly established by Congress in October 2006, and not in traditional military courts (called courts-martial) or federal court. (Enemy combatants *cannot* be put on trial for simply fighting in a war.)

But human rights groups have argued that provisions in several international treaties require the United States to use the same courts it would use to prosecute its own combatants for committing war crimes (which are courts-martial). Other critics say that commission rules will allow hearsay and, under certain circumstances, the admission of evidence obtained under torture, all of which could violate the terms of international treaties such as the Geneva Conventions.

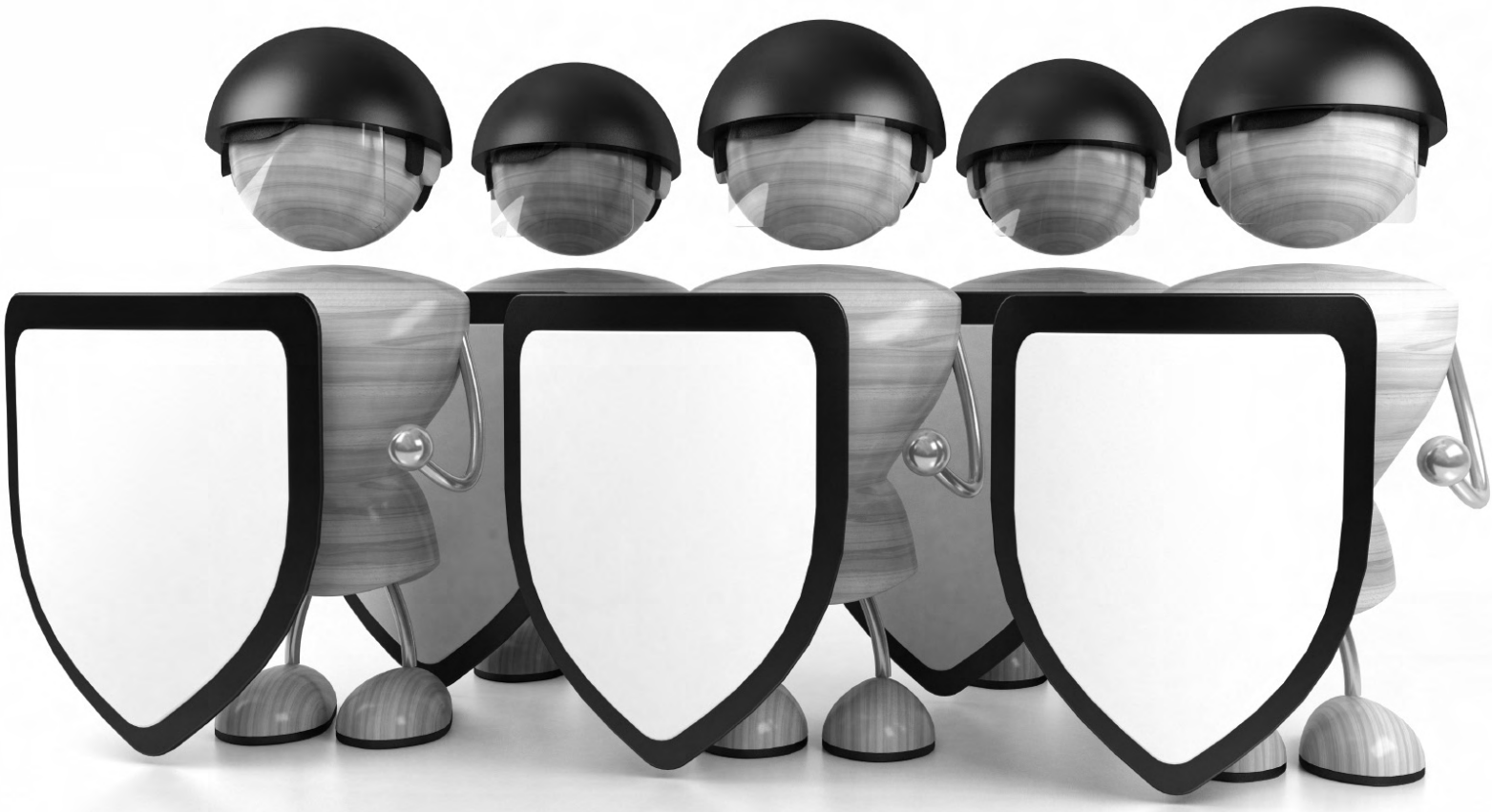
In June 2008, the Supreme Court ruled, in a 5-4 decision, that the foreign detainees held in Guantanamo Bay had a constitutional right to habeas corpus. It maintained that "the laws and Constitution are designed to survive, and remain in force, [even] in extraordinary times."

The Responsibility to Protect: A new approach in stopping mass atrocities?

Throughout history, conflicts between states have killed millions of people and caused suffering on a massive scale. To limit their destructive effects, international treaties seek to govern how countries carry out the actual conduct of war. For example, the Geneva Conventions provide certain protections for prisoners of war and civilians, require an occupying country to provide food and medical supplies to an occupied population, forbid unnecessary destruction of property, and also make it a war crime to carry out acts such as torture against those detained during an armed conflict, among many other provisions.

In addition to interstate conflict, historians note that major turmoil occurring within states—in the form of civil wars, massive repression, and similar situations—has also claimed millions of lives. In the last few decades alone, many countries and regions—including Cambodia, Somalia, Bosnia and Herzegovina, Kosovo, and Rwanda—have suffered from catastrophic domestic turmoil. But there are no treaties or even standards on how nations may (or even should) respond to such upheavals occurring within individual countries. (Legal experts generally say that the laws of war, embodied in the Geneva Conventions and other treaties, don't apply to internal conflicts.) Moreover, legal analysts say that the principle of respecting a country's sovereignty under current international law—where a government has the legal right to take care of its own domestic affairs without foreign interference and also expects other nations to respect its territorial security—has often prevented the world community from addressing these situations.

But human rights groups now say that an emerging legal doctrine called the "responsibility to protect" (popularly known as "R2P") could allow the international community to take measures against nations which are unable or even unwilling to address massive suffering and loss of life resulting from internal strife, repression, and state failure, among other situations. But critics have questioned the legality of such a doctrine. What exactly is the R2P doctrine? What measures can be used under this doctrine and under what circumstances? Are there any controversies that surround the R2P doctrine? And where does it stand today?



An inflexible respect for state sovereignty has prevented the world from addressing armed conflicts occurring more frequently within states. Several UN secretaries-general have admitted the United Nations has not done a good job in responding to domestic turmoil resulting in massive losses of life.

The principle of non-intervention: Inadvertently shielding mass atrocities?

Legal scholars say that the protection of a country's sovereignty and territorial security is one of the main pillars of international law. Respecting a state's sovereignty and territorial borders, they say, helps to maintain peace and security by encouraging predictable relations among the nations of the world. The Charter of the United Nations—in force since 1945—is one legal instrument that calls on its member nations (who include the world's wealthiest and even the most impoverished countries) to respect each other's sovereignty. In fact, Article 2(1) of the UN Charter declares: "The [UN] organization is based on the principle of the sovereign equality of all its Members."

To preserve state sovereignty, the UN Charter prohibits member nations from undertaking certain actions. For example, under Article 2(4), member states are prohibited from threatening to use or using physical force against any other state, though the Charter lists two exceptions. Under Article 42, the United Nations Security Council may authorize member nations to use force to restore international peace and security. Article 51 allows a country to use force to defend itself without obtaining UN approval.

The UN Charter also calls on nations to respect state sovereignty by discouraging them from interfering in each other's domestic affairs. Article 2(7) states that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." Political analysts note that countries are generally reluctant to get involved in the internal matters of other states. A country may fear, for instance, that its intervention in another country's affairs—for example, by directly supporting a certain leader, helping to overthrow another government, or even sending troops into another country without permission—may set a precedent for other countries to take security matters into their own hands, which could then threaten international security. Countries that intervene in the domestic affairs of other states may also open themselves to similar interference. Furthermore, they also worry that other nations could cite domestic turmoil in a neighboring country simply as a cover, for example, to take over disputed territory or to carry out strategic goals unrelated to a domestic conflict.

But many critics say that this seemingly uncompromising and inflexible respect for state sovereignty has prevented the world community from addressing an evolving situation where armed conflicts are now occurring more frequently within rather than between states, and where current international treaties—such as the Geneva Conventions—are not applicable. One non-governmental organization noted that "the end of the 20th century was marked by a change in the nature of armed conflict. Internal conflicts replaced interstate conflict, and civilians now make up the vast majority of casualties." These conflicts—some of which are described below—have led to atrocities such as genocide and ethnic cleansing.

CASES OF MASS ATROCITIES AND THE RESPONSE FROM UN MEMBER STATES

Country (Date of atrocities)	Details of atrocities
Cambodia (1975–79)	According to human rights groups, policies carried out by the Khmer Rouge government led to the deaths of over 1.7 million people. The United Nations did not intervene in these killings, which were largely carried out through executions and starvation. Vietnam overthrew the Khmer government in 1979.
Bosnia and Herzegovina (1992–95)	A major civil conflict among Bosnian, Croatian, and Serbian groups in Bosnia and Herzegovina claimed more than 250,000 lives. The Security Council passed multiple resolutions to stop the conflict, and later authorized UN member states to use force to press for a political settlement. Most of these forceful measures were carried out only after large-scale atrocities had occurred.
Somalia (1991–95)	A civil war and a resulting famine killed over 300,000 people. The Security Council passed multiple resolutions and later deployed peacekeeping forces. The United States also led military operations to deliver humanitarian aid, but ended its involvement in 1993. As the conflict continued, the UN withdrew its mission in 1995.
Rwanda (1994)	Hutu extremists killed over 800,000 Tutsis over the course of a few months. While the Security Council had already deployed a peacekeeping mission before the infighting began, it did not authorize the mission to get involved in the conflict. Also, the peacekeeping force did not take any forceful measures to stop the conflict.

Source: Human Rights Watch

Some members of the Security Council members frequently argue that, because such conflicts are domestic in nature, Article 2(7) of the UN Charter prohibits intervention in such cases, and that they would veto any resolution authorizing the UN to do so. (Under the UN Charter, the United Nations Security Council has the primary responsibility for maintaining international peace and security. At least nine of its 15 members must vote to approve a resolution in response to a certain security matter. A resolution could, for example, authorize UN member states to use force against another country. If *any* of the five permanent members casts a veto, then the resolution fails, and the UN as a group cannot take any action.) While the Security Council did authorize its member nations to intervene in the affairs of other countries for humanitarian reasons in some instances, the objections from a few members has largely prevented the UN from acting forcefully to prevent these atrocities.

Given these various constraints, several UN secretaries-general have readily admitted the United Nations has not done a good job in responding to domestic turmoil which has resulted in massive losses of life. A UN report released in 2004 stated that "the Security Council so far has been neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly, or not at all."

Under the doctrine of the responsibility to protect (or R2P), "no state can hide behind the concept of sovereignty while it conducts—or permits—widespread harm to its population. Nor can states turn a blind eye when these events extend beyond their borders."

The R2P doctrine: Overcoming state sovereignty to stop mass abuses?

Because the United Nations has been unable to respond to these mass atrocities in an effective manner, the government of Canada, in 2000, established an independent working group called the International Commission on Intervention and State Sovereignty (or ICISS) whose 12 appointed members (from various professional and national backgrounds) studied how nations may be able to respond to domestic mass atrocities—such as ethnic cleansing and genocide—in a world where international law called for the respect of state sovereignty and also prohibited interference in a country's domestic affairs. The ICISS, whose work was funded by several foundations and governments, presented a report to the United Nations in September 2001 called "The Responsibility to Protect."

Citing what it believes to be a growing international consensus, the ICISS report said that a nation's claim to sovereignty has evolved to become conditional on the ability to protect its population from harm. While not diminishing the importance of a country's right to sovereignty, the report added that "state sovereignty implies responsibility, and the primary responsibility for the protection of people lies with the state itself." Therefore, if a state fails or refuses to protect its civilian population from pervasive harm, then the "principle of non-intervention yields to the . . . responsibility to protect." Under such a situation, the international community would be obligated to intervene in the affairs of another country by working through either an existing international organization or a willing coalition of nations. (Another group said that "no state can hide behind the concept of sovereignty while it conducts—or permits—widespread harm to its population. Nor can states turn a blind eye when these events extend beyond their borders.") Some of the cases where the UN could intervene would have to involve, for example, large-scale atrocities.

The report also said that this responsibility to protect does not call on countries to undertake a single action, but, instead, entails a broad spectrum of measures falling into three main categories.

- ***Responsibility to prevent:*** The ICISS report said that the world should first take preventive measures to "address both the root causes and direct causes of internal conflict and other man-made crises." Some measures include development assistance, poverty reduction programs, promotion of human rights, and support for a free press. These measures would also have to be tailored to the unique culture, sensibilities, and realities of each individual country, stated the report.
- ***Responsibility to react:*** When preventive measures have failed, then nations would have a responsibility to react. Nations may undertake a wide variety of increasingly coercive measures, include financial sanctions, the freezing of overseas assets, restrictions on income-generating activities, aviation bans, restrictions on diplomatic representation, arms embargos, international prosecution, and, as a last resort, military intervention. The ICISS report also said that the world community should consider several criteria before employing military intervention.
- ***Responsibility to rebuild:*** After intervening in a country's internal affairs, nations would have a responsibility to rebuild that country by providing full recovery, reconstruction, and reconciliation efforts. They would help to repair a country's infrastructure and strengthen its national institutions, for instance.

Supporters of the responsibility to protect doctrine say that its legal basis lies in "specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law, and national law." Some of these treaties include the Universal Declaration of Human Rights, the Geneva Conventions, the United Nations Convention against Torture, and the treaty creating

the International Criminal Court (or ICC), among many others. One humanitarian group said that the provisions within these treaties "set forth standards of conduct" for countries to follow in many different areas of law. So as more and more countries have agreed to relinquish some of their sovereignty under these treaties and to undertake specific responsibilities under them, the ICISS report said that "the authority of the state [is no longer] absolute." Under the Geneva Conventions, for instance, a signatory nation has a responsibility not to mistreat prisoners of war and to provide food and medical supplies to an occupied population. The Convention against Torture imposes a responsibility on states not to transfer people to countries where they are likely to face torture.

Critics say that the application of the R2P doctrine is open to abuse simply because it is a still evolving and broad concept . . . Supporters point out that "currently, there is no formal inter-governmental process to implement this doctrine at the United Nations."

Weaknesses in the R2P doctrine

The ICISS said that the responsibility to protect is a non-binding doctrine that tries to bridge the gap between respecting state sovereignty and the need to prevent large-scale atrocities. Its supporters hope that the report will serve as a foundation for greater debate and discussion on when (and even whether) nations may intervene in the internal affairs of another country. Humanitarian groups add that the R2P doctrine provides what they believe are more suitable guidelines to address the contemporary situation where armed conflicts are now occurring mostly within states.

However, some point to what they say are many shortcomings in the R2P doctrine. For instance, critics say that the application of the R2P doctrine is open to abuse simply because it is a still evolving and broad concept that has not been systematically organized into a framework of formal rules. Countries could, therefore, seek to exploit these ambiguities to further their own national interests under the guise of the R2P doctrine.

Others question the legitimacy of the R2P doctrine because, they say, its application would mainly affect smaller and weaker nations, all of whom look to international law to protect their sovereignty and territorial integrity against pressures from much stronger nations. One commentator said that it is highly unlikely that nations such as Bhutan or the Solomon Islands would ever forcefully intervene in the affairs of the United States to bring aid to victims of Hurricane Katrina in New Orleans. In fact, many note that, in past humanitarian interventions, stronger countries had intervened only in the affairs of weaker nations. These smaller nations also worry that stronger countries will invoke an R2P doctrine as a cover for other motives.

There are also practical concerns regarding the application of the R2P doctrine. While polls say that international public opinion would support an intervention to stop atrocities such as genocide, commentators point out that such support quickly declines once an operation begins to face major difficulties. For example, the Security Council authorized a peacekeeping mission in 1992 to help monitor a ceasefire between warring factions in Somalia. It later authorized the United States military to secure a safer environment in southern Somalia for the delivery of humanitarian aid. But American public support for the U.S. intervention dropped when warlords attacked and killed many American soldiers. The United States withdrew from Somalia in 1993. Because of continued fighting and further attacks on UN peacekeepers, the UN largely pulled out its mission in 1995.

Others point out that simply invoking the R2P doctrine will not compel countries to intervene in the domestic affairs of another country. For example, limited financial and personnel resources of the UN member nations and even a lack of political will could undercut support to invoke the R2P doctrine. In the case of genocide in Rwanda in 1994 (which claimed hundreds of thousands of lives), many countries said that sending thousands of troops to restore order in that landlocked country deep within the African continent without permission from its government would be an arduous task. Several officials also pointed out that it would also be difficult to quell the massive fighting among different ethnic groups without resorting to the use of force, which could claim more lives. Although the UN already had an existing peacekeeping mission in Rwanda before the outbreak of fighting, the Security Council voted to reduce its presence in the country in the face of the growing civil unrest.

