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ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW  
NOVA SOUTHEASTERN UNIVERSITY  
SHEPARD BROAD LAW CENTER

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International Law Weekend saw the intersection of esteemed scholars, students, attorneys, and activists engaged in thought-provoking discussion. The *ILSA Journal of International & Comparative Law* left New York City just before the arrival of Hurricane Sandy, finding ourselves discussing NGO's, metadata, piracy, mining, crimes of sexual violence and degradation, the rise and fall of nations, and collective, global rights for the disabled.

These panels were remarkable, and those who conducted the panels even more impressive. This edition focuses on individuals who have made it their life's work to further our understanding of how the law and humanity are inseparable. We are forced to hear the voices of the oppressed, and this collective body of work should enhance our readership's understanding of how creativity and cultural immersion can bring about discussion—and that discussion might effectuate meaningful change. As mentioned above, Hurricane Sandy touched-down on the Tri-State area as our members and many of the panelists were taking-off, away from the storm. As such, we dedicate this edition to those who were affected by Sandy, its aftermath, and our hope for their recovery.

There are innumerable people to thank for this International Practitioner's Notebook, Volume 19:2. To begin with, we thank the authors, many of whom mediated or participated in panel discussions with topics ranging from Persons with Disabilities to explaining the Ad Hoc Tribunals for those victims of sexual violence during wartime. These articles are often difficult to read in so far as they are not redacted for their disturbing content. However, they reflect the reality of the world in which we live. My hope is that the readership finds the work as important as our staff did in our selection of these pieces.

I would like to personally thank Vivian Shen from the *ILSA* National Office. She was our guide towards publication and access to authors. Next, ABILA, we thank you for working with *ILSA* to bring an eclectic, worldwide crowd together for a special weekend. These two organizations share a collective bond to educate and engage those who have the privilege of attending ILW weekend.

I would like to thank the *ILSA Journal's* faculty advisers at the Shepard Broad Law Center, Professors Roma Perez and Doug Donoho. Their commitment to education and scholarship is much appreciated. My own staff, from Junior Staffers to our Executive Board, thank you for your late nights, persistence, and precision. It was an honor to do great work with you.

Finally, I would like to thank my own family for their support and love. My hope is that our readership is as moved as I was by these contributions.

Todd Wise, *Editor-in-Chief*, 2012-2013



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of the  
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and the INTERNATIONAL LAW ASSOCIATION**

Presents

International Law Weekend 2012

"Ideas, Institutions, and Interests—Dynamics of Change in International  
Law"

October 25–27

Thursday events held at the  
House of the Association of the Bar of the City of New York  
42 West 44th Street, New York City  
Friday and Saturday panels held at  
Fordham University School of Law  
140 West 62nd Street, New York City

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## ILW PANELS

THURSDAY, OCTOBER 25, 2012

6:30pm

*The Rise of China and the Rule of International Law*

China's ascent to new heights of wealth and power is reshaping the global legal landscape. This distinguished panel opens International Law Weekend with a wide-ranging discussion about the effects of China's rise. It examines the impact on human rights, international environmental law (including climate change), capital markets, international security affairs, and on lawyering itself.

This panel is dedicated to the memory of Charles Siegal, past President of the American Branch of the International Law Association.

Introduction to International Law Weekend:

Ruth Wedgwood, President of the American Branch of the International Law Association

Panelists:

Jerome Cohen, Professor of Law, New York University School of Law

John G. Crowley, Partner, Davis, Polk & Wardwell LLP

Elizabeth Economy, C.V. Starr Senior Fellow and Director for Asia Studies, Council on Foreign Relations

Winston Lord, former U.S. Ambassador to China; former U.S. Assistant Secretary of State for East Asian and Pacific Affairs

Moderator:

Benjamin L. Liebman, Robert L. Lieff Professor of Law and Director of the Center for Chinese Legal Studies, Columbia University School of Law

## FRIDAY, OCTOBER 26, 2012

9:00am *Resource Management in Common (Non-Sovereign) Areas: Law of the Sea and Space Law Compared*

Discussion of the legal and economic implications for space exploration and exploitation of the Common Heritage of Mankind concept in the Moon Agreement (1979) and in UNCLOS (1982, 1994); Rights to mine, responsibilities to share and regime characteristics. These topics will address the three themes of ILW - Ideas, e.g., the Commons; Institutions, e.g., regime structure; and Interests, e.g. property rights and the public interest.

Panelists:

George Walker, Dean's Research Professor of Admiralty and International Law, Wake Forest University School of Law; Member, ABILA Executive Committee; Chair, Law of the Sea Committee, ABILA; Member, Baselines Under the International Law of the Sea Committee, International Law Association

John E. Noyes, Roger J. Traynor Professor of Law, California Western School of Law; Chair, ABILA Executive Committee; Member, Baselines Under the International Law of the Sea Committee, International Law Association

Matthew Schaefer, Law Alumni Professor of Law and Director of Space, Cyber, and Telecom Law Program, University of Nebraska College of Law

Frans von der Dunk, Harvey & Susan Perlman Alumni and Othmer Professor of Space Law, University of Nebraska College of Law; Member, Space Law Committee, International Law Association

9:00am *Comparative Corporate Governance: Stakeholders and Quotas*

Corporate governance debates around the role of shareholders and stakeholders shift across national lines and in transnational contexts. The spread of gender balance quotas for corporate boards in Europe will lead to the presence of a critical mass of women at the top of many developed world corporations. This panel will explore how such quotas might drive the relationship between shareholders and stakeholders, and how it may transform corporate governance overall.

Panelists:

Darren Rosenblum, Professor of Law, Pace Law

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James Fanto, Professor of Law, Brooklyn Law  
School  
Mary R. “Nina” Henderson, Director, CNO  
Financial Group

9:00am

*Dynamics of Change in International Disabilities Law:  
The Case of Access to Justice*

International disabilities law is one of the most rapidly developing fields in international human rights law. This change has been driven in large part by the world’s newest human rights treaty, the Convention on the Rights of Persons with Disabilities (CRPD). The panel will focus on one vital concept in the CRPD – access to justice– as a case study of change in international disabilities law. The panel will examine the forces for change that led to the inclusion of strong access to justice provisions in Article 13 of the CRPD. The panel will also survey the impact of Article 13 in spurring change in national access to justice policies, international rule of law programming, and rule of law assistance programs.