Furthermore, critics have questioned the need for an R2P doctrine. One political analyst noted that the Security Council had—over the course of several decades—approved the use of several measures associated with the R2P doctrine such as diplomatic pressure, economic sanctions, criminal prosecution, and the use of military force in trying to restore international peace and security. But supporters of the R2P doctrine point out that these measures were implemented in a haphazard fashion depending on a specific international crisis. In fact, the UN Charter neither specifies all of the measures a country may use to restore international peace nor the exact sequence in which they should be carried out. Also, while the Security Council currently has wide latitude to address threats to international peace and security (and even retains the option not to act at all), advocates say that it would have less latitude under a working R2P doctrine. They also point out that—in direct contrast to humanitarian operations which tries to stop a conflict only *after* it begins—the R2P doctrine would try to address threats to international peace before they turned into actual conflicts.

Current status of the R2P doctrine

While many believe that the ICISS report provides a strong conceptual basis and justification for an R2P doctrine, one supporter pointed out that "the task remains to translate [the] principled acceptance [of the R2P doctrine] into effective action." Legal experts point out that the report itself is not a legally binding document and provides only a starting point for discussions concerning various aspects of an R2P doctrine, including which bodies may invoke the R2P doctrine, what standards to use when invoking that doctrine, and what measures various nations can undertake during its actual implementation.

In recent years, supporters of the R2P doctrine have been urging the UN member states to "codify a spectrum of activities to be taken by the international community and regional organizations, where appropriate, when crises that threaten populations reach a certain threshold." They say that, with formal rules and guidelines in place, the international community will be able to respond to large-scale domestic suffering with more consistency. Following the publication of the ICISS report, the United Nations began to address the R2P doctrine:

- In December 2004, a high-level UN panel issued a report called "A More Secure World: Our Shared Responsibilities" where it stated: "We [the panel only] endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large scale killing, ethnic cleansing, or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent."
- The UN Secretary-General in March 2005 released a report called "In Larger Freedom, Report of the UN Secretary General" where he stated: "I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it." He added: "We must also move towards embracing and acting on the responsibility to protect potential or actual victims of massive atrocities. The time has come for Governments to be held to account . . ."
- In October 2005, the UN General Assembly unanimously adopted its "World Summit Outcome Document" where it stated: "Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it."

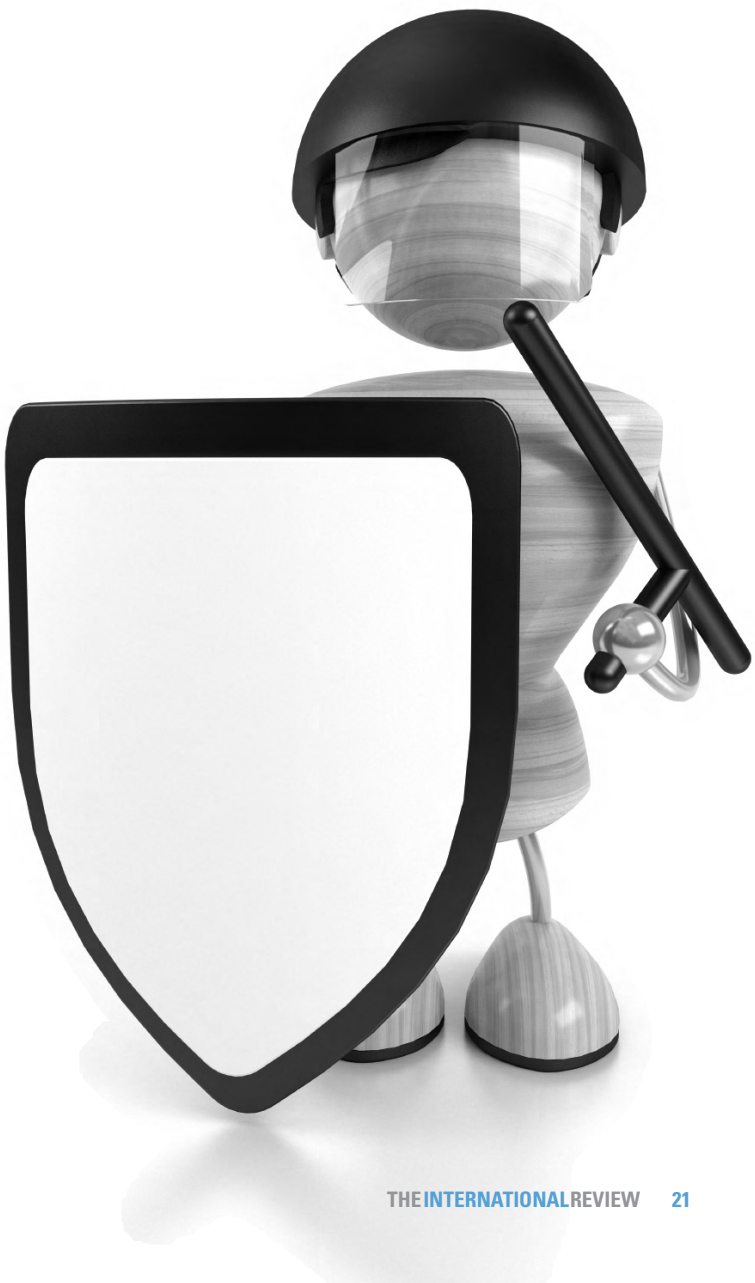
But one legal analyst said that these texts, while recognizing the emergence and growing recognition of a R2P doctrine, do not explicitly require countries to implement such a doctrine. In fact, supporters of the R2P doctrine said that "currently, there is no formal inter-governmental process to implement R2P at the United Nations." Instead, the current UN secretary-general has appointed a "Special Adviser on the Prevention of Genocide" and a "Special Adviser for Proposals on Responsibility to Protect" to study further an R2P doctrine.

There are also disagreements on how to interpret certain sections of the UN texts. While the ICISS report says that a range of different groups—ranging from the Security Council to the General Assembly to regional organizations—could invoke the R2P doctrine, the 2004 High Level Panel report suggests that only the Security Council may invoke that doctrine, but only under particular circumstances. On the other hand, the 2005 document suggests that only the Security Council may invoke the R2P doctrine on a case-by-case basis.

A responsibility to protect Darfur and Myanmar?

Even though it is still being debated, several UN member states have tried to invoke the R2P doctrine in response to recent situations. Some analysts believe that these cases could serve as the first tests over the viability of an R2P doctrine.

Darfur: In Sudan, a conflict between government-backed militias fighting against rebel groups in the Darfur region of that country have claimed over 400,000 lives and displaced over 2 million people, according to human rights groups. They say that these militias have carried out acts of torture, rape, and killings against civilians on a scale which the United States described as genocide. But, in 2005, a UN commission concluded



that while it was "clear that there is a reign of terror in Darfur" with "massive human rights violations," the scale of atrocities "did not amount to a policy of genocide." Still, a growing international consensus called on the Sudanese government to stop the militias' activities and also on other nations to intervene to stop the internal fighting.

In March 2005, the Security Council passed Resolution 1590, which established a peacekeeping mission (called the United Nations Mission in Sudan or UNIMIS) to oversee the implementation of a fragile peace agreement in Sudan, which later fell apart due to continued fighting. Despite passage of the resolution, Sudan did not give permission to UNIMIS to enter its territory. The Security Council then passed Resolution 1674 in April 2006, which generally addressed the protection of civilians in armed conflict, but did not specifically mention Sudan or Darfur. It stated that the United Nations reaffirmed "the provisions of paragraphs 138 and 139 of the 2005 "World Summit Outcome Document" regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity." But political analysts note that the resolution did not require UN member states to intervene in the conflict in Darfur.

In August 2006, the Security Council passed Resolution 1706, which expanded the mandate of UNMIS to include its deployment specifically to Darfur. Although the UN "invited" Sudan's consent for the deployment of the UNMIS peacekeeping troops, Sudan still refused permission. That country later agreed to a hybrid United Nations-African Union peacekeeping force, but critics say that Sudan has hampered the full deployment of those forces. In the meantime, the government-backed militias continue to carry out attacks against civilians in Darfur, say humanitarian groups.

Political analysts say that while there was public support for intervening in Sudan to stop that country's civil war, there was less uniform support among the members of the Security Council. For example, China, which has commercial oil deals in Sudan, expressed its long-standing opposition to any intervention in any country, and, instead, called for more diplomatic talks. Others note that the lack of any resolutions authorizing UN member nations to use force in trying to stop the fighting in Darfur simply reflected that body's concern over violating Sudan's sovereignty.

Some have also questioned whether the international community should intervene in Darfur. They note that Sudan had arrested in October 2008 a prominent militia leader who is wanted by the ICC for his alleged involvement in carrying out attacks against civilians in Darfur. While the government has not indicated whether this person will face trial in Sudan or the ICC (which is located at The Hague in the Netherlands), one analyst said that this recent move "is widely being interpreted as a way for Sudan to improve its image abroad and try to head off the possible genocide prosecution of the country's president." In July 2008, the Chief Prosecutor of the ICC announced that he was seeking an arrest warrant for the current president of Sudan for his alleged involvement in human rights violations in Darfur. (For more information, *See Another First: Arrest warrant for sitting head of state* on page 42.)

In the case of Darfur, many say that nascent attempts to invoke the R2P doctrine—which itself remains a work in progress—was premature.

Myanmar: The R2P doctrine faced a similar fate recently in Myanmar. In May 2008, a cyclone struck Myanmar and claimed the lives of over 100,000 people. Relief agencies say that the country military junta—which has ruled that country for decades—initially rebuffed international assistance and refused to admit aid workers. Countries such as France—fearing that the lack of medical aid and other supplies would create a public health threat in the aftermath of the cyclone—began to call on countries to invoke the R2P doctrine. Some hoped that the very discussion of the R2P doctrine would pressure Myanmar to open its borders and allow international assistance. Even the United States began to consider air-dropping supplies without permission from Myanmar's ruling junta.

Political analysts say that while there was public support for intervening in Sudan to stop that country's civil war, there was less uniform support among the members of the Security Council.

But these efforts were largely rebuffed (even by supporters of the R2P doctrine). Some argued that the R2P doctrine did not apply to natural disasters, and pointed out that Myanmar did slowly increase access for international aid workers and the delivery of supplies. Also, they say that any implementation of an R2P doctrine would most likely involve the use of force (since Myanmar would attack any unauthorized missions), which could then claim the lives of the very civilians that the UN wanted to help. Such a situation, say officials, would undermine support for an R2P doctrine. At the end, analysts say that the R2P doctrine did not play any role in the case of Myanmar. Also, the Security Council did not pass any resolutions concerning Myanmar and its slow response to the devastation left by the cyclone.

So what is the role of the nascent R2P doctrine in world affairs today? Some believe that this evolving doctrine will become more useful as the world community continues its efforts to build a specific set of standards for its implementation. Others believe that because there will be more domestic conflicts around the world involving atrocities such as genocide and ethnic cleansing which could spread to neighboring countries, the nations of the world will have no choice but to adopt some form of the R2P doctrine. (One commentator pointed out that very few people would have thought that the world would one day create a permanent International Criminal Court.) On the other hand, skeptics believe that it will be politically difficult—if not impossible—to craft a working R2P doctrine where all 192 UN member nations agree on its various criteria for taking action, and where all but the most powerful countries will be subject to its scope.

The North Atlantic Treaty Organization: Legal aspects of its evolving security mission

The North Atlantic Treaty Organization (or NATO) was originally created to defend its own member states against an attack from the former Soviet Union. Now that its main adversary no longer exists, many describe NATO as a military alliance in search of a mission in a world with new and broader threats, including terrorism, organized crime, and widening civil conflicts. During the last decade, NATO had undertaken various operations which did not involve the direct defense of its members. There is now an ongoing debate concerning the legality of NATO's recent missions and its evolving role in maintaining international peace and security.

Can NATO undertake missions that are not strictly defensive in nature and do not involve an immediate and direct threat to a NATO member or even non-NATO members? Does the NATO treaty allow its members to use force in such cases? Or would they need explicit authorization from, say, the United Nations Security Council? Where does the debate stand today?

The United Nations: One approach in maintaining international peace and security

The United Nations is currently the primary global institution that maintains international peace and security. The UN Charter (or "Charter"), which came into force in 1945, is the principle treaty that sets forth the rights and obligations of its 192 member states. Under Article 2(4), for example, member states are prohibited from threatening or using physical force against any state. But the Charter lists two exceptions. Under Article 42, the United Nations Security Council may authorize member nations to use force against a particular country if non-military measures (such as sanctions) do not restore international peace and security. Under Article 51, member states have "the inherent right of . . . self-defense if an armed attack occurs" without having to wait for UN approval.

But the UN system of maintaining security has some major shortcomings. For instance, under the current voting structure of the Security Council, at least nine of its 15 members must vote to approve a resolution in response to a certain security matter. But if *any* of the five permanent members (currently China, France, Russia, the United Kingdom, and the United States) casts a veto, then the resolution fails, and the UN as a group cannot take any action. Political analysts say that this veto power often causes inaction in addressing urgent security matters. In another shortcoming, the UN cannot enforce resolutions on its own because it doesn't have, for instance, a standing army. Instead, it relies on its member states to enforce its decisions (sometimes through military force).

Another approach: Self-defense through NATO

Given the UN's shortcomings in maintaining international peace and security, the Charter also allows member nations to create alliances to defend themselves from attack. More specifically, Article 52 allows countries to form regional alliances "provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."

That article serves as the legal basis of the world's largest and most powerful military alliance—the North Atlantic Treaty Organization (or NATO)—whose members are located mostly in the North Atlantic region of Europe and North America (with the United States being its strongest member). The "central focus" of the alliance, according to NATO, is to defend collectively the "security and territorial integrity of member states." Historians note that NATO was created primarily to counter the Soviet Union and its satellite countries in Eastern Europe. This collective alliance, say military analysts, was the most effective means of defense against the Soviet Union whose military forces could have easily overwhelmed the defenses of individual nations. The North Atlantic Treaty (or NATO treaty), signed in 1949, outlines the purpose and obligations of the alliance.

Although NATO is an organization separate from the United Nations, the NATO treaty uses the UN Charter to guide the workings of the alliance. In its preamble, the NATO treaty states that "the Parties to this Treaty reaffirm their faith in the purposes and principles of the Charter of the United Nations . . ." The first article goes on to say that "the Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations." Moreover, Article 7 explicitly acknowledges the primary role of the UN Security Council (and not NATO) in the maintenance of international peace and security. "The UN remains at the core of the wider institutional framework within which the [NATO] alliance operates," says NATO. Still, NATO does not need the permission of the Security Council before taking any action to defend its members against an attack, say experts. Doing so could allow nations who are not members of NATO to veto defensive measures undertaken by the alliance. (Again, all countries—NATO and non-NATO alike—have the right to self-defense under Article 51 of the UN Charter.)

The most important provision of the NATO treaty is Article 5 under which its members agree that "an armed attack against one or more of them in Europe or North America shall be considered an attack against them all," and that the other members—individually or collectively—would come to the aid of the member being attacked, and take "such action as it deems necessary." (Scholars have generally referred to these potential self-defense responses as "Article 5 missions.") The NATO treaty defines an armed attack as "an attack against the territory of any of the parties in Europe or North America, or on the territory of or on any islands under the jurisdiction of any of the parties in the North Atlantic area north of the Tropic of Cancer."

Under its procedures, if a member comes under attack, NATO would first invoke Article 5 in order to establish the legal basis for a possible defensive response. It must then confirm that the attack falls under the purview of NATO. (Commentators say that, during the Cold War, NATO had never invoked Article 5.) Contrary to popular belief, NATO members neither have to come to the immediate defense of a member being attacked nor are they automatically required to launch military attacks against an aggressor. "In determining the size and nature of their contribution to collective defense, member countries of NATO retain full sovereignty and independence of action," says NATO. But it also states that its members must still follow defense planning procedures and take into account the best interests of the alliance.

Decisions on how NATO responds to an attack are made by the North Atlantic Council, which is a forum where representatives from every NATO member make important decisions by consensus only. "Action is agreed upon the basis of unanimity and common accord," states the NATO Handbook. "There is no voting or decision by majority."

NATO in a post-Cold War world

When the Soviet Union and other communist governments collapsed in the 1990s, analysts began to question the relevance of NATO in a world where its main adversaries no longer existed. But some argued that—with its existing political and military structures—NATO could still be used as a check against Russia and other nations. They also pointed out that other international organizations (such as the United Nations) were not military alliances with a standing army. "At present, NATO is the only regional institution capable of countering security challenges effectively, if necessary, by military means," said one international security expert.

NATO announced that "its immediate focus [of defending its members against threats had] undergone fundamental change." Some of these threats now included, but were not limited to, terrorism, sabotage, large refugee flows, and even organized crime. But because NATO was still primarily a military alliance, its leadership had—since the 1990s—thrust the organization into situations requiring the use of military force. Political analysts have referred to these particular NATO operations as "non-Article 5 missions" because they didn't involve the direct defense of another NATO member under Article 5 of the alliance's treaty.

During the last decade, NATO undertook various operations which did not involve the direct defense of its members. Can NATO undertake these kinds of missions? And does the NATO treaty allow its members to use force in such cases without permission from the UN Security Council?

Bosnia and Herzegovina: In its first major operation at the end of the Cold War, NATO supported the United Nations in resolving a major civil conflict among Bosnian, Croatian, and Serbian groups in Bosnia and Herzegovina, which, according to some estimates, ultimately claimed more than 250,000 lives. In February 1992, the Security Council passed Resolution 743, which authorized the creation of a peacekeeping mission called the United Nations Protection Force (or UNPROFOR) whose primary duty was to "create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis."