Chair:

Steven Hill, Counselor for Legal Affairs, U.S.  
Mission to the United Nations; Chair,  
International Disability Law Committee, ABILA

Panelists:

Esmé Grant, Disability Rights Educator, U.S.  
International Council on Disabilities  
Marco Nicoli, Senior Knowledge Management  
Officer, Legal Vice Presidency, World Bank  
Stephanie Ortoleva, Founder and President,  
Women Enabled

9:00am

*Intellectual Property and Sustainable Development*

This panel provides a timely follow-up to Rio+20 (the UN Conference on Sustainable Development). It covers issues ranging from global climate change to the protection of traditional knowledge and biological diversity to the tension between intellectual property enforcement and human rights. The panel also explores the impact of bilateral, plurilateral and regional trade, investment and intellectual property agreements on the development of the international intellectual property regime. Sponsored by the Committee on International Intellectual Property, ABILA.

Chair:

Peter K. Yu, Professor of Law, Kern Family Chair

in Intellectual Property Law, Drake University Law School; Member, ABILA Executive Committee; Chair, International Intellectual Property Committee ABILA

Panelists:

Sabrina Safrin, Professor of Law & Arthur L. Dickson Scholar, Rutgers School of Law–Newark  
Joshua D. Sarnoff, Professor of Law, DePaul University College of Law

Lea Shaver, Associate Professor of Law, Robert H. McKinney School of Law, Indiana University

9:00am

*Due Process in UN Security Council Sanctions Committees*

Proposed by ABILA's United Nations Law Committee, this panel will examine fairness issues in the operations of committees the Security Council has empowered to authorize sanctions on entities and individuals. A key question to be confronted is how the UN can authorize penalties without a hearing while at the same time advocating due process in instruments like the Universal Declaration of Human Rights.

Chair:

John F. Murphy, Professor of Law, Villanova University School of Law; Honorary Vice-President, ABILA

Panelists:

Katherine M. Gorove, Attorney, Office of the Legal Adviser, U.S. Department of State

Edward J. Flynn, Senior Human Rights Officer, United Nations Counter-Terrorism Committee

Brian Wilson, Legal and Sanctions Expert, United Nations Security Council

John Carey, former Chair, International League for Human Rights; former Alternate U.S. Member, UN Human Rights Sub-Commission; former Justice; New York State Supreme Court; Member, ABILA Executive Committee; Chair, United Nations Law Committee, ABILA

10:45am

*A Conversation with Mary Jo White, former U.S. Attorney for the Southern District of New York and current head of litigation at Debevoise & Plimpton LLP—Prosecuting Al Qaeda Terrorism and Exposing Corporate Corruption - A Life in the Law*

Mary Jo White is a legendary figure at the New York Bar. A graduate of Columbia Law School and a law clerk to U.S. District Judge Marvin Frankel, she became the first woman to serve as U.S. Attorney for the Southern District of New York, running an office of more than 200

prosecutors and civil division attorneys from 1993 to 2002. She directed the successful criminal prosecution of the 1993 terrorist bombing of the World Trade Center, convicting al Qaeda terrorist Ramzi Yousef and two other al Qaeda defendants. She twice indicted Osama bin Laden, for conspiring to attack American nationals and bombing U.S. Embassies in East Africa. She led the investigation of the Clinton Administration's pardon of fugitive financier Marc Rich and at the request of the Attorney General, reviewed all other pardons of that period. She is currently chair of the litigation department at the law firm of Debevoise & Plimpton, where she directed a world-wide investigation of alleged corrupt payments by the Siemens company, including over \$100 million paid to Argentine officials, resulting in the appointment of a monitor to oversee corporate compliance.

Chair:

Ruth Wedgwood, Edward B. Burling Professor of International Law and Diplomacy, Johns Hopkins University

10:45am

*Current Developments in Sovereign Debt Claims: Disappointed Investors Take Action*

A panel of leading experts will examine the latest developments in disputes between states and investors arising out of the sovereign debt crisis. The discussion will examine investor actions in the wake of Argentina's sovereign debt restructuring and the Greek sovereign debt crisis, among others, and will focus on the range of forums in which "holdout" investors have instituted proceedings, including U.S. courts, the European Court of Human Rights, and the International Centre for the Settlement of Investment Disputes.

Moderator:

Steven A. Hammond, Partner, Hughes Hubbard & Reed LLP

Panelists:

Jonathan C. Hamilton, Partner, White & Case LLP  
Boaz S. Morag, Counsel, Cleary Gottlieb Steen & Hamilton LLP

Catherine M. Amirfar, Partner, Debevoise & Plimpton LLP

Michael J. Ushkow, Associate, Sullivan & Cromwell LLP

10:45am

*Solitary Confinement in a Supermax Prison: Is this Cruel and Inhuman Punishment?*

This panel will discuss the history of solitary confinement in the United States, whether the conditions of "SuperMax" confinement are consistent with the prohibition on cruel and unusual punishment, and current debates at the international level and litigation at the national level to address the issue.

Moderator:

Christina Cerna, Adjunct Professor of Law, Georgetown Law; Member, ABILA Executive Committee; Chair, International Human Rights Law Committee, International Law Association

Panelists:

Jamie Fellner, Senior Advisor, U.S. Program, Human Rights Watch  
Juan Méndez, United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment  
Taylor Pendergrass, Senior Staff Attorney, New York Civil Liberties Union  
Alexis Agathocleous, Staff Attorney, Center for Constitutional Rights

10:45am

*Legislative and Executive Authority when Congress & the President Disagree on Matters that May Affect Foreign Affairs: Clinton v Zivotofsky*

In granting a petition for certiorari in *Clinton v Zivotofsky*, which the lower courts had dismissed on political question grounds, the Supreme Court directed the parties to also address the question whether a statute that required the Consul to enter Israel as the country of birth on the passport and the Consular Report of Birth Abroad of children of U.S. citizens born in Jerusalem, if the parents so requested, "impermissibly infringes on the President's power to recognize foreign sovereigns." The Court decided 8 to 1 that the action was not barred by the political question doctrine, but did not decide whether the statute was a constitutional exercise of Congressional power, the question it had specifically directed the parties to address. This panel will explore that question.