Because the UN did not have a standing army, it relied on its member nations to enforce several Security Council resolutions

concerning the Yugoslav conflict. For example, Resolution 816 (passed by the Security Council in 1993) authorized UN member states to take "all necessary measures" to enforce a ban on military flights over Bosnia and Herzegovina "through regional organizations or arrangements," and also by working "under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR." Officials say that NATO was the regional organization that mainly enforced this "no-fly" zone by working closely with the UN. (Political analysts also point out that the phrase "all necessary measures" commonly refers to the use of force.)

The Security Council also passed Resolution 836 in 1993, which authorized UN member states to take "all necessary measures" in helping UNPROFOR protect civilian "safe havens" within Bosnia and Herzegovina. The resolution also called on member states to work "through regional organizations or arrangements," and also in close coordination with the UN Secretary-General and UNPROFOR officials to protect these safe havens. At the request of and in close coordination with the UN (and also under the legal basis of Resolution 836), NATO carried out a sustained air campaign in 1995 against Bosnian Serb forces which had surrounded and attacked the city of Sarajevo. During the air campaign, both organizations had to agree on the targeting of certain locations before actual strikes were carried out. After the warring parties in the conflict signed a peace agreement in 1995, the Security Council passed Resolution 1031, which authorized a military force under the authority, direction, and political control of NATO to implement the peace agreement. After stabilizing the country, NATO ended its mission in 2004, and transferred its duties to troops from the European Union.

The conflict in Kosovo: NATO's most controversial mission concerned its bombing of Serbia during that country's internal conflict with a province called Kosovo. That province had—in 1990—declared independence from and started a guerilla insurgency against Serbia, which, in turn, led a violent crackdown to protect what it called its "medieval heartland." Political analysts said that while Kosovo was legally a part of Serbia, it had exercised some measure of autonomy. It had, for instance, its own assembly, which Serbia later dissolved to suppress any further moves toward independence. (Ethnic Albanians make up over 90 percent of Kosovo's population. The remaining 10 percent are Serbian.) By 1998, the conflict in Kosovo had claimed the lives of thousands of people.

In response to the continued fighting, several countries introduced a draft resolution in the Security Council which would have authorized UN member states to use military force if the warring parties did not end their hostilities, maintain a ceasefire, and begin negotiations on a political settlement. But in order to avoid a veto from Russia (an ally of Serbia), the final resolution—which passed in September 1998—did not contain any references to the use of force. Instead, Resolution 1199 said that if the disputing parties did not comply with the terms of the resolution, then the Security Council would "consider further action and additional measures to maintain or restore peace and stability in the region." Legal experts say that this ambiguous language did not seem to authorize explicitly the use of force. There were also "conflicting views on whether another resolution would be necessary specifically to authorize military action," said another analyst. Furthermore, Russia later threatened to veto any additional resolution which authorized the use of force in Kosovo. "A military strike will not help normalize the situation but will have the opposite effect," said a Russian diplomat. China also expressed its opposition to the use of force.

Citing inaction on the part of the Security Council, and also to halt the fighting and the growing humanitarian crisis in Kosovo, NATO launched military strikes against targets in Serbia during a 77-day air campaign in March 1999. Serbia later agreed to withdraw its forces from Kosovo. The Security Council shortly thereafter passed Resolution 1244, which placed Kosovo under the temporary protection of the United Nations Interim Administration Mission in Kosovo. Tens of thousands of NATO troops also entered Kosovo to prevent any further hostilities.

While the NATO treaty doesn't explicitly allow NATO members to undertake operations which are not defensive in nature, it also does not prohibit them outright.

The legality of non-Article 5 missions

NATO's involvement in Bosnia and Herzegovina and Kosovo has spurred an ongoing debate concerning the role of that military alliance. Can NATO undertake these non-Article 5 missions under international law and under its own treaty? Also, can NATO use force during these missions without approval from the Security Council?

While providing detail in some sections, the NATO treaty is silent on many other issues. It does not, for example, explicitly restrict where NATO may geographically carry out its defensive measures. Therefore, an aggressor located far from the north Atlantic region, if it attacked a NATO member, would probably not be immune from a possible NATO military response, say analysts. In addition, the treaty does not specifically describe the kinds of threats to which NATO members may respond. While the alliance was created to defend against a Soviet military invasion, political experts note that NATO members currently face different kinds of genuine threats today, including terrorism.

Furthermore, while the NATO treaty doesn't explicitly allow NATO members to undertake operations which are not defensive in nature (i.e., non-Article 5 missions), it also does not prohibit them outright. In the case of Bosnia and Herzegovina, some critics have argued that NATO did not have a legal basis to

get involved in the conflict because it did not involve the direct defense of its members. (NATO did not invoke Article 5 of its treaty before commencing operations in Bosnia and Herzegovina, which was not even a NATO member.) Whether NATO had a legitimate legal basis under its treaty to undertake these missions has not been fully resolved. But political analysts note that, because NATO has undertaken many more non-Article 5 missions since its interventions in the Balkans in the 1990s, it seems to have become an accepted practice for the time being.

There is greater controversy concerning whether NATO may use force during its non-Article 5 missions. Many legal scholars argue that, under the UN Charter, UN member states working through NATO must receive authorization from the Security Council to use force if an operation is not defensive in nature. In the case of Bosnia and Herzegovina, they point out that the Security Council had passed several resolutions allowing its member nations not only to work through existing regional organizations (such as NATO), but also to undertake "all necessary measures" to help the UN in resolving the Yugoslav crisis.

However, during the conflict in Kosovo, many critics have denounced NATO's decision to use force against Serbia. First, they argued that because the Security Council did not explicitly authorize NATO to carry out military attacks against Serbia in Resolution 1199, that alliance violated Article 2(4) the UN Charter, which prohibits the threat or use of force against any state without approval from the Security Council. Second, when it attacked Serbia, critics said that NATO was not coming to the defense of any of its members. In fact, Serbia did not attack any NATO members during the conflict in Kosovo. Third, they said that NATO violated Article 53 of the UN Charter, which states that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council." Fourth, many worried that other countries would use NATO's decision to attack Serbia as a precedent to bypass the Security Council and take matters into their own hands, which they believe could slowly undermine international law. "It has been a longstanding standard of international law that internal disputes in a country, however disagreeable, do not justify external military intervention," said one international law scholar.

On the other hand, NATO argued that because Serbia had violated the terms of Resolution 1199, NATO had a sufficient legal justification to intervene in Kosovo. In addition, officials believed that because the fighting in Kosovo could have spread to neighboring countries such as Greece and Turkey (both of whom are members of the NATO alliance), NATO had to defend its security interests. "The regional destabilization resulting from the forced exodus from Kosovo would have had serious implications," said a former NATO secretary general. Furthermore, several NATO countries argued that they had a moral obligation to intervene in Kosovo to stop a growing humanitarian crisis—even if their actions seemed to violate international law. "If you read the letter of the law, it does not expressly provide an exception for a humanitarian intervention. But many people think such an exception does exist as a matter of custom and practice," said one expert.

NATO also said that it would not use its intervention in Kosovo as a precedent in other security matters. "Kosovo did not mark NATO's mutation into a crusader for universal values," said a high ranking NATO official. "All our nations cherish a predictable international order." He added that Kosovo's "unique combination of humanitarian, legal, political, and strategic considerations" was "unlikely to repeat itself in the future." The controversy over the legality of NATO's intervention in Kosovo remains unresolved even today. A former UN Secretary General once said that while he thought that the NATO bombings against Serbian forces were necessary, he faulted the members of the Security Council for failing to find "common ground in upholding the principles of the Charter."

A less aggressive NATO?

Political analysts believe that, because of the controversy surrounding its intervention in Kosovo, NATO is unlikely to undertake a similar mission in the future involving the use of force without approval from the Security Council. Instead, NATO has undertaken several non-Article 5 missions which did not involve the use of force. The table below lists some of these missions.

NATO NON-ARTICLE 5 MISSIONS: 2001-PRESENT

Name of Mission (Country of deployment, Date of Mission)	Purpose of mission
Essential Harvest, Amber Fox, and Allied Harmony (Macedonia, 2001–2003)	• To collect surrendered weapons from rebels, provide additional security to international monitors, and bring further stability to the region.
Turkey Mission (Turkey, 2003)	• To defend Turkish borders from any possible spillovers from the 2003 Iraq war through the use of surveillance aircraft.
NATO Training Mission (Iraq, 2004)	• To assist Iraqi in establishing an effective security sector.
African Union Mission in Sudan (Sudan, 2005–2007)	• To help the African Union (AU) expand its peacekeeping mission in Darfur, transport additional AU peacekeepers into the region, and train AU personnel.

Source: North Atlantic Treaty Organization homepage

Political analysts also say NATO seems to be taking a more cautious approach in world affairs. At its summit in April 2008, NATO members discussed neither the legality of non-Article 5 missions nor the use of force without explicit approval from the Security Council. During a conflict in South Ossetia in August 2008—where the Russian military occupied (and later refused to withdraw from) several cities in the neighboring country of Georgia—the North Atlantic Council

replied that it "[intended] to support the territorial integrity, independence, and sovereignty of Georgia" by creating a commission which will "oversee cooperation with Georgia on a wide range of matters," and also by delivering humanitarian aid to assist refugees fleeing from the fighting. Some commentators described these responses as "tepid." The Georgian government, which is not a member of NATO, had wanted the North Atlantic Council to take more robust measures and also warn Russia of "serious consequences" if it did not withdraw its forces from Georgian territory.

While there is still controversy concerning the legality of non-Article 5 missions and the use of force in such operations, there was also was some debate concerning a NATO mission undertaken for actual defensive purposes. In response to the September 11, 2001, terrorist attacks against the United States, NATO invoked Article 5 for the first time in its history. (It later confirmed that those attacks—which were carried out by the terrorist network Al Qaeda with the support of the Taliban in Afghanistan—came under the purview of NATO.) The United States invaded Afghanistan months later (saying that its purpose was to "capture Osama bin Laden [the head of Al Qaeda], destroy Al Qaeda, and remove the Taliban regime which had provided support and safe harbor to Al Qaeda"). But commentators noted that the invasion was not an operation carried out under the authority of NATO. Also, legal experts questioned whether the United States' invasion of Afghanistan was a measure taken in self-defense. Some questioned, for instance, whether an armed attack had actually occurred, since the September 11 bombings were carried out by a terrorist network and not by Afghanistan itself. Another noted that, because the United States had not defended itself immediately after the attacks, the invasion could not be viewed as a defensive measure.

In order to address the new threats facing the world today, some say that both the United Nations and NATO must update their operational treaties. For example, humanitarian groups say that the UN should authorize urgent humanitarian missions (with NATO participation) without having to obtain approval from the Security Council. In fact, several human rights organizations say that there is a growing belief that countries now have a so-called "responsibility to protect" people in other countries whose governments cannot or have even refused to help them after the aftermath of, say, domestic turmoil or natural disasters. In such a case, proponents of this emerging doctrine say that a group of countries may intervene in the internal affairs of another country without explicit approval from the Security Council, but only under strict conditions which are still being debated. (See *The Responsibility to Protect: A new approach in stopping mass atrocities?* on page 17.)

But opponents point out that the Article 2(7) states that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." There is also a movement to reform the voting structure of and increase the membership of the Security Council. But political experts say that it is highly unlikely that any permanent member of the Security Council will agree to major changes which could dilute its power in that body. Neither proposal has made much headway.

Fleeing from Iraq: How effective is the UN refugee convention?

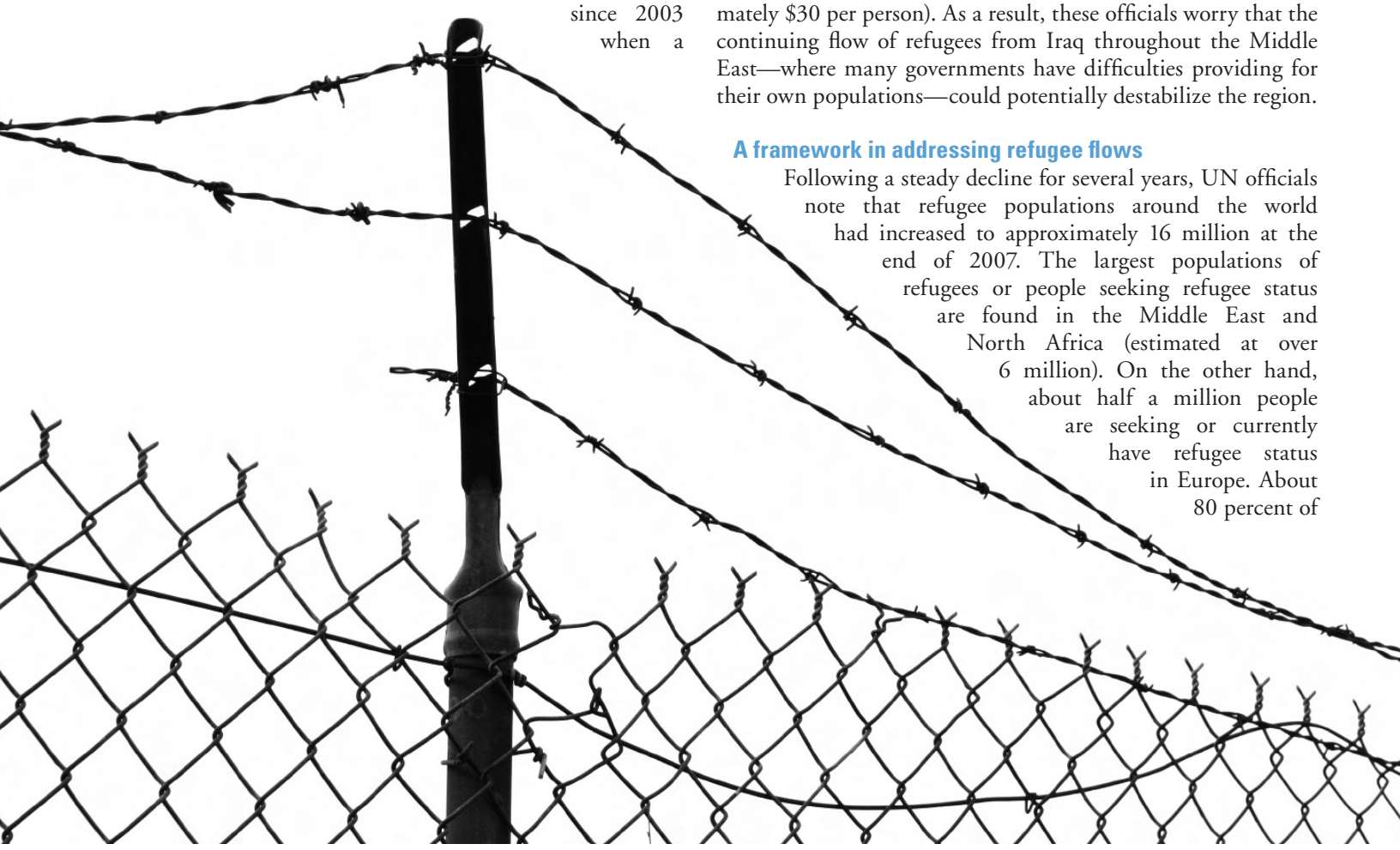
According to the United Nations, the world's refugee population increased last year as more and more people fled from continued infighting in countries such as Afghanistan and Iraq. Officials say that the flow of refugees, especially from Iraq, has overwhelmed the resources of neighboring countries, and could lead to a humanitarian crisis. While there is an international treaty that guides countries on how to address and handle refugee flows, some legal experts are questioning its effectiveness. How are different nations around the world handling refugee flows from Iraq? Are their refugee policies in compliance with international law? Have there been any shortcomings, and what more can be done to aid refugees and other peoples who are fleeing from conflicts around the world?

The current situation of Iraqi refugees

Political analysts say that political persecution in Iraq carried out by Saddam Hussein's regime had led to a continuous flow of refugees from that country. But the number of Iraqis fleeing their country has increased significantly since 2003 when a United States-led coalition toppled the previous government. The United Nations estimates that over two million Iraqis have fled the country since the invasion, and that another 2.5 million are internally displaced within Iraq (all of which represents roughly 16 percent of the total population.)

Many Iraqi refugees (half of whom are children) said they wanted to escape from domestic infighting among different political militias and radical groups, which has claimed tens of thousands of lives. Others are fleeing persecution by religious factions and supporters of the former government. Many also say that a lack of employment opportunities, and also a lack of housing, electricity, education, health care, and other basic services have forced them to leave the country.

Iraqi refugees have mainly sought refuge in Syria and Jordan, which have allowed 1.5 million and 750,000 refugees to enter their countries, respectively. They have also gone to other Middle Eastern countries, including Egypt, Iran Kuwait, Lebanon, and Yemen. UN officials estimate that it will cost at least $2 billion a year for the next several years to provide aid to Iraqi refugees, but that the UN can provide only $152 million in funding (or approximately $30 per person). As a result, these officials worry that the continuing flow of refugees from Iraq throughout the Middle East—where many governments have difficulties providing for their own populations—could potentially destabilize the region.