Panelists:

William S. Dodge, Associate Academic Dean for Research and Professor of Law, University of California, Hastings College of the Law; former Counselor on International Law, U.S. Department of State, Office of the Legal Adviser  
Malvina Halberstam, Professor of Law, Benjamin N. Cardozo School of Law; former Counselor on

International Law, U.S. Department of State,  
Office of the Legal Adviser; Member, ABILA  
Executive Committee

Nathan Lewin, Partner, Lewin & Lewin, LLP,  
Washington, D.C.; attorney for Menachem  
Zivotofsky

Paul B. Stephan, John C. Jeffries, Jr.,  
Distinguished Professor of Law; David H.  
Ibbeken '71 Research Professor; Director,  
Graduate Studies Program, University of Virginia  
School of Law; former Counselor on International  
Law, U.S. Department of State, Office of the  
Legal Adviser

10:45am

*Roundtable on Climate Geoengineering*

Climate change geoengineering, defined by the U.S. National Academy of Sciences as “options that would involve large-scale engineering of our environment in order to combat or counteract the effects of changes in atmospheric chemistry,” has gained currency in recent years due to the extremely tepid response of the international community to climate change. The purpose of this roundtable will be to discuss legal issues associated with climate geoengineering research and development and potential deployment, including ethical issues, governance issues, and the contours of a potential framework for liability for potential negative impacts.

Moderator:

Andrew Strauss, Associate Dean for Faculty  
Research and Development & Professor of Law,  
*Widener* University School of Law

Panelists:

Wil Burns, Associate Director & Professor,  
Energy Policy & Climate program, Johns Hopkins  
University; Member, Legal Principles Relating to  
Climate Change Committee, International Law  
Association

Scott Barrett, Lenfest-Earth Institute Professor of  
Natural Resource Economics, School of  
International & Public Affairs, Columbia  
University

Dale Jamieson, Director of Environmental  
Studies, New York University

1:15pm

Tribute to Charles Siegal, President of ABILA (2004-  
2008)

1:15pm

Keynote Address:

Theodor Meron, President, International Criminal  
Tribunal for the former Yugoslavia

*From Ad Hoc Tribunals to the Residual Mechanism: A*

*New Model of International Criminal Tribunals*  
Professor Theodor Meron currently serves as president of the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague, as well as the presiding judge of the Appeals Chambers of the International Criminal Tribunal for Rwanda and the ICTY, and head of the International Residual Mechanism for Criminal Tribunals. Professor Meron is world-famous both for his judicial work, and an extraordinary corpus of scholarly work on the modern history of the laws of war and humanitarian law, including *Human Rights in Internal Strife: Their International Protection* (1987); *Human Rights and Humanitarian Norms as Customary Law* (1989); *Henry's Wars and Shakespeare's Laws* (1993); *Bloody Constraint: War and Chivalry in Shakespeare* (1998); *War Crimes Law Comes of Age: Essays* (1998); *International Law In the Age of Human Rights* (2004); *The Humanization of International Law* (2006); and *The Making of International Justice: A View from the Bench* (2011).

3:00pm

*Lawyers and China's Future*  
This panel will feature the blind, self-taught Chinese legal activist Chen Guangcheng in conversation with a leading U.S. expert about the challenges and possibilities facing the legal profession in China. Topics will include: The current status of the rule of law in China; persecution of legal advocates; prospects for legal education; access to legal services; the implication of the upcoming leadership change; and the role and responsibilities of foreign firms and law schools.

Panelists:

Chen Guangcheng, Legal Activist and Law Student, New York University School of Law  
Ira Belkin, Executive Director, US Asia Institute, New York University School of Law

3:00pm

*International Investment Law and Dispute Settlement Part I: Educating Lawyers in Law Schools, Firms and at the Bar*

The last decade shows an acceleration of economic globalization and an increase in the number of bilateral and multilateral investment agreements. As a consequence, foreign direct investment disputes increasingly come into public view and reflect the competing economic and public interests of multinational enterprises and host governments that can significantly impact the costs, risks, benefits and legal obligations of all involved parties. This panel of eminent academic and practicing international business and arbitration lawyers will share their views on the education and training needs of 21st century investment lawyers and arbitrators.

Moderators:

Norman Gregory Young, Professor of Law for International Business, California State Polytechnic University College of Business

Roberto Aguirre Luzi, Partner, King & Spalding; Co-Chair, Bilateral Investment Treaty and Development Committee, ABILA

Panelists:

Lawrence Newman, Of Counsel, Baker & McKenzie LLP; Chair, International Judicial Integrity Committee, ABILA

Mark E. Wojcik, Professor, The John Marshall Law School; Chair, Teaching of International Law Committee, ABILA

Liyan Yang, Professor of International Economic Law, GuangXi Normal University School of Law (Guilin, China); Adjunct Professor of Law, South West University of Politics and Law (Chongqing, China)

Discussants:

Meg Kinnear, ICSID Secretary-General, World Bank

Andrea Bjorklund, Professor of Law, University of California, Davis School of Law; Visiting Professor of Law, McGill University School of Law; Director of Studies, ABILA; Member, ABILA Executive Committee

3:00pm

*The Global Fight Against Sex Trafficking: Finding Synergies Between NGOs, the Private Bar, and Corporate Law Departments in Responding to the Crisis*

This panel will examine recent developments in responding to the global sex trafficking crisis. Panelists will discuss recent legislative developments and efforts to coordinate the work of international institutions and NGOs, as well as examine the critical need for more effective leveraging of those efforts through law firm pro bono programs.

Chair:

Lauren Hersh, New York Office Director, Equality Now

Panelists:

Dorchen Leidholdt, Adjunct Professor at Columbia University School of Law, Director of the Center for Battered Women's Legal Services at Sanctuary for Families; Co-Founder of the Coalition Against Trafficking in Women

William Silverman, Shareholder, Greenberg

Traurig, LLP  
Sarah Cave, Partner, Hughes Hubbard & Reed  
LLP  
Alison King, Pro Bono Counsel, Kaye Scholer  
LLP

3:00pm

*European Union—Progress, Set-backs and Crises*

The EU had an eventful year in 2011. Its Member States and institutions have successfully implemented the important changes produced by the 2009 Lisbon Treaty. However, the crises in the Euro-zone have caused serious strains that are still not fully overcome. Meanwhile, the impact of the Charter of Fundamental Rights and citizenship of the Union have proved highly beneficial. The EU has also had to confront global foreign policy concerns.

Panelists:

Elizabeth F. Dedeis, Professor of Law, Seton Hall Law School

Roger Goebel, Professor of Law; Director of the Fordham Center on European Union Law, Fordham University School of Law

Hugo Kaufmann, Director, European Union Studies Center, CUNY Graduate Center

Peter L. Lindseth, Olimpiad S. Ioffe Professor of International and Comparative Law and the Director of International Programs, University of Connecticut School of Law

Roland Tricot, Legal Advisor, European Union Delegation to the United Nations

3:00pm

*The 1982 Manila Declaration on the Peaceful Settlement of International Disputes: Modern Applicability and Relevance*

Thirty years ago, the UN General Assembly adopted the widely-remarked Manila Declaration on the Peaceful Settlement of International Disputes. On this key instrument's anniversary and in the context of a changed geopolitical landscape, representatives of Egypt, the Philippines, Romania, United States, and other UN partners, will discuss the Declaration's continued relevance in dispute settlement. This discussion will seek to advance the ambition of the 67th session of the UN General Assembly of "bringing about adjustment or settlement of international disputes or situations by peaceful means."

Moderator:

Roy S. Lee, Adjunct Professor of Law, Columbia University School of Law; former Director of the United Nations Office of Legal Affairs Codification Division; former Secretary of the

International Law Commission and the United Nations General Assembly Sixth Committee; former Executive Secretary of the Diplomatic Conference and Preparatory Committee on the Establishment of an International Criminal Court

Panelists:

H.E. Libran N. Cabactulan, Ambassador and Permanent Representative of the Philippines to the United Nations

Ebenezer Appreku, Legal Advisor of the Ministry of Foreign Affairs of Ghana

Mark Simonoff, Minister-Counselor and Legal Adviser, United States Mission to the United Nations

3:00pm

*Maritime Delimitation—A 30-Year Perspective Since the 1982 Law of the Sea Convention*

The delimitation of the maritime zones between states whose coasts are opposite or adjacent to each other has been a major contentious issue of the law of the sea. During the 1973-82 UN Conference on the Law of the Sea, the issue (median line v. equitable principles) was hotly debated but no consensus was reached. A compromise wording of "constructive ambiguity" was adopted in Articles 74 and 83 of UNCLOS. In the past 30 years, in cases decided by the ICJ, arbitral tribunals and, recently, ITLOS, the applicable law was clarified. The panel will review this process of evolution and evaluate the outcome.

Chair:

Andrew Jacovides, former Ambassador of Cyprus to the United States; arbitrator and author

Panelists:

Vladimir Jares, Principal Legal Officer, Division for Ocean Affairs and the Law of the Sea, United Nations Secretariat

David A. Colson, Counsel, Patton Boggs LLP

Rob van de Poll, International Manager Law of the Sea, Fugro N.V.

4:45pm

*Guantanamo Military Commissions and the Future of International Criminal Law*

The United States' continued use of military commissions has important implications not only for the future of U.S. counter-terrorism policy, but also more broadly for the development of international criminal law. Who may be prosecuted for war crimes? To what extent can security concerns limit procedural safeguards? What are the consequences of invoking international norms to create a specialized forum for the prosecution of terrorism

suspects? This panel will explore these and other questions.

Moderator:

Karen Greenberg, Director, Center on National Security, Fordham University School of Law

Panelists:

Sarah Cleveland, Louis Henkin Professor in Human and Constitutional Rights, Columbia Law School

Jonathan Hafetz, Associate Professor of Law, Seton Hall University School of Law

Samuel T. Morison, Appellate Defense Counsel, Office of the Chief Defense Counsel, U.S. Department of Defense

Gabor Rona, International Legal Director, Human Rights First

4:45pm

*International Investment Law and Dispute Settlement Part II: A Conversation with Meg Kinnear, Secretary-General of ICSID*

A timely conversation with Secretary-General Meg Kinnear on the increasing involvement and future of International Centre for the Settlement of Investment Disputes (ICSID) in Investor-State dispute settlement, and on the education of lawyers and arbitrators who use its facilities.

Introduction:

Ruth Wedgwood, Edward B. Burling Professor of International Law and Diplomacy, Johns Hopkins University; President, ABILA; Member, International Commercial Arbitration Committee, International Law Association

Panelists:

Meg Kinnear, ICSID Secretary-General, World Bank

Andrea Bjorklund, Professor of Law, University of California, Davis School of Law; Visiting Professor of Law, McGill University School of Law; Director of Studies, ABILA; Member, ABILA Executive Committee

4:45pm

*Taming Globalization: U.S. Foreign Affairs Law and the Next Administration*

In their 2012 book "Taming Globalization," law professors Julian Ku and John Yoo laid out a vision of how the U.S. Constitution should be interpreted in light of the pressures created by the movement toward greater global cooperation and governance. They argue that while the U.S. may need to accept greater international cooperation and deeper global integration, such processes should

respect U.S. constitutional commitments to popular sovereignty, separation of powers, and federalism. This panel will evaluate this argument in light of some of the some of the challenges faced by the next U.S. administration (whether Democratic or Republican) in the treatment of treaties, customary law, and international organizations in the near future.

Chair:

Julian Ku, Professor of Law and Faculty Director of International Programs, Maurice A. Deane School of Law at Hofstra University

Panelists:

Jamil Jaffer, Counsel, House of Representative Committee on Intelligence

Duncan Hollis, Associate Dean for Academic Affairs and Professor of Law, Temple University Beasley School of Law

Deborah Pearlstein, Assistant Professor of Law, Benjamin N. Cardozo School of Law at Yeshiva University

4:45pm

*Foreign State Immunity in National Courts as Required by International Law*

This panel will explore the contentious doctrine of immunity in national courts for foreign states and foreign governmental officials as required by international law, by focusing on two recent I.C.J. cases: *D. R. Congo v. Belgium* (2002) and *Germany v. Italy* (2012) both of which produced vigorous dissenting opinions. The panel will address the underlying doctrines as well as the practical implications.

Panelists:

John Cerone, Professor of Law, Director of the Center for International Law and Policy, New England School of Law; Member, International Human Rights Law Committee, International Law Association

Anthony Colangelo, Assistant Professor of Law, Southern Methodist University, Dedman School of Law

Valerie Epps, Professor of Law, Suffolk University Law School; Vice-President, ABILA

Brad Roth, Professor of Law, Wayne State University; Member, Committee on Recognition/Non-Recognition in International Law, International Law Association

4:45pm

*Recent Developments in International Family Law*

Five distinguished experts will review significant developments in the rapidly developing field of internationally family law, including international abduction, adoption, surrogacy, protection of children and adults, and recovery of maintenance and child support. The Hague Conference on Private International Law continues to be a primary focal point for these topics, but the panel will also address developments in the European Union and the Organization of American States as well as questions of domestic implementation of family law conventions in the United States. The panel will include experts from the Hague Conference and the State Department; the perspectives of private practitioners and academics will also be represented.