A framework in addressing refugee flows

Following a steady decline for several years, UN officials note that refugee populations around the world had increased to approximately 16 million at the end of 2007. The largest populations of refugees or people seeking refugee status are found in the Middle East and North Africa (estimated at over 6 million). On the other hand, about half a million people are seeking or currently have refugee status in Europe. About 80 percent of

refugees remain in their respective regions and are hosted by neighboring countries.

Historians say that although there have been refugees since times of antiquity, there weren't any comprehensive international treaties to deal with such large movements of people. But, in 1951, UN member nations signed the Convention Relating to the Status of Refugees (or the "Convention"), which is the primary international agreement that addresses refugees and various issues that concern them. Legal experts say that many nations use the convention as the foundation for their own refugee laws, policies, and procedures. Although the Convention was initially created to deal with refugee problems that stemmed from the aftermath of World War II, a 1967 protocol made the provisions of the original agreement applicable to refugees anywhere in the world.

Under the Convention, a refugee is a person who is outside his own country and is unable to return to or seek protection in that country because he has "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion." When a person enters another country, he is not automatically granted refugee status. Instead, that person becomes an "asylum seeker," and a country must first evaluate his claims of persecution, among many other requirements. (Because the Convention itself does not specify how to undertake such evaluations, many signatory countries have, instead, developed their own legal procedures to assess such claims.) There are other classes of people who are not considered refugees under the Convention, including migrants who seek better employment opportunities, stateless people (i.e., people who are not citizens of any country), and those who have been displaced from their homes but remain in other areas within their own country. Those ineligible for refugee status include war criminals, soldiers, and people who have committed serious crimes outside the asylum country.

Once an asylum seeker receives refugee status, he has certain rights within a host country, including freedom of movement, access to the court system, and eligibility for public assistance, health care, and education. Refugees also have certain obligations under the Convention, including a duty to abide by the laws of their host country. Having refugee status does not give people the legal right to settle permanently in a host country unless they face serious, long-term threats of persecution. Under the Convention, a person's refugee status is valid only as long as that person faces persecution. When those conditions no longer exist, refugees must return to their home country. But the Convention also prohibits the forcible return (or refoulement) of asylum seekers who claim persecution.

The United Nations High Commissioner for Refugees (or UNHCR) currently administers the Convention. That agency publishes, for instance, guidelines and recommendations concerning its various provisions. UNHCR also monitors the agreement's implementation by collecting information from signatory countries concerning their laws and regulations regarding refugees. Furthermore, UNHCR leads and coordinates efforts to protect refugees around the world, and also provides direct assistance to them. It also offers assistance to people who are not refugees (such as stateless and internally displaced people).

The continuing flow of refugees from Iraq throughout the Middle East—where many governments have difficulties providing for their own populations—could potentially destabilize the region.

While the Convention provides a basic framework for countries to address refugees, political analysts point to what they believe are various shortcomings. The terms of the Convention, for instance, are not enforceable. So refugees cannot file a lawsuit against a particular host country for not providing an extensive array of assistance and services. In addition, several terms in the Convention are vaguely-worded and, therefore, open to interpretation. For example, there are no precise definitions for terms such as "persecution." The Convention also does not list criteria or standards to determine whether a person's fear of persecution is "well-founded."

The refugee convention: Effective in helping Iraqi refugees?

As the flow of people leaving Iraq increased since 2003, UNHCR recommended to the Convention's signatory nations that all Iraqi asylum seekers from southern and central Iraq should be granted refugee status. Despite these recommendations, many Iraqis have not received (or are struggling to receive) such status.

For example, Syria and Jordan—which currently host the largest number of Iraqis fleeing their country—are not parties to the 1951 Convention or its 1967 Protocol, meaning that they don't have to comply with its terms. But even if these countries were parties to the refugee convention, it is unlikely that they would grant refugee status to a large exodus of Iraqi citizens. A UN official pointed out that there is already a large population of refugees in both countries as a result of past conflicts. (In Syria, one person in 11 is a refugee. In Jordan, the ratio is one in nine.) Admitting and granting refugee status to a large influx of people could easily strain the economies of both countries, which themselves are struggling to care for their respective populations. And complying with the terms of the Convention—such as granting work eligibility to refugees, and also the right to basic services such health care and education—could also create social and political tensions within the host countries, according to political analysts.

Currently, Syria and Jordan (along with Egypt and Lebanon) are no longer accepting Iraqi refugees.

The responses from individual countries in the European Union (or EU) have varied significantly. Sweden, for example, has admitted over 40,000 Iraqi refugees, which is more than all of the other EU countries combined. But its government is now admitting fewer numbers because, according to some views, other EU countries have not been sharing the burden of admitting refugees, and also because the refugees are beginning to strain the government's resources. In contrast, Germany has revoked the refugee status of approximately 18,000 Iraqis who came to the country before 2003 to escape persecution from Saddam Hussein's regime. Its government argued that, with Saddam Hussein no longer in power, the rationale for refugee status had ended, despite continuing violence and unrest in Iraq. In 2006, the United Kingdom granted refugee status to three percent of Iraqi asylum seekers (compared to 0.4 percent for the previous two years). Other EU countries have simply deported Iraqi asylum seekers who were not granted refugee status but claimed persecution, which some experts believe is a violation of the Convention.

The United States is also admitting Iraqi refugees, especially those Iraqis who had worked as interpreters for U.S. military forces and American government agencies, and who are now being persecuted by religious groups and supporters of the former regime. But critics say that the pace of admitting these Iraqis has been slow because the United States had imposed more rigorous security measures in processing refugee applications after the September 11, 2001, terrorist attacks. (The government had also placed a temporary moratorium on admitting refugees soon after those attacks.) Analysts say that these measures created a logjam in processing refugee applications.

In response, the United States created a special immigrant visa program for interpreters in 2006. Initially, the program granted 50 visas annually for only Iraqi interpreters, all of whom had to apply in Syria, Jordan, or Egypt. (Some say that many eligible Iraqis were unable to apply because the journey to these countries was either too expensive or difficult.) But the program later granted 5,000 visas annually, and allowed people to apply in Iraq. The government also broadened the scope of the program to include any Iraqi who had worked for the United States for over a year and was in serious danger of persecution for that work. Still, while the United States had set a target of admitting 12,000 Iraqi refugees a year, many believe that the actual numbers fall short of that goal.

Some humanitarian and human rights groups have claimed that the United States and Iraq are pressuring other countries not to accept and even to send back Iraqi refugees as a way of showing that the political situation in Iraq is stabilizing. They say that such a policy would violate the Convention, and that security conditions in the country have not markedly improved to allow the mass return of refugees.

Many have criticized the effectiveness of the current refugee convention in helping Iraqi refugees, arguing that their fate seems to depend on the willingness of host governments to abide by the terms of that agreement. But supporters point out that the agreement was a result of extensive political debate and compromise, and that the Convention had finally created expectations for its signatory nations to fulfill.

Others say that the refugee convention itself may become outdated because its provisions don't address contemporary developments, including the increasing number of stateless people which some groups estimate to number over 11 million people worldwide. A treaty called the Convention Relating to the Status of Stateless Persons (which came into force in 1960) sets out how its signatory countries are to treat stateless people who enter their territory legally. Under the terms of that convention, countries must "accord to stateless persons the same treatment as is accorded to aliens generally." That is to say, a stateless person who legally enters the territory of a signatory country must be given benefits that are generally available to other non-nationals.

For example, Article 17 says that "the Contracting States shall accord to stateless persons lawfully staying in their territory treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances" in areas such as obtaining employment, education, and social welfare benefits. Article 32 says that "the Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons." But only 62 countries have ratified this agreement, meaning that they will abide by its terms.

Refugee advocacy organizations note that the UN General Assembly has, over the last several decades, called on UNHCR to provide more assistance to stateless people and also to persuade countries to sign and ratify the convention on stateless persons. But one group claimed that "an internal evaluation released in 2001 suggested that UNHCR had done little to exercise its mandate on statelessness." Some have suggested that the United Nations has not allocated sufficient funding to UNHCR to expand its activities significantly to include stateless people.

Others have called on UNHCR to help people who have been displaced within their own countries due to internal conflict such as the one taking place in Iraq. (Some estimate that internal displacement has affected over 25 million people around the world.) Currently, there is no international treaty that addresses internal displacement. Instead, there is a document called the "Guiding Principles on Internal Displacement" (released by the UN Commission on Human Rights in 1998), which identifies "rights and guarantees relevant to the protection of persons from forced displacement and to their protection and assistance during displacement as well as during return or resettlement and reintegration." It states, for instance, that "internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country." It also says that "national authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction."

But as in the case of stateless people, analysts point out that UNHCR does not have the resources to address fully the issue of internal displacement. Other experts say that individual countries should undertake more efforts to prevent internal displacement from occurring in the first place.

Fighting Internet censorship through international trade?

Over the past decade, the Internet has transformed societies around the world in significant ways. For example, more and more companies are using the Internet to promote their businesses. Various surveys say that Internet sales across a spectrum of different economic sectors are increasing every year by hundreds of millions of dollars. The Internet also provides people with instant access to all kinds of information. While many have praised the development of this technology, many dictatorial regimes are severely limiting or even blocking its use. According to political analysts, these governments fear that unrestricted access to the Internet could undermine their authority by allowing political opponents to provide alternative sources of information or better coordinate their protests. While free speech advocates and democracy-promotion groups are trying to fight what they believe are excessive Internet restrictions in these countries, their attempts have been largely unsuccessful. But in a recent approach, some are advocating the use of international trade law to fight such censorship.

Censoring content on the Internet

Analysts say that some form of Internet censorship (also called "filtering") occurs in all nations. "There is no country on earth where Internet and telecommunications companies do not face at least some pressure from governments to do things that would potentially infringe on users' rights of free expression and privacy," said one commentator. But the extent to which such filtering occurs and the type of materials that are actually censored vary from one country to the next. According to the Berkman Center for Internet and Society, countries such as the United States, Canada, and New Zealand narrowly focus their filtering efforts on content that contain child pornography and copyrighted works, among other materials. Also, these governments themselves do not filter such content. Instead, they pass regulations that prohibit its posting and distribution on the Internet. Private companies that provide the actual Internet services must then remove such material.

On the other hand, dictatorial governments directly filter content on the Internet within their jurisdictions. Civil libertarians say that China, for instance, has one of the most comprehensive and sophisticated systems of Internet filtering, which some have dubbed as the "Great Firewall." A recent study of Internet filtering practices found that Burma, Iran, Syria, Tunisia, and Vietnam also engage in substantial filtering of political content on the Internet. These governments use a variety of methods to censor Internet content which they consider objectionable. In a technique called "blocking," the government literally blocks a computer's connection to specific Internet sites. A similar measure called "keyword blocking" prevents a computer user from finding information on blacklisted terms such as "religious freedom." In addition to these technical controls on Internet content, some countries employ large numbers of "Internet police" who physically monitor Internet content. One commentator believes that China uses tens of thousands of such police.

In recent years, civil libertarians have criticized several American technology companies (including Google and Yahoo!) for allowing foreign governments to censor the Internet content maintained by the companies' foreign subsidiaries. In the most publicized case, the Chinese government arrested and then, in 2005, sentenced a Chinese journalist to 10 years in prison for distributing his notes on a classified government document to a pro-democracy group by using Yahoo's e-mail system. Government officials identified and tracked down the journalist after Yahoo's Hong Kong subsidiary provided them with information concerning his e-mail account with that company. In their defense, these companies have argued that their foreign subsidiaries must comply with local laws and regulations. Although companies such as Google and Yahoo! are based in the United States, one legal analyst noted that protections afforded by the U.S. Constitution—such as those concerning freedom of speech—don't extend to their foreign operations.

In response to such criticism, Google has called on the U.S. government to take a more active role in combating the use of Internet filtering, arguing that the company has little leverage against other governments. Currently, there is no international treaty that specifically addresses how countries may regulate Internet content. There are treaties (such as the International Covenant on Civil and Political Rights) calling on their signatory countries to recognize and respect a variety of rights such as freedom of speech and press within their respective jurisdictions, which could arguably extend to how countries deal with Internet content. But legal experts say that the provisions of these treaties are largely unenforceable, and don't specify the degree to which a country is to protect these rights. Instead, different countries have adopted their own laws and standards concerning the exercise of speech and similar activities. China's constitution, for example, says that its citizens have freedom of speech. But legal experts note that such speech is still highly regulated, and that China's standards of protecting certain forms of speech fall far short of those in the United States. China also did not sign the International Covenant on Civil and Political Rights.

Given these shortcoming, civil libertarians and democracy-promotion groups are advocating the use of international trade law to combat Internet filtering by repressive governments. "It's fair to say that censorship is the No. 1 barrier to trade that we face," claimed one Google spokesperson. Several groups, including the California First Amendment Coalition, have asked officials from the Office of the United States Trade Representative to bring this issue before the World Trade Organization (or WTO). But how is Internet filtering related to international trade?

Using the World Trade Organization to fight Internet censorship

The WTO is the primary international organization which sets the rules for global trade and the settlement of trade disputes. The trade activities of its 153 member nations (80 percent of whom are developing countries) encompass over 90 percent of global trade. One of the main objectives of the WTO—which began its operations in 1995—is to lower barriers to international trade. Economists and policymakers believe that doing so will increase competition and, in turn, lead to higher quality goods sold at lower prices (all for the public's benefit). Under WTO rules, member nations must hold periodic global trade talks to reduce these barriers, which could include, for example, high tariffs on certain imported products and even government regulations which may unfairly target foreign products in order to favor domestic goods.

The WTO carries out its objectives by overseeing the implementation of several trade agreements, including the General Agreement on Tariffs and Trade (or GATT), which regulates trade in tangible goods, and also the General Agreement on Trade in Services (or GATS), which regulates—as its name implies—trade in services, including accounting, banking, legal, and telecommunications services. (For instance, an accounting company based in the jurisdiction of one WTO member may want to offer its services to the citizens of another WTO member.) Under GATS, a WTO member does not have to open all of its service sectors to foreign competition. Instead, each WTO member announces in advance not only which domestic service sectors it will open to foreign competition, but also the means by which it will allow foreign companies to deliver that service. (For example, a WTO member may require that a foreign shipping company deliver goods to its borders whereupon a local company will make final deliveries. On the other hand, it could also allow that foreign company to establish an actual physical presence within the country, and even deliver domestically-mailed packages in direct competition with local delivery companies.) The GATS also allows a WTO member to establish what are called "market-access limitations" such as limiting the number of licenses allowing a foreign company to operate within its borders. (A WTO nation may allow, for instance, a foreign bank to establish a commercial presence in the country, but then place a cap on the actual number of branches it may open.)

In the event of a trade dispute, WTO members adjudicate their claims through a formal dispute settlement process. (One member may argue that the trade policies of another member violate certain WTO trade treaties, causing it economic harm.) Unlike most international organizations which can't enforce their treaties simply because their provisions don't provide such authority, the WTO allows a winning side to a dispute to impose punitive measures (such as targeted sanctions) against the losing side. As a result, some analysts (and even critics) have described the WTO as one of the most powerful global organizations ever created.

Given its relative effectiveness, advocates for a spectrum of issues have urged the WTO to adopt and then set standards for their particular areas of concerns. Humanitarian groups have claimed, for instance, that the growth of international commerce has directly affected labor and human rights, and that the WTO should, therefore, create enforceable standards to protect these rights. (The WTO circumvented these issues by creating an informal study group to examine them. It noted that, unlike existing agencies such as the International Labor Organization, the WTO did not have any expertise concerning labor issues.) Free speech and democracy-promotion advocates are some recent groups that are now pushing the WTO to address their issues of concern such as Internet censorship.

Internet censorship and international trade law

Professor Tim Wu of Columbia Law School was one of the first legal experts to argue that Internet filtering efforts carried out by governments could be viewed as a violation of international trade law. For example, when China joined the WTO in 2001, its government had made a commitment under the GATS to open many specific areas of the country's services sector to foreign competition, including full access to "data processing services." Professor Wu said that this particular sector could arguably encompass Internet search engine services provided by companies such as Google and Yahoo! So if China deliberately blocked or filtered content and search results, it could constitute a barrier to trade since China had promised full access to "data processing" services.

However, Professor Wu says that using the GATS to challenge China's Internet censorship efforts face several hurdles. For example, he points out that there is a debate concerning whether "data processing services" does, indeed, encompass

services provided by Internet search engines. Analysts point out that the GATS relies on the Central Products Classification (or CPC) system to define various terms found throughout the agreement. While the GATS agreement itself was being negotiated in 1994, the definition for "data processing services" did not seem to extend to what is now considered services provided by Internet search engines. But under the 2001 version of the CPC, the definition of "data processing services" includes "online information provision services" (which does appear to include search engines). So as to whether Internet search engine services are included within the definition of "data processing services" depends largely on a particular version of the CPC system. (China said that it relied on the 1994 CPC when it joined the WTO.) Professor Wu says that this is an issue which could be resolved through a WTO dispute settlement proceeding, which would occur only after a WTO member formally challenges China's current policy of filtering Internet search engine results.

Another hurdle concerns Article XIV of the GATS, which states that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures . . . necessary to protect public morals or to maintain public order." Under this scenario, China can argue that its filtering practices help to maintain public order. Furthermore, Professor Wu notes that it "a common dictum in the trade world that censorship was not meant to be considered a trade barrier under GATT or GATS." So a WTO member challenging China's Internet filtering efforts would have to show that these efforts are being carried out mainly for protectionist reasons, which, at this time, does not seem to be the case. (The WTO prohibits member nations from instituting a wide variety of protectionist policies.)