Moderator:

David P. Stewart, Professor of Law, Georgetown University Law Center; Vice-President, ABILA; Co-Chair, Commercial Dispute Resolution Committee, ABILA; Member, International Protection of Consumers Committee, International Law Association

Panelists:

Linda Silberman, Professor of Law, New York University School of Law, Member, International Civil Litigation & the Interests of the Public Committee, International Law Association

Barbara Stark, Professor of Law and Hofstra Research Fellow, Hofstra University School of Law; Chair, International Family Law Committee, International Law Association

Louise Ellen Teitz, Professor of Law, Roger Williams Law School; First Secretary, Hague Conference on Private International Law; Member, ABILA Executive Committee; Co-Chair, Commercial Dispute Resolution Committee, ABILA; Member, International Commercial Arbitration Committee, International Law Association; Member, International Protection of Consumers Committee, International Law Association

Michael Coffee, Office of the Legal Adviser, U.S. Department of State

Melissa A. Kucinski, Associate, Bulman, Dunie, Burke & Feld

4:45pm

*Maritime Law and Piracy*

Panel will appraise current international law, policies, and strategies designed to curtail maritime piracy incidents. This will be an international panel with speakers from the United States, Europe and Asia. Panelists have jointly authored a book to be published this summer by Pedone (France) and Hart (UK/US): *Maritime Piracy in Comparative Perspective: Problems, Strategies, Law*.

Panelists:

James Kraska, Levie Chair in Operational Law, U.S. Naval War College; Chair, Use of Force Committee, ABILA

Cedric Leboeuf, Research Fellow, Centre de Droit Maritime et Océanique, Université de Nantes, France

Charles Norchi, Professor of Law, University of Maine School of Law

Gwenaelle Proutiere-Maulion, Director, Centre de Droit Maritime et Océanique, Université de Nantes, France

Patrick Chaumette, Professor of Labor Law and Director, Centre de Droit Maritime et Océanique, Université de Nantes, France

**SATURDAY, OCTOBER 27, 2012**

9:00am

*Anticipatory Self-Defense: The Israeli-Iranian Crisis*

This panel will explore the background and history of anticipatory self-defense, its distinctions from pre-emption, and explore the legal principle from two varying perspectives. Does Israel have the legal authority to strike Iran? What are the limits of such authority and at what point does such authority cease to exist? Does acceptance of such authority have any impact on the international community? The panel will examine the doctrine, debate, and offer perspectives on the immediate crisis with a presidential election looming.

Chair:

Captain Glenn M. Sulmasy, Chairman, Department of Humanities and Professor of Law, U.S. Coast Guard Academy

Panelists:

Major General Charles J. Dunlap, U.S. Air Force (ret), Executive Director, Center on Law, Ethics, and National Security and Professor of

the Practice of Law , Duke University  
Jeremy Rabkin, Professor of Law, George  
Mason School of Law  
Lori F. Damrosch, Henry L. Moses Professor  
of Law and International Organization and  
Hamilton Fish Professor of International Law  
and Diplomacy, Columbia Law School; Co-  
Editor-in-Chief, *American Journal of  
International Law*

9:00am

*The Alien Tort Statute and the Future of Transnational  
Litigation*

From the Alien Tort Statute, to the enforcement of  
foreign judgments, to the application of U.S. federal  
and state law to extraterritorial activities, to questions  
related to international arbitration, U.S. courts are  
called upon to interpret transnational legal questions.  
This panel brings together leading practitioners and  
academics to discuss the current state of affairs and  
explore what the future may bring.  
Panelists:

John B. Bellinger III, Partner, International  
Practice Group, Arnold & Porter; former Legal  
Adviser of the U.S. Department of State  
Trey Childress, Associate Professor of Law,  
Pepperdine University School of Law; Visiting  
Associate Professor of Law, Washington &  
Lee University School of Law  
Tara Lee, Co-chair, Transnational Litigation  
Practice Group, DLA Piper  
Andrea Neuman, Co-chair, Transnational  
Litigation and Foreign Judgments Practice  
Group, Gibson Dunn & Crutcher LLP

9:00am

*Perspectives on Crimes of Sexual Violence in  
International Law*

The panel brings together a range of perspectives on the  
adjudication of sex crimes in international law. The  
panel analyzes major trends and offers assessments of  
current statutes, precedents and procedures at the major  
criminal tribunals, including those for the former  
Yugoslavia, Rwanda and in Cambodia and The Hague.  
Speakers will also address the incorporation of  
international norms into domestic law, as well as the  
difficulty of balancing the interests of the victim with  
maintaining the presumption of the defendant's  
innocence.

Panelists:

Peggy Kuo, Former Prosecutor, International Criminal Tribunal for the former Yugoslavia  
Caleb J. Fountain, Law Student, New York University School of Law  
Susana SáCouto, Professorial Lecturer-in-Residence and Director of the War Crimes Research Office, American University Washington College of Law  
Daniel McLaughlin, Crowley Fellow in International Human Rights and Adjunct Professor, Fordham University School of Law  
Jennifer M. Green, Associate Professor of Law, University of Minnesota Law School

9:00am

*The International Climate Change Regime and Africa*

Climate change is predicted to have significant effects on the African continent; indeed, several impacts have already been reported. The extent to which African interests have been adequately represented and reflected in the international negotiations on climate change is less clear. This panel will explore the role and influence of Africa in the international climate change negotiations, as well as the degree to which the applicable instruments have succeeded in promoting African climate change adaptation and mitigation. The panel will close with recommendations for making the international deliberations, instruments and procedures work better for Africa.

Moderator:

Paolo Galizzi, Clinical Professor of Law, Leitner Center for International Law and Justice, Fordham University School of Law

Panelists:

Kofi E. Abotsi, Senior Lecturer, GIMPA Law School

Daniel Buckley, Climate Change Policy Analyst, United Nations Development Programme

Thoko Kaime, Lecturer in Law & Deputy Director, Environment Regulatory Research Group, University of Surrey

9:00am

*Law in the Time of Cholera: Haiti's Epidemic, the UN and the Responsibilities of International Organizations*

Haiti is suffering from a cholera epidemic that has been attributed to waste management practices on a United Nations peacekeeper base. The epidemic is now the worst single country cholera epidemic in modern history. Haiti's cholera epidemic and the UN response to it is an excellent touchstone to explore the UN's responsibility to provide a fair forum for personal

injury claims arising out of peacekeeping operations. The panel will explore UN liability for the Haiti cholera epidemic in the context of the UN Status of Forces Agreement's immunity provisions and of the developing law on accountability of international organizations. Panelists include experts who were on the ground in Haiti and responded to the outbreak, international legal experts, and lawyers who filed a groundbreaking case on behalf of 5,000 victims of cholera seeking compensation from the UN.