Recent developments in curbing Internet censorship

Despite these hurdles, several countries are trying to pass legislation to address Internet censorship. The U.S. House of Representatives in 2007 introduced the "Global Online Freedom Act" (or GOFA) which, among other provisions, would make it illegal for American companies to provide their users' personal information to countries engaged in Internet censorship for repressive purposes. In addition, the European Parliament introduced, in July 2008, the "European Union Global Online Freedom Act" (also known as EU GOFA), which calls on the EU to treat "substantial restrictions on Internet freedom" as a trade barrier. According to the text of the proposed legislation, restrictions would include "actions that restrict or punish the free availability of information via the Internet for reasons other than legitimate foreign law enforcement purposes, including deliberately blocking, filtering, or censoring information available via the Internet based on its peaceful political or religious content." The EU GOFA would also support the development and distribution of anti-censorship technology, which could help computer users circumvent Internet filtering.

But neither the United States nor the EU has adopted or implemented these proposed bills. For example, Congress has not yet debated the GOFA bill. While the European Parliament passed the EU GOFA by a large margin, that bill must also be approved by the European Council, which will take up the issue in 2010.

Lowering oil prices by suing OPEC?

In July 2008, the price of crude oil reached a record $145 per barrel. In turn, the prices of products made from crude oil have also soared. The price of a gallon of gasoline, for instance, increased to almost $5 in the United States. Officials and policymakers have tried various tactics to cope with rising crude oil prices such as encouraging the development of alternative energy sources and promoting conservation efforts. (Economists worry that soaring crude oil prices will hurt economic growth.) In one instance, the United States Congress even introduced legislation to push the federal government to begin legal proceedings at the World Trade Organization (or WTO) against the organization that represents the world's leading oil exporting countries. Will such legislation help to lower crude oil prices? What are the prospects that Congress will pass such a bill?

The influence of OPEC

Last year, the 13 member nations of the Organization of Petroleum Exporting Countries (also known as OPEC) collectively produced over 34 million barrels of crude oil per day (or MBPD), which represented over 40 percent of world production. OPEC member nations currently include Algeria, Angola, Ecuador, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, the United Arab Emirates (or UAE), and Venezuela. (Indonesia is scheduled to leave OPEC at the end of 2008). OPEC's stated objectives, among others, are to "coordinate and unify petroleum policies among member countries, in order to secure fair and stable prices for petroleum producers . . . ," which the organization carries out largely by setting production quotas among its member countries, according to energy analysts. (OPEC does not set the actual price of crude oil.) Lowering the amount of crude oil available for sale—by decreasing production within individual countries—can help push up the price of petroleum products.

Experts say that OPEC's decisions to raise or lower production quotas are influential simply because its member countries—as a whole—control a large percentage of the world's crude oil production. But acting individually, these countries have less influence. According to the United States Central Intelligence Agency, Saudi Arabia by itself produced an average of 9.5 MBPD last year. Iran produced 3.9 MBPD. On the other hand, two non-OPEC nations, Russia and the United States, produced 9.4 MBPD and 7.6 MBPD, respectively.

Challenging the legality of oil production quotas

Since 2004, United States Senator Frank Lautenberg (D-NJ) has been spearheading legislation which would challenge at the WTO the legality of OPEC's use of oil production quotas. Analysts say that Senator Lautenberg and other critics believe that these quotas are the main culprits behind higher oil prices. Created in 1995, the WTO is the international organization that sets the rules for global commerce and the settlement of trade disputes. One of its main duties is to administer several international trade agreements, including the General Agreement on Tariffs and Trade (or GATT), which regulates trade in tangible goods. Currently, 9 of the 13 members of OPEC are also members of the WTO. They are Angola, Ecuador, Indonesia, Kuwait, Nigeria, Qatar, Saudi Arabia, the UAE, and Venezuela, which collectively produce 23.36 MBPD of oil.

Under WTO rules, member nations must settle their trade disputes through a formal dispute settlement process. (A WTO member nation may assert that the trade policies of another member violate the provisions of certain WTO treaties, causing it economic harm.) Parties to a dispute must first consult (or simply hold discussions without taking any legal action) with each other to resolve their differences. If they don't reach an agreement, the aggrieved party may ask the WTO to establish a dispute settlement panel to adjudicate the matter. The panel's finding can be appealed to the WTO's Appellate Body whose rulings are final. If a losing party does not comply with the final ruling, the WTO can authorize the prevailing party to impose sanctions or other penalties. (The WTO itself does not impose sanctions.)

Senator Lautenberg's proposed legislation (called S. 2964, and introduced in May 2008) argues that OPEC's use of oil production quotas violates Article XI of GATT, which states that "no prohibitions or restrictions . . . whether made effective through quotas . . . shall be instituted or maintained by any contracting party on the importation . . . or exportation or sale for export of any product." If passed, the bill would require the President to "initiate consultations" with OPEC seeking the elimination of any action which "limits the production or distribution of oil" or "an action in restraint of trade with respect to oil." (That is to say, the bill would require the President to ask OPEC to end its use of oil production quotas. If consultations fail, the United States would have to "institute [dispute settlement] proceedings" at the WTO. On the other hand, the bill—which has four co-sponsors—does not require the President to take any other action against OPEC such as imposing economic sanctions.

A background report (written by Senator Lautenberg's staff) discusses possible exceptions to Article XI which OPEC may raise in defending its production quotas, but concludes that they would be unsuccessful. For example, Article XXI of the GATT (sometimes referred to the national security exception) states that "nothing in this agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests." But the report argues that OPEC had never made this claim in the past when justifying its use of production quotas, and that doing so now would not seem credible.

Other possible defenses include invoking Article XX(h), which allows otherwise GATT-inconsistent measures that were created through an "intergovernmental commodities agreement." But the report argues that OPEC does not constitute an "intergovernmental commodities agreement" that has a broad membership in the international community. In fact, the organization is open only to petroleum exporting countries. OPEC could also invoke Article XX(g), which allows measures that violate GATT if they are related to the "conservation of exhaustible natural resources." But the report says that OPEC had never invoked Article XX(g) in justifying its production quotas. However, various scholars believe that OPEC would be able to qualify for an Article XX(g) exception by arguing that its production quotas are intended to conserve oil, which is an exhaustible resource.

Some scholars believe that OPEC won't have to assert any exceptions under GATT to justify its use of production quotas. According to this viewpoint, GATT rules apply only to actual finished products that are part of a measurable inventory of goods. Prior to its extraction from the ground and its entry into commerce, crude oil (in its natural state) is not yet an actual "product," they say. As a result, unrefined oil is beyond the reach of GATT, including its prohibitions on quotas. These scholars believe that GATT was not meant to apply to a wide range of unprocessed commodities (such as unrefined oils and metals). If unrefined commodities fell under the scope of GATT rules, they argue, then one WTO member could potentially initiate dispute settlement proceedings against another member (which is believed to have, for instance, a large supply of gold) for not increasing its efforts in mining and processing gold. As of October 2008, no country had ever challenged the legality of OPEC's use of production quotas at the WTO.

Senator Lautenberg had introduced similar legislation in 2004, but the bill died in Congress. Legislative analysts say that Congress has never passed such legislation, and that the latest bill is unlikely to reach a vote in committee. In addition to many legal obstacles, political analysts believe that challenging OPEC's use of production quotas could backfire. They fear that OPEC could, for instance, deliberately lower production simply to show the United States that the organization will not bow to outside pressure.

Other legal efforts to bring down oil prices

In addition to these legislative efforts, plaintiffs have challenged OPEC's use of production quotas in U.S. courts on antitrust grounds, arguing that American laws generally prohibit price fixing. A court dismissed one case (filed in 1978 by the International Association of Machinists and Aerospace Workers) on the ground that the plaintiff did not properly notify OPEC of the lawsuit. (The plaintiff, said the court, did not go through diplomatic channels.) In addition, the court cited the "act of state" doctrine whereby the "courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." It reasoned that the development of natural resources is a sovereign function of states for which they enjoy full immunity from legal proceedings in other countries. An appeals court later affirmed this ruling.

In a second case, filed in 2000 by a lone gas station in Alabama, the court concluded that OPEC was not a sovereign entity (such as an actual country) that enjoyed any immunity from domestic lawsuits. It prohibited OPEC "from entering any agreements amongst themselves . . . or otherwise determine the volumes of production and export of crude oil." But an appeals court later overturned that ruling, finding that the plaintiff did properly notify OPEC of the lawsuit by using diplomatic channels.

Several experts have criticized these legal efforts to stop OPEC from using oil production quotas. While quotas certainly affect oil prices, they note that many other factors also play a role. For example, they point out that oil is priced in U.S. dollars. Because the value of the dollar has decreased, countries must spend more dollars to buy the same amount of oil. Others say that countries such as China and India are using much more oil to fuel their rapid economic expansion, which, in turn, lowers oil supplies delivered to other countries. In Nigeria, rebel groups seeking a share of oil profits have attacked that country's oil infrastructure, which led to a decrease in production. Others point out that tensions in the Middle East between the United States and Iran have affected oil prices.

Many also note that even as demand for oil increased in recent years, oil producing countries are falling behind in expanding their physical capacity to extract and then refine more oil. Others have blamed energy speculators for increasing prices. Given these various factors, some have questioned whether a legal proceeding at the WTO will actually lower oil prices. They note that it will be very difficult for the WTO (or any organization for that matter) to determine to what extent any given factor has contributed to rising oil prices.

While many continue to criticize OPEC for using production quotas, economic historians note that, from 1933 through 1972, the United States itself influenced the price of domestically produced oil by regulating output among different states. In addition, over a period of several decades, several U.S. presidents had invoked Section 232 of the Trade Expansion Act of 1962 to impose restrictions on oil imports in order to maintain steady price levels for domestically produced oil. (That act allows the president to restrict imports of any product that threatens to impair "national security.")

After reaching its record high in July 2008, the price of crude oil began to fall. For example, in October 2008, a barrel of crude oil was trading below $70. Commentators believe that the legislation introduced by Senator Lautenberg did not play any direct role in that decline. Instead, they say that rising prices combined with a slowing world economy had lowered the demand for oil. In fact, prices had declined so much (compared to the early summer) that OPEC members decided in September 2008 that they would lower production by 500,000 barrels a day in order to push prices back up.

International Law News Roundup

COMPARATIVE LAW

Outsourcing reproduction to other nations?

While businesses have long contracted out labor intensive work—in a practice called outsourcing—to countries with lower labor costs, this phenomenon has also spread to different service sectors such as computer programming, tax-filing preparation, and even legal work. Analysts say that many people are now going to other countries to find surrogate mothers, which the media have dubbed as reproductive outsourcing. How prevalent is this practice, and what are some of its legal implications?

Surrogacy is an arrangement under which a woman (known as a "surrogate") agrees to become artificially inseminated and, upon birth of the child, give up her parental rights and custody of the child to the person(s) for whom the child was carried. Surrogacy is often the last resort of infertile couples attempting to have a child. While there is no single legal definition of surrogacy in the United States, legal and medical dictionaries provide various descriptions of this arrangement.

In some cases, the surrogate mother donates her egg, making her genetically related to the child. In others, the surrogate mother is inseminated with both donor egg and sperm, and, therefore, has no genetic relation to the child. (This is known as a gestational surrogacy.) Surrogacy arrangements exist in two forms. In an altruistic arrangement, the surrogate mother does not receive compensation for carrying a child to birth, though she is usually reimbursed for medical and other reasonable expenses. On the other hand, in a commercial arrangement, the surrogate mother receives financial compensation for acting as a surrogate.

In the United States, there is no federal law that regulates surrogacy arrangements. Instead, individual states regulate these arrangements within their respective jurisdictions. (The American Bar Association created model laws to regulate surrogacy arrangements, but they are nonbinding.) Michigan, for instance, imposes the possibility of both fines and jail time for parties to any kind of surrogacy contract, which can also extend to any organization that "induces, arranges, procures, or otherwise assists" in such an arrangement. New York imposes civil penalties on individuals who enter into a commercial surrogacy contract. In addition, any organization that repeatedly "induces, arranges or assists" in a surrogacy arrangement can be convicted of a felony.

In contrast, other states allow and regulate surrogacy arrangements and contracts. Texas has enacted regulations that transfer parental rights to the intended parents after the birth of a child carried by a surrogate mother. In California, no court has ever awarded parental rights to a gestational surrogate mother.

Although surrogacy arrangements have existed for decades, there are still many unresolved legal issues related to this practice. For example, there are questions concerning the extent to which parties may enforce provisions in surrogacy contracts. Some require an abortion under certain situations. Others attempt to regulate the surrogate mother's diet and personal activities. More difficult legal questions arise when both the intended parents and the surrogate mother refuse to take responsibility for a child born with a defect.

There are also ethical and moral considerations surrounding this practice. Some fear that the surrogacy process exploits underprivileged women who need financial assistance. Opponents have decried surrogacy as "renting a womb" or creating a "baby factory." There are also medical concerns. Many worry that a surrogate mother who develops complications during the pregnancy or after birth could suffer physical, emotional, and psychological impairments.

> The popularity of surrogacy arrangements in India (and other countries) is outpacing the passage of laws and regulations necessary to oversee that practice and prevent potential abuses.

The United States is not the only country grappling with these issues. Because there are no international treaties that specifically address surrogacy, each country must regulate these arrangements on its own. The United Kingdom, for instance, allows only altruistic surrogacy where the surrogate mothers receive financial payments only for expenses related to the pregnancy. In addition, a surrogate mother cannot be forced to relinquish the child if she chooses not to. France does not allow commercial surrogacy, but is currently revising its bioethical laws, which may lead to changes in surrogacy arrangements. Japan does not have any laws regarding surrogacy, though there is a push to pass legislation that would outlaw the practice. In 1983, Japanese obstetricians adopted a non-binding ban on surrogacy. But analysts note that some doctors have disregarded this policy.

Because there are many legal uncertainties regarding surrogacy arrangements in other countries, many foreign couples have turned to those American states such as California (where laws favor intended parents) to have surrogate children. According to some estimates, there were over 1,000 surrogacy births in the United States last year. Intended parents have included both domestic residents and couples from Canada, Iceland, Japan, Saudi Arabia, and the United Kingdom. But experts point out that because surrogacy arrangements in America cost between $40,000 to $120,000 (including medical and legal expenses, and other fees), many foreigners and U.S. citizens alike have turned to other countries.

According to various media sources, India is quickly becoming a popular destination for surrogacy. They have cited India's low costs for surrogacy arrangements, high quality medical care, English-speaking doctors, a large population of women willing to become surrogate mothers, and also a lack of legal restrictions. While Indian laws allow surrogacy arrangements, there are no specific regulations that actually guide various aspects of this practice. Some report that the government attempted to pass national laws to regulate surrogacies, but these efforts have stalled. The Indian Council of Medical Research did frame national guidelines in 2005 to regulate

surrogacy arrangements, but they are voluntary and not legally binding. As a result, clinics and hospitals largely self-regulate their practices.

It is estimated that there are 3,000 surrogacy clinics in India which earn approximately $450 million a year. Surrogate mothers in India receive a fee of $3,000 to $5,000 dollars (compared to the tens of thousands of dollars in the United States). The total cost of surrogacy in India (including hospital costs, and surrogacy and legal fees) can be one-fifth to one-half of the cost in the United States. Gestational surrogacy is the most prevalent form of surrogacy in India because the absence of a genetic link between the surrogate mother and the child diminishes the mother's legal rights, say some commentators. Also, contracts in India require the surrogate mother to relinquish all rights to the child upon birth.

Although Indian law allows surrogacy arrangements, the lack of specific regulations guiding the practice has led to legal complications in some cases. Recently, a Japanese couple arranged a gestational surrogacy in that country. While the husband donated the sperm and an Indian woman donated her egg, the child was carried by a different Indian woman. The Japanese couple divorced before the birth of the child, and the former wife refused to take the child. During this time, the Indian surrogate mother left the child at the hospital (as stipulated in the contract). The father is attempting to take custody by adopting the child. But Indian law forbids single fathers to adopt children. One Indian newspaper dubbed the child "the country's first surrogate-orphan."

In addition to the legal uncertainties, there are may other concerns. Many worry that the largely self-regulating clinics will exploit surrogate mothers. One article noted that because the amount of money offered to surrogate mothers in India could represent 10 to 15 years of earned wages, a spouse or family members could pressure women to participate in surrogacies against their will. Some critics point out that many surrogate mothers are illiterate and may not fully understand what may be involved in a surrogate arrangement, which is still regarded as a social taboo in India. Others say that while clinics closely monitor the health of a surrogate mother during pregnancy, such care could drop considerably after birth when a surrogate mother may need further post-natal care.

Legal analysts say that the popularity of surrogacy arrangements in India (and other countries) is outpacing the passage of laws and regulations necessary to oversee that practice and prevent abuses, and that more problems could arise in the future.

COMPARATIVE LAW

Anti-anorexia law in France

A proposed law in France would make it a crime to use mass media (such as websites or publications) to promote certain behaviors that are now widely classified as eating disorders. While supporters believe that the law will help to counter the perception that people must become or stay extremely thin, some opponents fear that it could have the opposite effect.

Under the current bill, people who create or promote websites or publications promoting eating disorders such as anorexia and bulimia could face punishment of up to two years in jail and fines up to €30,000 (and would increase to three years and €45,000 if the medium is linked to a person's death). Commentators believe that the high profile death of a Brazilian model from anorexia in 2006 pressured the government to propose the law. There are currently up to 40,000 anorexics in France (90 percent of whom are young women), according to various media sources.

Social critics believe that, over the last few decades, media all over the world have been glamorizing what many health experts say are unrealistic expectations to be thin. They say that France has recently seen the growth of websites that promote anorexia and bulimia as lifestyle choices. According to health experts, people who have anorexia have a strong fear of gaining weight and, as a result, dramatically reduce their intake of food, leading to what some have described as "self-starvation." On the other hand, bulimia is an eating disorder where people first consume and then purge large quantities of food in a short period of time by vomiting or taking laxatives. These disorders can lead to serious health problems and even death. Critics say that these websites give advice to its readers on how to lie to doctors to avoid detection of eating disorders, and also on using laxatives, fasting, and purging, all in an effort to become or stay extremely thin.

Opponents of the bill say that it raises serious issues concerning freedom of speech and is also a misguided attempt to micro-manage people's lives. They also believe that the law would be difficult to enforce, especially if a particular website was created outside of France. Others say that the bill could also do more harm than good by raising awareness of, say, pro-anorexia information. Rather than trying to pass and enforce the proposed law, some say that the government should aggressively promote education and counseling related to proper health and nutrition.

While the bill was passed by France's Parliament in April 2008, it still needs approval from the Senate. Legislative analysts believe that the bill will be amended to improve enforcement procedures and also to establish criteria which will be used to determine whether a particular medium is promoting "extreme thinness."

COMPARATIVE LAW

Legal rights for apes in Spain?

In June 2008, a parliamentary committee in Spain approved a bill which would grant certain legal rights to chimpanzees, gorillas, and orangutans, which are collectively known as great apes. While some groups have praised these efforts, critics argue that the government should spend its time and resources to address what they say are more pressing problems.

The proposed bill would require the Spanish government to implement the agenda of the Great Ape Project, which is an international organization of primatologists and other experts who advocate basic legal rights for apes. If Spain passes and implements this law, great apes will have a right to life and protection from torture. Various media sources say that it will be illegal to perform harmful experiments on apes, keep them in circuses, and use them in television commercials or filming. It will also be illegal to kill an ape except in

self-defense. While the bill will not require the release of apes that are currently kept in zoos, it will require better living conditions for them.

Supporters of the bill say that, unlike most other animals, the DNA of great apes closely resembles that of humans. And like humans, they have advanced cognitive abilities. They also note that great apes "have curiosity, they feel affection and jealousy, they lie, and suffer horribly when they are deprived of their freedom." Given these special characteristics, supporters argue that countries around the world should pass legislation giving certain rights to apes.

On the other hand, some scientists worry that the bill (if passed) could prohibit the use of apes in studying the virus that causes AIDS, which many now believe originated from them. Others note that Spain already has animal rights laws in place and don't see the need for more specific rights for apes. Many have also argued that the Spanish government should focus its efforts on improving the country's economy and promoting human rights conditions around the world, among other pressing issues, instead of conveying certain rights to animals. Despite these criticisms, legislative analysts believe that the bill will become law later this year, and will be incorporated into Spain's penal code.

INTERNATIONAL CIVIL LIBERTIES

Foreign libel suits and the protection of free speech

Does the First Amendment's provision concerning freedom of speech protect U.S. citizens from lawsuits filed in other countries by foreigners who claim that their reputations had been harmed by what they believe are false statements concerning them? In a recent case, a citizen of Saudi Arabia won a lawsuit filed in the United Kingdom against an American author whose book claimed alleged financial ties between that individual and terrorist groups. How will such a decision affect free speech in the United States? What are some of its legal implications?

In 2003, Rachel Ehrenfeld—a resident of New York who is also director of the American Center for Democracy (a think tank that advises "decision-makers and the public as to the ideological underpinnings, organizational structure, and political objectives used by terrorists and terrorist state sponsors")—published a book called *Funding Evil: How Terrorism is Financed—and How to Stop It*, which purports to trace the flow of funds to terrorist organizations. In her book, Ehrenfeld claims that Sheikh Khalid Bin Mahfouz (a former chairman of the National Commercial Bank in Saudi Arabia) sponsored various terrorist organizations, and is also alleged "to have deposited tens of millions of dollars in London and New York directly into terrorist accounts—the accounts of the same terrorists who were implicated in the 1998 bombing of the U.S. embassies in Kenya and Tanzania." The book also contends that the bin Mahfouz family supported various charity organizations which, in turn, aided the international terrorist network Al-Qaeda.

Bin Mahfouz, a Saudi citizen living in Saudi Arabia, denied these allegations, and, along with his sons—who are also businessmen with financial interests around the world—filed a lawsuit in the United Kingdom in 2004 against Ehrenfeld and her publisher Bonus Books, which never distributed the book in that country. Court records show that he had filed as many as 29 lawsuits in the United Kingdom against others who made similar statements regarding his alleged ties to terrorism.

Lawsuits such as the ones filed by bin Mahfouz revolve around a concept called defamation, which is the act of making a false statement that harms someone's reputation and exposes that person to public ridicule and contempt. There are different forms of defamation. When the false statement is a gesture or made orally, it is called slander. If, on the other hand, the defamatory statement is published in written form, it is called libel. Many countries have in place a framework which allows people to file defamation lawsuits. There are varying thresholds in determining whether a certain remark was defamatory in nature.

In the United States, libel laws and the standards for adjudicating such lawsuits are shaped by the First Amendment of the U.S. Constitution, which states that "Congress shall make no law . . . abridging the freedom of speech . . ." American courts have long protected certain forms of speech from what they believe are undue restrictions in order to promote public discourse in the proverbial "market place of ideas." For example, in *New York Times Co. v. Sullivan* (1964), one Supreme Court justice wrote: "There is a national commitment [in the United States] to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks . . ."

Though each state in America has its own laws and standards for adjudicating libel suits, they share several common elements. A plaintiff must show, among many other factors, that the defendant had knowingly and recklessly published material that he knew was false, and which would hurt the public reputation of the plaintiff. In order to win monetary damages, the plaintiff must prove that he or she had suffered an actual injury. (For instance, a plaintiff may have to show that the defendant's false statements directly resulted in, say, lost business.) Given this high threshold and a long history of jurisprudence protecting controversial speech, legal experts say that it is difficult to win libel suits in the United States and collect damages.

In contrast, the common law tradition in countries such as the United Kingdom—where there is no equivalent of the First Amendment—places more importance on protecting an individual's reputation, say legal commentators. As a result, there are different standards for adjudicating libel suits in the United Kingdom. For instance, defamatory speech is presumed to be false. So, during a lawsuit, a defendant (and not the plaintiff) would have the burden of proving the veracity of a particular statement. Furthermore, a plaintiff does not have to show that a libelous statement had caused an actual injury to collect monetary damages.

How did bin Mahfouz and his sons, who are not British citizens, file a libel suit (*Mahfouz and others v. Ehrenfeld and another*) in the United Kingdom to protect their individual reputations against what they believe were false statements made by an American citizen in a book published in the United States? The British court deciding the case reasoned that bin Mahfouz and his sons did have a legal basis to file a libel suit. It noted that

buyers in the United Kingdom had purchased 23 copies of *Funding Evil* through "various online bookshops," and that the first chapter was even available on the Internet. As a result, this would have allowed people in that country to form some opinion (whether right or wrong) concerning bin Mahfouz and his sons.

In addition, the court pointed out that bin Mahfouz's sons had ties to the United Kingdom—they were operating a business headquartered in that country. So if the owners had a reputation of supporting terrorist causes, it could have affected the company's operations. Media analysts note that, in the last several decades, plaintiffs from several parts of the world (including many from the United States) had filed libel suits in the United Kingdom even though they did not have strong ties to that country. But some critics believe that some plaintiffs had engaged in "forum shopping" where they look for a legal forum which will provide them with the most favorable chances of winning a libel suit.

A successful enforcement of a British libel suit in New York could chill free speech if American citizens fear that foreign plaintiffs could sue them abroad for an activity that is protected in the United States.

In December 2004, the British court ruled in favor of bin Mahfouz and his sons. (Ehrenfeld decided not to appear in court to defend herself.) It decided that statements in Ehrenfeld's book about bin Mahfouz and his sons were false, ordered the author and her publisher to issue a correction and an apology, and forbade them from publishing the same statements in the United Kingdom. The court also awarded bin Mahfouz and his sons damages of £10,000 each, plus attorney fees and costs. Media reports say that bin Mahfouz has not attempted to enforce this judgment in the United States.

After the British court ruling, Ehrenfeld asked the U.S. District Court for the Southern District of New York in late 2004 to declare that judgment unenforceable in the United States in order to prevent bin Mahfouz from seizing her assets. (In technical terms, she asked the court to issue a declaratory judgment, which is an opinion from a court addressing a question of law "without ordering anything to be done.") In April 2006, the court dismissed the case, arguing that, because bin Mahfouz did not have sufficient business or personal ties to New York, it did not have jurisdiction to issue any kind of declaration. (Bin Mahfouz had sold his New York apartments prior to the case, and no longer had business connections to the state.) It also rejected Ehrenfeld's argument that various communications (such as letters and e-mail messages) sent from bin Mahfouz's lawyers to her in New York established sufficient business ties in that state since they did "not appear to support any business objective."

Ehrenfeld appealed the district court's decision to the U.S. Court of Appeals for the Second Circuit, which affirmed the lower court's decision in June 2007. But the appeals court asked the New York Court of Appeals (that state's highest court) to decide whether the communications between Ehrenfeld and bin Mahfouz's lawyers had established sufficient ties to New York to give a court the legal authority to issue a judgment. The appeals court ruled that they did not, hence leaving open the possibility that bin Mahfouz would be able to rely on a foreign court ruling to seize Ehrenfeld's assets in New York. Some commentators speculated that a successful enforcement of the British court ruling in New York could undermine freedom of speech if American citizens feared that foreign plaintiffs could sue them in foreign jurisdictions for an activity (e.g., publishing) that is largely protected in the United States.

In response to media reports concerning the Ehrenfeld and bin Mahfouz case, two members of the New York State Legislature—Assemblyman Rory Lancman (D-Queens) and Senator Dean Skelos (R-Rockville Centre)—sponsored the "Libel Terrorism Protection Act" whose purpose is to "amend the [New York] civil practice law and rules in relation to enforceability of certain foreign judgments." More specifically, the bill would grant jurisdiction to New York courts to hear cases involving "any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of [New York]," regardless of the plaintiff's ties to the state. The provisions would also apply retroactively to such an individual. (Such language would, therefore, give New York courts the authority to hear Ehrenfeld's request for a declaratory judgment even though bin Mahfouz did not have ties to New York.)

The bill, though, does not automatically void all defamation rulings rendered by foreign courts against New York residents. Instead, it does not require New York courts to honor foreign judgments rendered in countries whose laws do not provide protections comparable to those available under the First Amendment. In April 2008, New York State Governor David Patterson signed the bill into law. The U.S. House of Representatives unanimously passed a bill in September 2008 which prohibits domestic courts from recognizing or enforcing foreign defamation cases "unless the domestic court determines that the foreign judgment is consistent with the first amendment to the Constitution of the United States." Senators Arlen Specter (R-PA) and Joseph Lieberman (ID-CT) introduced companion legislation in the U.S. Senate that would give "any United States person against whom a lawsuit is brought in a foreign country for defamation" the ability to file a suit in federal court to have the court declare the foreign judgment unenforceable in the United States. It would also give jurisdiction to federal courts to hear cases against foreign individuals who file lawsuits outside the United States against American defendants. Legislative analysts believe that the U.S. Senate will pass a bill later in the fall.

INTERNATIONAL CIVIL LIBERTIES

The Olympic Games and freedom of speech

When representatives to the International Olympic Committee (or IOC) chose China to host the 2008 Olympic Games, political analysts wondered about the extent to which protestors—who wanted to re-ignite a debate about that country's questionable human rights practices—would be able to carry out their demonstrations in one of the most authoritarian countries in the world. They also noted that, while some international treaties call on countries to recognize and uphold various political rights (such as freedom of speech), the Olympic Charter itself prohibits demonstrations during

the games. What exactly are the rules concerning political demonstrations during the Olympic Games, and do they violate international law?

The IOC—which is the international body responsible for coordinating the Olympic Games—is not an actual international organization comparable to, say, the United Nations or the International Monetary Fund. Instead, it describes itself as "an international, non-governmental, not-for-profit organization." Among its many responsibilities, the IOC interprets and enforces the Olympic Charter, which regulates various aspects of the Olympic Games such as setting qualifications for athletes and establishing procedures on how to choose locations for events. While national Olympic committees, athletes, and those involved in the Olympic Games must follow the rules and regulations of the Charter, the document itself is not considered an international treaty that is binding on state governments.

One provision in the Charter which has long caused controversy is Chapter 51(3), which states: "No kind of demonstration or political, religious, or racial propaganda is permitted in any Olympic sites, venues, or other areas." IOC officials say that the enforcement of this clause helps to ensure that the Olympic Games run smoothly. They also argue that the Olympics are sporting events and not a forum for politics, and that any sort of demonstration during the games would detract from the athletes' accomplishments. In fact, the Charter states that the mission of the IOC, among others, is to "encourage and support the organization, development, and coordination of sport and sports competitions."

Authorities in the host countries enforce certain provision in the Olympic Charter by using their own laws. Experts note that most countries have placed limits on the exercise of speech, which include protests.

If an athlete violates the Charter, the IOC can disqualify that person, take away his medals, or even ban him from Olympic competition altogether. Most countries, including the United States, require their Olympic athletes to sign an agreement with their own national Olympic committees promising to adhere to the rules of the Charter, including Chapter 51(3). In one of the most memorable protests during the Olympic Games, two African-American sprinters—John Carlos and Tommie Smith—raised their fists during their medal awards ceremony in the 1968 Olympics in Mexico City to protest the treatment of black people in the United States and also to support the civil rights movement. The IOC expelled them from the games.

On the other hand, human rights groups contend that it is appropriate to hold political protests to highlight what they consider to be violations of fundamental rights in the host country or to garner attention for many other issues, and that prohibiting such protests could be considered a violation of freedom of speech. They believe that conducting these protests during the Olympic Games—in front of an audience of what media analysts estimate to be over four billion people who watch or listen to the games through the Internet, television, and radio—can pressure a nation to change its policies.

While the IOC chairman recently said that free speech was an "absolute human right," critics wondered how to reconcile that statement with Chapter 51(3). They also note that the ban on protests seemed to conflict with provisions in certain international treaties. For example, the Universal Declaration on Human Rights (which was adopted by UN member states, including China, in 1948) states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media regardless of frontiers." But legal analysts note that the declaration is largely aspirational (i.e., states should aspire to carry out its terms), and does not have the force of law.

On the other hand, the International Covenant on Civil and Political Rights—which declares in Article 19(2) that "everyone shall have the right to freedom of expression," and that "this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print"—allows people to petition the state to seek remedies for violations of that agreement. (Article 2 of the covenant says that "each State Party to the present Covenant undertakes . . . to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy . . .") The covenant came into force for its signatory countries in 1976.

Still, commentators say that the covenant does not set explicit minimum standards for a spectrum of political rights. As a result, the implementation of the covenant has varied widely across the world where different countries have set their own restrictions on the practice of various rights, including freedom of speech. Also, because China has not ratified the covenant, it has no binding effect on that nation. Other analysts point out that the provisions of the Olympic Charter, including Chapter 51(3), do not supersede the laws of the host country during the duration of the games simply because it is not considered an international treaty. Instead, it restricts certain demonstrations and the distribution of specified materials only at actual Olympic venues. Some also question whether the IOC (which is not considered a sovereign entity) falls under the jurisdiction of international treaties such as the covenant, which applies only to state governments.

The responsibilities of enforcing the various provisions of the Olympic Charter fall, in theory, to the IOC. In fact, a majority of the provisions of the Charter can be enforced through administrative decisions. On the other hand, provisions such as Chapter 51(3) are usually enforced by authorities in the host countries applying their own laws. Experts note that most countries place limits on the exercise of speech, and usually stop disruptive protests which can interfere with public safety. For example, New York City requires demonstrators to apply for a permit if they want to protest in certain venues.

In 2002, during the Olympic Games in Salt Lake City, Utah, many people worried that an inflexible enforcement of Chapter 51(3) could violate constitutional provisions protecting freedom of speech in the United States. To alleviate these concerns while also ensuring the smooth operation of the Olympic Games, the U.S. organizing committee and the City of Salt Lake provided what they called "designated public forums" where a total of 170 people could hold political demonstrations near the Olympic venues, though they had to apply for a permit to do so (which was granted at the discretion of the city).

In the case of the 2008 Olympic Games in Beijing, political analysts note that China's constitution states that "citizens of the People's Republic of China have freedom of speech, publication, assembly, association, procession, and demonstration." But they say that vaguely worded domestic regulations—and their interpretations by government authorities—have allowed China to restrict these rights severely. For example, publications, demonstrations, news, and other media are subject to censorship if they harm "the interests of the nation" or disturb social order and stability.