Panelists:

Mario Joseph, Managing Attorney, Bureau des Avocats Internationaux (Port-au-Prince, Haiti)

Brian Concannon, Jr., Director, Institute for Justice & Democracy in Haiti

Jonathan M. Katz, Former Associated Press Haiti Correspondent, Author of forthcoming book *The Big Truck That Went By: How the World Came to Save Haiti and Left Behind a Disaster*

Rishi Rattan, Chair, Advocacy Sub-Committee, Physicians for Haiti

José Alvarez, Herbert and Rose Rubin Professor of International Law at New York University School of Law

9:00am

*Rule of Law and Development: Why Nations Fail and What We Can Do About It*

Billions of dollars over decades have been spent on the assumption that good governance is essential for the welfare of nations, and that the rule of law is essential for good governance. But the problems are not only poorly written laws; rather, the systems that produce the laws need to change. This panel will assess the role of lawyers in changing the institutions that produce poverty into those that produce prosperity, including best practices, challenges, and unintended consequences and the implications for United States foreign policy and development programming.

Panelists:

Wade Channell, Senior Legal Reform Advisor, United States Agency for International Development

Lara Goldmark, Technical Area Manager, Economic Policy, DAI

Norman L. Greene, Partner, Schoeman, Updike & Kaufman, LLP; Co-Chair, Bilateral Investment Treaty and Development Committee, ABILA

Terra Lawson-Remer, Assistant Professor of

International Affairs, The New School; Fellow  
for Civil Society, Markets and Democracy,  
Council on Foreign Relations  
Eugenia McGill, Lecturer, School of  
International and Public Affairs, Columbia  
University

9:30am ILSA Board of Directors Meeting

10:45am *The Future of the Ad Hoc International Criminal  
Tribunal Option*

In this roundtable discussion, leading government  
and academic experts will discuss the future of ad  
hoc international criminal tribunals, focusing on the  
possibility of creating specialized international,  
hybrid, or regional tribunals for piracy, terrorism,  
cyber-attacks, and other cases outside the  
jurisdiction of the International Criminal Court.

Moderator:

Milena Sterio, Associate Professor of Law,  
Cleveland State University Marshall  
College of Law

Panelists:

Duncan Gaswaga, Judge, Seychelles  
Supreme Court

Stephen Rapp, U.S. Ambassador at Large  
for War Crimes Issues; former Chief  
Prosecutor, Special Court for Sierra Leone

Sandy L. Hodgkinson, former Assistant  
Secretary of Defense

Michael Scharf, Professor of Law &  
Associate Dean for Global Legal Studies,  
Case Western Reserve University School of  
Law; Member, ABILA Executive  
Committee

Paul Williams, President, Public  
International Law and Policy Group

10:45am *Tax Havens and Tax Justice: Offshore Banking,  
Transfer Pricing, and Public Policy*

This session will examine the issue of "tax  
planning" and international "tax havens" - namely,  
whether the current rules on the attribution of  
corporate income to offshore tax venues with highly  
favorable tax rates serves or disserves the public

interest and the fair allotment of the tax burdens of a democracy. This issue was the subject of a recent Sundance film called "We're Not Broke." In addition, the presentation will discuss the challenges in tracing the fortunes of corrupt dictators who have looted their countries, even after they are deposed from power.

Speaker:

James S. Henry, Managing Director, Sag Harbor Group, Inc.; Global Board Member, Tax Justice Network; former Chief Economist, McKinsey & Company

10:45am

*Integrity in International Sport: Current Challenges and Legal Responses*

This panel will examine the problem of corruption in international sport, including match fixing and bribery in relation to major sports events. Examples will include the London 2012 Summer Olympic Games, the FIFA World Cup, and professional tennis. Panelists will present case law from the Court of Arbitration for Sport and other tribunals, and share insights into how international sports organizations are approaching the challenges presented.

Chair:

Ank Santens, Partner, White & Case LLP

Panelists:

Richard McLaren, Attorney, McKenzie Lake Lawyers; Professor, University of Western Ontario; CAS Arbitrator; Vice Chair, Sports Law Institute, Marquette University

Antonio Rigozzi, Partner, Lévy Kaufmann-Kohler; Professor, University of Neuchâtel

Isabelle Solal, former Head of Integrity & Compliance, FIFA Transfer Matching System GmbH

10:45am

*International Aspects and Comparative Perspectives of Intellectual Property Rights Enforcement*

The panel will address current initiatives, at the international level, to increase the existing international standards of enforcement of Intellectual Property Rights (IPR). It will discuss the evolution of the global debate on IPR enforcement from the TRIPS Agreement to ACTA, as well as the influence of regional agreements for the

development of multilateral rules; analyze the multiplication of international organizations dealing with IPR enforcement, the increasing use of networks of government officials to advance new rules and how it has changed the dynamics at the multilateral level; promote a debate on the different perspectives of developing and developed countries on the issue; and assess the challenges to be addressed. This panel brings together senior experts from the government, international organizations, private sector and academia.

Panelists:

Flávio Campestrin Bettarello, Head of Trade Policy, Intellectual Property, Services, Transportation and Trilateral Cooperation, Embassy of Brazil

Ahmed Abdel Latif, Senior Programme Manager for Innovation, Technology and Intellectual Property, International Centre for Trade and Sustainable Development

Valéria Guimarães de Lima e Silva, Global Research Fellow, Hauser Global Law School Program, New York University

Alan Blum, Partner, Moses & Singer LLP

Commentator:

Bernard Colas, Partner, Colas Moreira Kazandjian Zikovsky; President of the Canadian Branch of the International Law Association

10:45am

*Emerging International Decision-Making: the Role of the International Law Commission and Other Forums for Legal Consensus Building*

Arnold Pronto will provide a UN perspective on contemporary challenges to the international law-making efforts of the International Law Commission, and the search for relevance in a time of legal complexity. Next, Mark Janis will offer an overview of the treaty-making process in the development of international law and the contributions of the ILC. Then Elizabeth Burleson will provide a comparative assessment of ILC natural resource codification and the climate negotiations. Noting that the ILC has helped bridge the governance gap among international legal processes, these short presentations will be followed by a broad discussion with the audience on inclusive, effective international decision-making.

Panelists:

Arnold Pronto, Senior Legal Officer in the Codification Division of the Office of Legal Affairs of the United Nations; Member, Secretariat of the International Law Commission

Elizabeth Burleson, Associate Professor of Law, Pace Law School; Member, Legal Principles relating to Climate Change Committee, International Law Association

Mark Weston Janis, William F. Starr Professor of Law, University of Connecticut School of Law

10:45am

*Towards a Culture of Accountability: A New Dawn for Egypt*

Governmental corruption and absence of rule of law were main factors that led to the January 25<sup>th</sup> revolution in Egypt last year. This panel focuses on both conventional corruption and unconventional corruption, and methods for combating them. The panel will also explain methods of fighting corruption from the perspective of Islamic law. Additionally, the panel will highlight the trend of respecting rule of law after the revolution and the obstacles that stand in the way of establishing a full rule of law.

Panelists:

Mohamed A. 'Arafa, Assistant Professor of Criminal Law and Criminal Justice, Alexandria University School of Law; Adjunct Professor of Islamic Law and Ph.D. Candidate, Indiana University Robert H. McKinney School of Law

Ahmad E. Eldakak, Assistant Professor of Law, Alexandria University School of Law; J.S.D. Candidate at Washington University in St. Louis.

M. Patrick Yingling, Law Clerk to Judge D. Michael Fisher, United States Court of Appeals for the Third Circuit

12:30pm

Pathways to International Law Employment  
*A unique forum that brings law students and new lawyers together with experienced practitioners to discuss possible careers in international law. Learn about international internship opportunities, how to network with legal experts from around the world, practice in other legal systems and cultures, become active in international organizations and societies, and develop legal and interpersonal skills. Sponsored by the ABA Section of International Law*

and ILSA.

Moderator:

Lesley Benn, Executive Director, ILSA

Panelists:

Beth S. Lyons, Defense Counsel at the International Criminal Tribunal for Rwanda

Carlos Ramos-Mrosovsky, Associate, Freshfields Bruckhaus Deringer US LLP

James Rouen, General Counsel, GTS Securities Services, Citigroup

Yasuhiro Saito, Principal, Saito Law Group

12:30pm

*The U.S. Advancing the International Criminal Court: Positive Contributions and Future Predictions for a Change in Relationship*

Although the United States is not a party to the International Criminal Court's Rome Statute, it can still play a positive role in contributing to the ICC's work and constructively engaging with the Court. The panel will explore the work that the U.S. is currently doing related to the ICC, as well as potential for additional involvement within the limitations currently prescribed by Congress. The panel will also explore the possibility of the U.S. in the future becoming a party to the Rome Statute.

Moderator:

Jennifer Trahan, Associate Clinical Professor of Global Affairs, New York University; Chair, International Criminal Court Committee, ABILA

Panelists:

Tiina Intelmann, President, Assembly of States Parties to the Rome Statute

Stephen J. Rapp, Ambassador-at-Large, Office of Global Criminal Justice, U.S. Department of State

William K. Lietzau, Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy, U.S. Department of Defense

John Washburn, Convener, American Non-Governmental Organizations Coalition for the International Criminal Court

12:30pm

*The Evolving Role of the Public - Past, Present and Future - In the Development of International Environmental Law*

The public is increasingly involved with shaping the

development and implementation of international environmental law and policy - for example, in international conferences, meetings within the framework of multilateral environmental agreements, and judicial and quasi-judicial proceedings. This panel will examine the nature and impact of the role of individuals, NGOs, groups, and other sub-national actors, with a focus on how access to information, public participation in decision-making, and access to justice can protect individual and collective rights and interests.

Panelists:

Marie Soveroski, Managing Director,  
EarthRights International  
Myanna Dellinger, Assistant Professor of  
Law, Western State University College of  
Law  
Elisa Ruoizzi, Researcher in International  
Law, University of Turin  
Marilyn Averill, Doctoral Student,  
University of Colorado Boulder

12:30pm

*Bribery Prosecutions for Profit? Policy and  
Practical Implications*

Commenting on the increase in Foreign Corrupt Practices Act (FCPA) enforcement, the U.S. Department of Justice's former Assistant Chief of FCPA enforcement stated, "[t]he government sees a profitable program, and it's going to ride that horse until it can't ride it anymore." Over the past six years, FCPA enforcement has generated significant revenue for the federal government. The UK Bribery Act, drafted to be more draconian than the FCPA, will start extracting its unlimited fines this year. Our experts will analyze and critique various national enforcement policies.

Chair:

Bruce W. Bean, Lecturer of Global  
Corporate Law, Michigan State University  
Law School; Member, ABILA

Panelists:

Michael Koehler, Assistant Professor,  
Southern Illinois School of Law  
Richard Alderman, Former Director, United  
Kingdom Serious Fraud Office  
Michael J. Madigan, Senior Counsel,  
Orrick, Herrington & Sutcliffe LLP  
Kathleen Harris, Partner, Arnold & Porter  
LLP

Daniel C. K. Chow, Joseph S. Platt-Porter  
Wright Morris & Arthur Professor of Law,  
Moritz College of Law, Ohio State  
University

12:30pm

*International Organizations and the Use of Armed  
Force*

This panel explores the role of international organizations in the context of evolving norms of international security and the use of armed force. Specifically, this panel will analyze the R2P doctrine, as evidenced by the intervention in Libya and self-defense doctrine as evidenced by interventions in Pakistan, Yemen, Somalia and other states. What role do international organizations (IOs) and regional organizations (ROs) play in legitimizing these actions? When ROs with overlapping authority differ as to the propriety of a military intervention, which organization's opinion should trump? Do variables such as membership, respect for human rights, resources, and internal governance matter for assessing the value of an RO's blessing? The panel will address head-on whether the support or opposition of a regional organization should matter when judging the legitimacy of the use of armed force.  
Moderator:

Vincent J. Vitkovsky, Partner, Edwards  
Wildman Palmer LLP; Member, ABILA  
Executive Committee

Panelists:

Gregory S. McNeal, Associate Professor of  
Law, Pepperdine University School of Law  
Jordan Paust, Mike and Teresa Baker Law  
Center Professor, University of Houston  
Law Center  
Kristin Chapman, Legislative Assistant,  
U.S. House of Representatives

12:30pm

*Countering Incitement of Terrorism Through the  
Internet While Respecting Human Rights*

This panel will explore the tensions between countering the incitement of terrorism through the internet while preserving freedom of expression. It will examine how different States and private actors have tried to overcome the legal and technical hurdles involved in regulating speech amounting to incitement of terrorism over the internet, with a view to identifying best practices in this regard.

Moderators:

Michele Ameri, Legal Officer, United Nations Office of Legal Affairs

Panelists:

Frank La Rue, United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Evan Kohlmann, terrorism investigator, analyst, expert witness, media commentator and author

Edward J. Flynn, Senior Human Rights Officer, United Nations Counter-Terrorism Committee Executive Directorate

12:30pm ABILA Executive Committee Meeting

2:15pm – 3:15pm ILSA Congress, Meeting of ILSA Members  
All ILSA members are asked to attend the ILSA Congress, the bi-annual meeting of ILSA Chapters. At the Congress, ILSA members will meet the 2012-2013 Student Officers, discuss the year's activities, and plan for the future of the organization.