Before the start of the games, the Beijing Organizing Committee issued a list of activities which would be prohibited for the duration of the event. (China argued that both existing domestic laws and Chapter 51(3) of the Olympic Charter allowed the country to enforce such restrictions.) For example, people would be prohibited from displaying the flag of Tibet, which is a province whose residents rioted against Chinese rule in the months before the games. The government also announced that it would not allow the foreign media to have unrestricted access to the Internet, and that it would also block the websites of human rights groups. The Chinese government later agreed to establish protest zones in designated city parks during the games. But media reports say that officials denied every application to use these zones.

INTERNATIONAL CRIMINAL COURT

Mistrial of its first trial?

In March 2006, Thomas Lubanga became the first person arrested and then transferred to the International Criminal Court—or ICC, which is the world's first permanent criminal tribunal—to face prosecution for allegedly ordering war crimes during a long-running civil war in the Democratic Republic of the Congo (or DRC). But during court proceedings, a panel of judges said that missteps by the prosecution had denied Lubanga a fair trial and ordered his release. Why did the panel make this ruling? And what is the current status of this case?

After taking him into custody, the ICC Prosecutor charged that Lubanga—the founder of a political party called the Union des Patriotes Congolais—had violated Article 8(2)(b)(xxvi) of the Rome Statute, which prohibits war crimes such as "conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities." (War crimes constitute one of the four crimes that the ICC is empowered to prosecute under the Rome Statute of the ICC, which is the treaty creating that criminal tribunal.) Witnesses and evidence suggest that Lubanga had ordered troops to conscript children to fight in the DRC's civil war, which ended in 2003. Following his arrest, an ICC pre-trial chamber confirmed the charges against Mr. Lubanga in 2007, and then sent his case to a trial chamber to conduct the ICC's first trial, which was scheduled to begin in June 2008.

During the course of the ICC's investigation, the Office of the Prosecution (or OTP) had received hundreds of confidential documents from the United Nations and other sources concerning Lubanga. Under Article 54(3)(e) of the Rome Statute, the Prosecutor may "agree not to disclose—at any stage of the proceedings—documents or information that the Prosecutor obtains on the condition of confidentiality . . . unless the provider of the information consents." According to legal experts, this provision protects the safety of those who provided the documents, many of whom work in dangerous conditions. In addition, the confidential information may be used only for generating new evidence (and not for use in an actual trial).

However, the Prosecutor determined that many of these documents contained potentially exculpatory information, that is "evidence [that] shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence." A substantial body of international case law holds that the disclosure of exculpatory evidence is a fundamental right of the accused and is necessary to ensure a fair trial. In fact, Article 67(2) of the Rome Statute says that "the Prosecutor shall, as soon as practicable, disclose to the defense evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence."

When these developments came to light, the OTP argued that its confidentiality agreement with the United Nations prevented it from disclosing these materials to the defense or even to the trial chamber judges to evaluate their exculpatory value. The defense, on the other hand, argued that the prosecution's obligation to disclose potentially exculpatory material superseded any nondisclosure agreements made with the United Nations.

In a decision which was seen as a setback in the ICCs' first trial, the trial chamber ruled in July 2008 that if the OTP had used Article 54(3)(e) sparingly for the limited purpose of generating "lead" evidence, then it could have made arrangements with the United Nations for the disclosure of potentially exculpatory evidence. Instead, it found that "the prosecution's general approach [had] been to use Article 54(3)(e) to obtain a wide range of materials under the cloak of confidentiality, in order to identify from those materials evidence to be used at trial."

After describing the prosecution's widespread use of Article 54(3)(e) as a "wholesale and serious abuse," the trial chamber concluded that "the trial process [was] ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial." It suspended the proceedings against Lubanga, and then, in July 2008, ordered his unrestricted release. But the trial chamber also suspended its decision and kept Lubanga in custody while the prosecution asked an appeals chamber for a review, which is still pending today.

A prosecution by the ICC—which is located in The Hague and began its operations in 2002—consists of many stages. A signatory nation to the Rome Statute or the United Nations Security Council may refer what is called a "situation" (such as a conflict where there are allegations of massive human rights violations) to the ICC for an investigation. Alternatively, the ICC may also initiate one on its own. After receiving authorization from a pre-trial chamber, the OTP conducts a fact-finding investigation to determine, among other requirements, whether the alleged crimes fall under the ICC's jurisdiction. (It may exercise its jurisdiction only in instances where a signatory nation is unable or unwilling to prosecute alleged violations of international human rights.) The OTP must also investigate both incriminating and exonerating circumstances equally.

The Chief Prosecutor may apply to a pre-trial chamber for arrest warrants for certain individuals. Because the ICC does not have its own police force to apprehend wanted individuals, it must rely on national governments to arrest and transfer them to the ICC. (Lubanga was arrested by Congolese authorities in March 2005 and was detained for a full year even before the ICC issued its arrest warrant or requested his transfer to The Hague.) Before proceeding to an actual trial, a pre-trial chamber holds a hearing to confirm the charges against the accused, meaning that it must find "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged." This step is comparable to an arraignment in an American criminal proceeding.

During the actual trial phase, the ICC and the American criminal system share many similarities. For example, the OTP must prove the guilt of the accused beyond a reasonable doubt. Also, the accused is entitled to conduct its defense either in person or through an appointed legal counsel. But unlike a criminal proceeding in the United States, juries are not used during an ICC trial. Instead, cases are decided by a panel of three judges. (Throughout the world, in fact, trial by jury for criminal proceedings is more of the exception than the rule, according to the U.S. Department of Justice.) Following the trial, the panel of judges issues its verdict, either convicting or acquitting the accused. A conviction carries a prison sentence and may also include reparations for the victims. But the ICC may not impose capital punishment.

In addition to the Lubanga trial, the OTP is beginning prosecutions in several other cases (all of which involve countries in Africa). For example, two cases against three other accused parties from the DRC are in the pre-trial phase. There is one case, also in the pre-trial phase, proceeding against four individuals from Uganda. The ICC also issued an arrest warrant for one person from the Central African Republic who is not yet in ICC custody. A case against two individuals from Sudan (who were allegedly involved in atrocities in the Darfur region of that country) is in the pre-trial phase. And, for the first time, the Chief Prosecutor (in July 2008) applied for an arrest warrant for a sitting head of state—President Omar Hassan al-Bashir of Sudan for his alleged involvement in atrocities committed in Darfur. (See *Another first: Arrest warrant for sitting head of state* below.)

INTERNATIONAL CRIMINAL COURT

Another first: Arrest warrant for sitting head of state

In July 2008, the Chief Prosecutor of the International Criminal Court (or ICC) publicly announced that he was seeking an arrest warrant for President Omar Hassan al-Bashir of Sudan for his alleged involvement in human rights violations in the Darfur region of that country. While the ICC—the world's only permanent international criminal tribunal—had previously issued arrest warrants for many other individuals, this was the first for a sitting head of state. (The ICC also recently began its first trial.) While many have applauded the Chief Prosecutor, Luis Moreno-Ocampo, others worry that the announcement could lead to more unrest in Darfur and endanger the lives of peacekeepers and aid organizations working there.

In the arrest warrant application submitted to an ICC body called a pre-trial chamber, Moreno-Ocampo charged al-Bashir with 3 counts of genocide, 5 counts of crimes against humanity (including murder, extermination, forcible transfer of the population, torture, and rape), and 2 counts of war crimes (including intentionally directing attacks against the civilian population and pillaging), all of which violate provisions in the Rome Statute of the ICC, the treaty creating the tribunal. The Chief Prosecutor did not accuse al-Bashir of directly carrying out these crimes, but asserted that the Sudanese president was "the mastermind" behind them, and, as a result, bore indirect responsibility for their commission.

While the roots of a long-running conflict in Darfur run deep, the current humanitarian crisis can be traced to 2003, when two African insurgencies—the Sudan Liberation Movement and the Justice Equality Movement—carried out a series of raids that killed hundreds of Sudanese government troops. In response, the government began to arm nomadic Arab militias known as the janjaweed, which unleashed what human rights groups have called a systematic campaign of destruction and terror against African civilians in Darfur.

In response to growing reports of alleged human rights violations, the United Nations Security Council adopted Resolution 1593 in March 2005, referring the situation in Darfur to the ICC for investigation and possible prosecution. (The Security Council has this authority under Article 13(b) of the Rome Statute.) If the Prosecutor finds reasonable grounds that a certain individual had committed a crime within the ICC's jurisdiction, he may request an arrest warrant from one of the ICC's pre-trial chambers. (For a step-by-step description of how the ICC carries out its investigations and criminal proceedings, see *International Criminal Court: Mistrial of its first trial?* on page 41.)

The Sudanese government later signed a peace agreement with several rebel groups in May 2006, but fighting continues against others in Darfur. Current peace talks, say UN officials, have stalled. Some estimates say that at least 200,000 people have died and over two million Darfurians have been displaced in the continuing conflict. Peacekeepers from the African Union (AU) and even the United Nations have been trying to maintain peace in the region. Yet critics believe that the Sudanese government has largely obstructed these efforts. Because of continuing attacks, the United Nations has been able to deploy to the region only 9,000 of the more than 20,000 peacekeepers it had authorized. Many critics also say that the AU troops are poorly equipped to carry out their duties.

Sudanese officials responded angrily to the announcement of the arrest warrant, referring to the ICC as a "stooge" for Sudan's enemies. According to one source, the ruling National Congress Party said that Moreno-Ocampo's announcement would cause "more violence and blood" in Darfur, but later said that Sudan would not retaliate against UN peacekeepers. More recently, however, Sudan has said that it could not guarantee the security of peacekeepers and threatened to expel them from the country.

Sudan also argued that the ICC did not have jurisdiction over al-Bashir or any other Sudanese citizen because it did not sign the Rome Statute. (Under international law, a state is ordinarily not bound to comply with treaties that it did not sign or ratify.) But some legal experts contend that if the UN Security Council can

refer human rights situations occurring within a UN member state to the ICC, then the ICC can claim jurisdiction over that nation simply by virtue of its membership in the United Nations (and regardless of whether it signed the Rome Statute). Others have disputed such legal reasoning. In any event, Sudan said that it would still appoint a team of lawyers to defend al-Bashir.

Experts say that even if the pre-trial chamber does issue an arrest warrant for al-Bashir (a decision which will be made in the fall of 2008), the ICC still faces several significant obstacles in bringing the Sudanese leader to trial.

For example, the ICC does not have a police force to execute its arrest warrants. Instead, it relies on the cooperation of signatory nations to the Rome Statute to apprehend wanted individuals physically present in their territories. (In fact, Article 89(1) of the Rome Statute requires signatories to comply with such arrest warrants.) But analysts say that Sudan did not sign that treaty, and point out that the ICC had previously issued arrest warrants against two other Sudanese officials over their alleged roles in carrying out atrocities in Darfur, and that the government had refused to apprehend these individuals. Al-Bashir also promoted one of the suspects to work in the government's office of humanitarian affairs. Given these circumstances, political analysts consider it highly unlikely that the current regime will arrest al-Bashir (though others believe that a new government may change its stance).

An arrest warrant application submitted to the International Criminal Court charges a sitting head of state with 3 counts of genocide, 5 counts of crimes against humanity, and 2 counts of war crimes.

News of the application for the arrest warrant has also divided the international community on how to bring peace to the conflict-torn Darfur region while still pursuing justice for its many victims. Critics say that the Chief Prosecutor's announcement will further destabilize the situation in Darfur by discouraging the current regime from reaching a political settlement in ending the fighting and also by exposing peacekeeping troops and humanitarian aid workers to more attacks from government proxy groups such as the janjaweed. Supporters of Moreno-Ocampo, on the other hand, respond that news of the arrest warrant could pressure the Sudanese government to revive peace talks. They also point out that many in the international community had leveled similar criticisms against the ad hoc UN criminal tribunal that had issued an arrest warrant for another sitting head of state—Slobodan Milosevic of Serbia. But threats of further violence did not materialize, and Milosevic was later brought to stand trial before a special tribunal for his alleged crimes carried during the war in the Balkans in the 1990s.

Members of the UN Security Council are also debating whether the Chief Prosecutor should have sought the arrest warrant. Although the ICC is a world body separate from and independent of the United Nations, experts say that the two organizations share what they call a "special relationship" that could affect the prosecution of al-Bashir. As was previously mentioned, the Rome Statute authorizes the Security Council to refer a situation to the ICC for investigation. Furthermore, under Article 16 of the Rome Statute, the Security Council may pass a resolution halting an investigation or proceedings for up to a year (hence giving it what some describe as veto power over ICC prosecutions).

In July 2008, South Africa and Libya—who are non-permanent members of the Security Council—proposed a resolution that would extend the mandate of UN peacekeepers in Darfur, but only if it contained provisions that would suspend any ICC actions against al-Bashir. While this proposal gained the support of China, Russia, the AU, and the Arab League, other countries such as France and the United States argued that the two issues should remain separate. Still others (Britain, for example) argued that the Security Council should wait until the ICC pre-trial chamber decides on whether to approve the arrest warrant application. (Experts note that a pre-trial chamber has never rejected one.)

Sudan later announced that it would try (in its domestic courts) those individuals suspected of committing atrocities in Darfur, and that it would allow the AU, the Arab League, and the United Nations to monitor such proceedings. (Under the Rome Statute, the ICC's jurisdiction is limited to crimes that national governments are unable or unwilling to prosecute.) But many analysts say that it is extremely unlikely that Sudan would take any action against its own president.

INTERNATIONAL INVESTMENT

New rules regulating sovereign wealth funds?

In response to growing international concern over the influence of large investment funds owned or controlled by foreign governments, a group of nations released a voluntary set of principles which are supposed to guide the operations and activities of these funds. What are some of these rules, and will they be effective in alleviating concerns over sovereign wealth funds (or SWFs) and their investment activities around the world?

In October 2008, the International Working Group of Sovereign Wealth Funds (or IWG)—whose membership comprises 26 nations with SWFs—released a voluntary set of 24 principles to guide the governance, accountability, and investment practices of individual SWFs. According to the IWG, its member nations will implement or aspire to implement what it describes as generally accepted principles and practices (or GAPP), though it also added that "the implementation of each principle of the GAPP is subject to applicable home country laws."

Analysts say that an SWF is usually a fund created or controlled by a government using budgetary surpluses or excess foreign exchange reserves, among other sources. The Abu Dhabi Investment Authority and Corporation in the United Arab Emirates has, for instance, assets of over $875 billion. Temasek Holdings of Singapore has $108 billion in assets. Norway's Pension Fund has $322 billion. Nations use SWFs to insulate their budgets and economies from market volatility, and also to maximize their incomes by investing in a broad range of assets in other countries. There is currently no agreed-upon definition for an SWF in international law or even the domestic laws of various countries. In addition, there is no international treaty whose specific purpose is to regulate the activities of and investments made by SWFs. Instead, many countries have domestic laws which regulate investments and acquisitions made by all foreign investors.

Several reports indicate that SWFs currently hold approximately 1.3 percent of the world's financial assets, including stocks, bonds, and bank deposits totaling over $3 trillion. In recent years, SWFs have increased their visibility by investing tens of billions of dollars in some of the largest and best-known banks in the United States. Many people worry that governments will use their SWFs to acquire companies, real estate, and banks primarily for political rather than economic reasons. Others say that the lack of transparency concerning their investment practices has also aroused suspicions.

Under the GAPP (which is not considered an international treaty), an SWF would have to define clearly and publicly disclose information about "its general approach to funding, withdrawal, and spending operations"; issue an annual report with accompanying financial statements on its operations and performance in a timely fashion; and make its investment decisions "in a manner consistent with its investment policy, and based on economic and financial grounds," among many other objectives.

The GAPP also calls on its participating countries to ensure that their SWFs operate within "a sound legal framework." For instance, a report issued along with the GAPP states that "the establishment of the SWF should be clearly authorized under [a country's] domestic law." It also states that "the legal structure [regulating SWFs] should include a clear mandate for the manager to invest the SWF's assets and conduct all related transactions." For SWFs that have operations in foreign countries, the GAPP calls on them to comply with all applicable laws in the host countries, including national security laws, prohibitions on insider trading, and rules that restrict monopolies. In turn, it says that the host countries should "not subject the SWF to any requirement, obligation, restriction, or regulatory action exceeding that to which other investors in similar circumstances may be subject."

The IWG said that it would hold periodic reviews to see how and whether its participating members were implementing these principles. But one critic noted that the GAPP does not contain any provisions which would impose penalties on countries that are not in full compliance. Others note that some provisions in the GAPP simply repeat particular guidelines issued by organizations such as the Organization for Economic Cooperation and Development and also by individual SWFs.

INTERNATIONAL TAX

Hefty tax bill for renouncing American citizenship

Giving up U.S. citizenship usually meant that a person would no longer receive the many benefits of being an American such as receiving a wide array of Constitutional protections and even certain social services. Recently, the United States amended its federal tax regulations which could also result in a hefty tax bill for some people giving up their citizenship.

Under previous federal tax regulations, Americans who renounced their citizenship had to continue paying federal taxes on their worldwide income for five years if they had previously paid at least $124,000 in taxes and had more than $622,000 in assets, according to tax experts and commentators. In 1996, Congress extended that number to 10 years. Individuals who refused to continue paying these taxes could face fines and other penalties. (Analysts note these tax exiles would also be subject to the jurisdiction of the United States when they visited the country to conduct business and also to see family and friends.)

In June 2008, the United States amended its tax regulations by implementing the "Heroes Earnings Assistance and Relief Tax Act of 2008," which also provides "tax benefits for soldiers and military veterans." The law revokes the 10-year tax payment rule. Instead, the government would tax the assets of anyone renouncing their citizenship—for whatever reasons—as if they were selling them (and only if they had a net worth of $2 million or owed more than $124,000 in income taxes on average over the past five years).

Every year, hundreds of Americans renounce their citizenship. According to news sources, 470 people gave up their citizenship last year while 509 people did so in 2006. Some renounce their citizenship for political reasons while others plan to settle permanently in other countries with their foreign-born spouses. In addition, it is believed that more and more people, particularly very wealthy individuals, are renouncing their citizenship simply to avoid paying taxes, though specific numbers are not available. These so-called "tax exiles" usually acquire citizenship in (and move their assets to) countries with a lower tax burden such as Ireland.

In order to renounce American citizenship, which can be done through the U.S. Department of State or a U.S. embassy or consulate, a person must prove that he had done so voluntarily and without duress, and had also obtained citizenship in another country. Tax professionals say that if a person gave up citizenship primarily for tax reasons, then the United States could even prevent him from entering the country again. (They also say that regaining such citizenship is very difficult.) Although the number of people who renounce their citizenship may seem small in comparison to those who become citizens (which was over 660,000 last year), the U.S. Congress became concerned over this trend and began its efforts to make it costly to renounce citizenship. If more and more people give up their citizenship, the government could see a decline in the collection of tax revenues.

There are exceptions to the new regulations. Under Section 877A(g), the changes don't apply to people who renounce their citizenship before 18 ½ years of age and who didn't live in the United States for more than 10 taxable years before the day they gave up his citizenship. It also doesn't apply to people who are in compliance with their tax obligations, were dual citizens at birth and continue to be so, and lived in the United States for no more than 10 of the past 15 taxable years.

In order to prevent tax exiles from circumventing these changes in the tax code by leaving their assets to, say, family members remaining in the United States, the new law would tax these recipients at the current U.S. gift tax rate, which is around 45 percent. Legislative analysts say that the new law should raise $411 million in revenue over the next 10 years, which will be used to offset the cost of the legislation's tax breaks for veterans and current members of the U.S. armed forces.

INTERNATIONAL TREATY

Will a new treaty end the trouble with bomblets?

The effects of war can far outlast the war itself and continue affecting a country's economy, natural resources, and the daily lives of its people. Even discarded weapons can continue to

inflict harm long after the cessation of hostilities. Landmines, for instance, are usually hidden from view, and continue to maim civilians. Another class of weapons called cluster munitions have killed and continue to hurt thousands of people all over the world (including a large percentage of children) even after the end of a conflict. To address this problem, over 100 nations recently concluded negotiations on a new treaty to eliminate the production and use of cluster munitions. What are some of the terms of this treaty, and will they be effective in curbing the effects of discarded cluster munitions?

A cluster munition is a container which holds hundreds or even thousands of smaller "bomblets." Launched from a canon or dropped from an aircraft, these containers open in midair and disperse the bomblets over a wide area. Some nations, including the United States, argue that cluster munitions are valuable military tools because they are effective in stopping the advance of enemy troops, which, in turn, can save the lives of U.S. soldiers.

Unexploded bomblets from cluster munitions have caused nearly 5,500 civilian deaths and more than 7,000 civilian injuries since 1965. They are especially dangerous to children who play with them.

But critics have long pushed to end the use of cluster munitions. They argue that certain characteristics of this particular class of weapons pose a long-term danger to civilian populations. For example, they say that, unlike traditional bombs which are detonated over specific military targets such as factories and government buildings, cluster munitions indiscriminately target wide geographic areas (such as open fields) which, during times of conflict, become temporary battlefields, but revert to civilian use once hostilities end.

Critics also point out that a high percentage of bomblets fail to explode and, therefore, can remain a threat for many years. These unexploded remnants of war often cause deaths or serious injuries when civilians pick them up (not realizing that they are holding a bomb). Larger bombs, on the other hand, usually explode immediately, destroying their specific targets. During the conflict between Israel and Hezbollah in 2006, the estimated failure rate for the bomblets released from cluster munitions ranged from 30 to 40 percent.

According to Handicap International, a disabilities advocacy group, unexploded bomblets have caused nearly 5,500 civilian deaths and more than 7,000 civilian injuries since 1965. They are especially dangerous to children who play with them. In fact, experts estimate that children represent a quarter of all casualties. In Laos and Vietnam, humanitarian groups say that cluster bombs dropped 40 years ago still cause casualties every year. Other countries where cluster bombs continue to pose a threat to civilians include Afghanistan, Bosnia, and Iraq. The United Nations also estimates that approximately one million unexploded bomblets used in 2006 remain in southern Lebanon, and that they won't be cleared away until December 2008.

Legal experts say that there are existing treaties that regulate how countries must handle unexploded weapons used during a conflict. For example, the Convention on Certain Conventional Weapons (or CCW) covers "munitions such as artillery shells, grenades, and gravity bombs that fail to explode as intended, and any unused explosives left behind and uncontrolled by armed forces." But they note that the CCW does not deal specifically with cluster munitions. In order to fill this gap, several CCW treaty members proposed to begin negotiations on a cluster munitions protocol within the CCW framework. But several treaty members—most notably China, Russia, and the United States—opposed these efforts. In February 2007, many other countries began negotiations outside of the CCW to end the use of cluster munitions. In May 2008, delegates from 111 countries concluded negotiations on a text for the Convention on Cluster Munitions (or the "Convention").

Pointing to what supporters say is strong and sweeping language, the Convention bans signatory countries from producing and using cluster munitions. More specifically, Article 1 states that "each State Party undertakes never under any circumstances to: (a) Use cluster munitions; (b) Develop, produce, otherwise acquire, stockpile, retain, or transfer to anyone, directly or indirectly, cluster munitions; (c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention." The Convention also requires signatory nations to destroy their existing stockpiles of cluster munitions within eight years, and to clear any areas contaminated with cluster munitions under their jurisdiction. Article 5 calls on signatory nations to provide assistance for victims of cluster munitions (including medical care, rehabilitation and psychological support) by working closely with cluster munition victims and their advocacy organizations.

The Convention also recognizes that those countries most affected by cluster munitions may not have the financial and logistical capabilities to clear away cluster munitions on their own. To help these particular countries, Article 6 says that "each State Party has the right to seek and receive assistance" in order to fulfill its obligations under the Convention. In addition, the Convention calls on countries to provide technical, material, and financial assistance to those countries most affected by cluster munitions. The Convention will be open for signature in December 2008. Countries that sign the agreement are simply indicating that they agree with the provisions of the text. The legislatures of these signatory countries must then vote to ratify the Convention, meaning that they will commit themselves to carry out the agreement's obligations, which will come into force six months after the 30th ratification.

While the Convention has drawn the support of a broad coalition of national governments, UN agencies, and humanitarian organizations, it has also attracted a number of critics. Countries that did not support the Convention include Brazil, China, India, Israel, Pakistan, Russia, and the United States, all of which are major producers or users of cluster munitions. The United States said that while it supports the regulation of cluster munitions in principle, it could not sign the Convention in its present form. A spokesperson for the U.S. Department of State said that cluster munitions "have demonstrated military utility, and their [complete] elimination from U.S. stockpiles would put the lives of our soldiers and those of our coalition partners at risk." The United States also claimed that technological advances, including self-destruct or automatic disabling features, will ensure that future cluster munitions do not pose nearly as great a threat to civilians.

Human rights groups have largely supported the final treaty text, but have expressed reservations about several provisions.

While the Convention explicitly binds its signatories not to "assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention," one prominent human rights group notes that Article 21 still permits military cooperation and joint operations between signatory and non-signatory countries. It fears that the Convention could lose some of its credibility if signatory countries conduct military operations with states that actively use cluster munitions. To avoid any perception that signatory countries are involved with the use of cluster munitions, human rights groups have called on them to issue official statements saying they will not provide assistance to non-signatory nations in the use of cluster munitions during joint military operations. Others point out that the Convention's terms are not enforceable, meaning that a signatory country that does not carry out its obligations will not face any sanctions.

The Convention also does not address whether non-signatory states may stockpile cluster munitions on the territory of signatory states. The United States, for instance, has stockpiled cluster munitions in its military bases in Britain and Germany, both of which plan to sign the Convention. But the British government had already indicated that it will ask the United States to remove any cluster munitions stockpiled on its territory within the eight-year period specified in the Convention.

Despite opposition from many countries and what are perceived to be several shortcomings, supporters of the Convention believe that its effectiveness will be comparable to that of the 1997 Mine Ban Treaty, which prohibits the development and use of anti-personnel landmines. (According to the U.S. State Department, over 5,000 people were killed or maimed by landmines last year compared to over 26,000 people four years ago.) Although many of the same countries that oppose the Convention also opposed the 1997 treaty, political analysts believe that the Convention will create an international stigma against the use of cluster munitions. One commentator said that Burma is now the only nation still using landmines. And while the United States did not sign the 1997 treaty, it asserts that it has not planted a single landmine since that agreement came into force.

NATIONAL SECURITY LAW

More government surveillance in the works?

In July 2008, the United States amended its laws to allow the federal government to carry out more aggressive surveillance measures—such as those conducted by the National Security Agency shortly after the September 11 terrorist attacks—against suspected terrorists and even American citizens. What are some of these new measures and will they erode civil liberties in the fight against international terror?

The United States prohibits law enforcement authorities from carrying out domestic surveillance measures—through techniques such as wiretapping and physical searches—against U.S. persons without a warrant issued by a court in order to protect basic civil liberties. In 1978, Congress passed the Foreign Intelligence Surveillance Act (or FISA), which created a separate legal framework to regulate the surveillance of foreign agents, terrorists, and even U.S. persons working with them. The act also created a separate court (called the FISA court) to consider applications from the government to conduct surveillance on such groups.

Under FISA, the surveillance of foreign agents (but not U.S. persons) does not require permission from the FISA court for up to a year. On the other hand, the government must obtain a court order if such surveillance could also involve the interception of communications of a U.S. person who may be involved with the foreign agents.

In December 2005, the United States acknowledged that the National Security Agency (or NSA) had carried out surveillance measures against thousands of individuals within the United States (including U.S. citizens) without a court order shortly after the September 11 attacks. Working directly with large telecommunication companies (such as AT&T, BellSouth, and Verizon), the NSA intercepted and examined thousands of telephone calls and e-mail messages. Since that time, plaintiffs have filed over 40 lawsuits against these companies, arguing that they had violated FISA and their civil liberties.

The government claimed that the president—as commander of the armed forces under Article II of the Constitution—had the legal authority to order the domestic surveillance of U.S. persons within the United States without court warrants in order to protect the country from possible threats. Other officials argued that a resolution passed by Congress (called the "Authorization to Use Military Force") had given authority to the NSA (via the president) to order warrantless surveillance.

In July 2005, the United States enacted several provisions which would bring these surveillance measures more firmly under FISA. A senior lawmaker said that these legal changes would serve as the "exclusive authority" for surveillance programs carried out by U.S. intelligence agencies rather than relying on what she described as "the whim of the president." One provision, for instance, will allow federal agents to carry out surveillance measures against an American citizen for seven days without a warrant from a court if "intelligence important to the national security of the United States may be lost." Intelligence agencies may also carry out surveillance measures against "large groups of [overseas] targets" when they are in communication with an American citizen in the United States. But they must still obtain a warrant from the FISA court if the main target of the surveillance measure is an American citizen.

Supporters say that several safeguards will prevent the government from abusing its more expansive surveillance powers. For example, while the media reported that the inspector generals of several intelligence agencies were initially unaware of the NSA surveillance programs, the law now requires a legal review of these programs on a regular basis which must be made available in an unclassified format. The FISA court will also have the power to review the legality of government procedures used to determine surveillance targets. Still, civil liberties groups believe that there should be much stronger safeguards.

The amendments to FISA will also allow courts to dismiss lawsuits against telephone companies if these companies provide proof of a written directive from the Executive branch "authorizing them to engage in wiretapping without warrants." These changes to the law will expire in 2012. But many analysts say that Congress will most likely renew them.

Laying a new legal foundation for continued U.S. involvement

After the United States and its coalition partners invaded and overthrew Iraq's regime headed by Saddam Hussein, many critics questioned the legality of the American occupation of Iraq under international law. In recent months, though, the United States and Iraq have been negotiating an agreement which will provide a stronger legal foundation for the continuing presence and involvement of American military forces in that country. What is the current status of negotiations, and what are some of the proposed terms of this agreement?

Legal experts say that, under international law, a nation may not threaten to use or use force against another sovereign country unless it receives authorization from the United Nations Security Council or is acting in self-defense. Many critics argue that because the U.S.-led invasion and occupation of Iraq in 2003 had—in their view—failed to satisfy either condition, the United States currently did not have a strong legal basis for remaining in the country.

But in the months following the invasion, the Security Council passed many resolutions which granted a limited (though not direct) form of legitimacy under international law for the U.S. occupation of Iraq. For example, Resolution 1511 passed in October 2003 authorized "a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq," though it did not specifically mention the United States, which is leading this multinational force. Resolutions 1637, 1723, and, most recently, 1790 extended the mandate of this multinational force until December 2008. But last year, Iraqi officials indicated that they would block any further UN resolutions authorizing American involvement in Iraq.

Instead, both Iraq and the United States are currently negotiating a bilateral treaty called a "Status of Forces Agreement" (known by its acronym "SOFA"), which will form the new legal basis for American military involvement in Iraq. The successful negotiation of such an agreement, said one political analyst, will show that Iraq had voluntarily agreed to permit American military forces to operate on its sovereign territory (hence giving U.S. efforts in the country a claim to legitimacy). On the other hand, the absence of such an agreement would allow Iraq to claim that the United States (by continuing its military presence without explicit permission) was violating Iraq's sovereignty. Legal experts note that the protection of a state's sovereignty remains one of the pillars of international law and global security.

A SOFA regulates the presence of a country's military troops operating within the jurisdiction of another country. For example, a SOFA usually includes terms specifying the duration of troops stationed in the host country and the extent to which these troops can carry out certain military exercises and operations. A SOFA also contains provisions regarding how military personnel will use a host country's postal services and banking facilities, import personal belongings, pay local taxes, and hire local workers and contractors, among many other issues. (The current UN resolutions don't address these specific issues.) Provisions in a SOFA may also specify how military personnel will pay for civil damages they cause while carrying out their duties.

Legal analysts say that one of the most contentious issues in negotiating a SOFA concerns questions of jurisdiction—which country will prosecute military personnel accused of committing crimes in the host country? According to the Congressional Research Service, soldiers who commit crimes while on duty will likely be subject to U.S. jurisdiction while off-duty soldiers will be subject to local jurisdiction. Every SOFA is unique, and according to various sources, the United States has negotiated close to 100 SOFAs with 53 countries. Some of the more well-known SOFAs include those negotiated with Germany, Japan, and South Korea, which regulate the activities of tens of thousands of soldiers.

The United States and Iraq had planned to complete two agreements by the end of July 2008, both of which would regulate and oversee the operation of American military forces in Iraq. The first agreement, a SOFA, would cover various issues such as taxation of U.S. activities in the country, the ability of the U.S. forces to use Iraqi facilities, and the extent to which the United States can conduct military operations in Iraq. The second agreement, called a "Strategic Framework Agreement," would cover issues such as training of Iraqi security forces, arresting insurgents without consulting the Iraqi authorities, and immunity for U.S. contractors who violated Iraqi law.

But analysts note that officials from both countries had not yet completed either agreement. Unlike other SOFAs, they say that the Iraq SOFA is much more complicated because American and Iraqi forces are still engaged in substantial combat against insurgents and radical groups. (The United States had largely quelled most resistance, for instance, in Germany and Japan before it completed its SOFAs with those nations.) Some have even described the Iraq SOFA as a "SOFA-Plus" because it contains provisions similar to other SOFAs, but would also allow the United States to conduct actual military operations in Iraq.

Both the United States and Iraq are still negotiating several points in the proposed SOFA, including the duration of U.S. forces in Iraq, a timetable for their withdrawal, the number of military bases to be built and maintained in Iraq, and whether U.S. troops will have immunity from Iraqi law. While Iraq is pushing for a withdrawal timetable of U.S. troops and also the legal authority to prosecute American troops, the United States is opposed to these efforts. The two sides are also still trying to resolve whether U.S. forces may detain insurgents without approval from the Iraqi government. During recent negotiations, the United States agreed to drop its demands for immunity for American security contractors who commit serious crimes in Iraq. It also agreed to work more closely with Iraqi authorities before carrying out military operations within the country.

Because many outstanding issues remain and probably won't be resolved until after December 2008, officials believe that the two countries will have to sign an interim pact, which would allow the United States to remain in Iraq under certain guidelines until the SOFA is completed. Although Iraq stated that it would block any future Security Council resolutions authorizing the American military presence, it will not stop working with the United Nations. In August 2008, Iraqi officials signed a three-year "blueprint" with the United Nations describing how various agencies of that world body will help Iraq in its reconstruction, development, and humanitarian efforts.

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