2:15pm – 4:15pm ABILA Members Meeting



# THE FUTURE OF AD HOC TRIBUNALS: AN ASSESSMENT OF THEIR UTILITY POST-ICC

Milena Sterio\*

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## I. INTRODUCTION

Over the past two decades, various mechanisms of international and regional justice have developed. The proliferation of international courts, hybrid tribunals, domestic war crimes chambers, truth commissions, civil compensation commissions, and other tools of accountability has sparked an academic debate over the usefulness of any such mechanism for redressing past violations of international law.<sup>1</sup> This Article will briefly discuss some of the best-known mechanisms of international, national, and “hybrid” justice, and will assess their role in light of the creation and existence of the International Criminal Court (ICC), the only permanent tribunal in international criminal law. Does international justice have a place for *ad hoc* tribunals, other than the ICC? With the relative successes of the ICC, will there be a need for additional *ad hoc* tribunals in the future? Or, will the ICC replace the need for any additional justice mechanisms and thus foreclose any future discussions over the establishment of *ad hoc* international, regional, or hybrid tribunals?

## II. RECENT TRIBUNALS: FROM NUREMBERG TO THE 21<sup>ST</sup> CENTURY

At the end of World War II, victor countries established the famous Nuremberg Tribunal, where the most prominent leaders of the Nazi regime

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\* Associate Professor of Law, Cleveland-Marshall College of Law. The author would like to thank the International Law Weekend organizers for the opportunity to moderate this outstanding panel.

1. Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295 (2003); *See generally*, Milena Sterio, *Seeking the Best Forum to Prosecute International War Crimes: Proposed Paradigms and Solutions*, 18 FLA. J. INT’L L. 887 (2006); *see generally*, David Tolbert, *International Criminal Law: Past and Future*, 30 U. PA. J. INT’L L. 1281 (2009).

were prosecuted for war crimes, “crimes against humanity,” and crimes against peace.<sup>2</sup> Nuremberg has been widely considered a catalyst for more modern-day tribunals, dedicated to the pursuit of international criminal justice.<sup>3</sup> Recent tribunals fall into three broad categories: International tribunals, hybrid tribunals, and internationalized or internationally-supported domestic chambers.<sup>4</sup>

#### A. *International Tribunals*

Three different international tribunals have been established over the last two decades: The International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the ICC.<sup>5</sup> All three tribunals are considered international because they employ international judges, prosecutors, registrars, and defense attorneys. They apply international law to any case before them and they function independently of any national jurisdiction.<sup>6</sup>

The ICTY and the ICTR are *ad hoc* tribunals, created to deal with specific conflicts in the former Yugoslavia and Rwanda with limited temporal and geographic jurisdictions.<sup>7</sup> Both the ICTY and the ICTR are expected to wind down and complete their operations within the next decade.<sup>8</sup> Both of these tribunals were created through the United Nations Security Council’s Chapter VII powers, as a tool for the reestablishment of international peace and security in the Balkans and Rwanda.<sup>9</sup> Both of these tribunals function independently of existing national courts in the former Yugoslavia and Rwanda, and both of these tribunals take primacy over any national prosecutions.<sup>10</sup> In fact, only those cases that the ICTY and ICTR

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2. Tolbert, *supra* note 1, at 1283–84 (discussing the establishment of the Nuremberg tribunal).

3. *Id.*

4. See generally, *id.*

5. Marieke L. Wierda, *What Lessons Can be Learned from the Ad Hoc Tribunals?*, 9 U.C. DAVIS J. INT’L L. & POL’Y 13, 13–14 (2002) (noting the establishing of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)); Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 N.Y.U. J. INT’L L. & POL. 1013, 1015 (2009) (noting the creation of the International Criminal Court (ICC) in 2002).

6. See Tolbert, *supra* note 1, at 1286–87 (describing the advantages and disadvantages of international tribunals).

7. *Id.* at 1286.

8. Security Council Report, August 2008 Monthly Forecast, [http://www.securitycouncilreport.org/monthly-forecast/2008-08/lookup\\_c\\_gIKWLeMTIsG\\_b\\_4374795.php?print=true](http://www.securitycouncilreport.org/monthly-forecast/2008-08/lookup_c_gIKWLeMTIsG_b_4374795.php?print=true) (last visited Feb. 18, 2013).

9. Raub, *supra* note 5, at 1018.

10. *Id.* (noting that both of these tribunals “were given primacy over national courts.”).

reject can be handed down for prosecution at the national level.<sup>11</sup> Much academic debate has already occurred over the impact, role, and usefulness of these Tribunals.<sup>12</sup> While scholars disagree about these issues, it is indisputable that these Tribunals have contributed to the development of international criminal law. Their future utility, however, remains limited because of their mandatory completion strategy and their inability to extend jurisdiction over other geographic areas.<sup>13</sup>

The ICC Statute was negotiated in 1998; the Court became operational in 2002 and has investigated seven cases and situations since its inception.<sup>14</sup> The ICC is the only permanent international criminal court.<sup>15</sup> It has jurisdiction over genocide, crimes against humanity, and war crimes.<sup>16</sup> It will potentially have jurisdiction over the crime of aggression in 2017, if a sufficient number of state parties ratify the appropriate amendments to the existing statute.<sup>17</sup> While many have applauded the creation of the ICC as a tremendous development in the field of international criminal law, others have remained skeptical about its ability to accomplish many of the existing goals of international justice.<sup>18</sup> The ICC has limited resources and can only prosecute a handful of cases.<sup>19</sup> Its jurisdiction is limited temporally, to 2002 onward, and its ability to hear any case depends on its ability to properly acquire power over a situation—the Court can exercise jurisdiction pursuant to a Security Council referral, pursuant to a referral by a state

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11. Jose Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 386 (1999) (noting that under the statutes of the ICTY and ICTR, "at any stage of the procedure the international tribunal may order national courts to defer to its competence and release a suspect to its custody for trial.").

12. See, e.g., Raub, *supra* note 5, at 1017–23; Tolbert, *supra* note 1, at 1285–87; Wierda, *supra* note 5, at 13–17.

13. Security Council Report, *supra* note 8.

14. See, e.g., James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 VILLA L. REV. 1, 2–3 (2009) (describing the establishment of the ICC); International Criminal Court, Situations and Cases, available at [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) (last visited Feb. 23, 2013).

15. *Id.* at 2.

16. *Id.*

17. Mauro Politi, *The ICC and the Crime of Aggression: A Dream that Came Through and the Reality Ahead*, 10 J. INT'L CRIM. JUST. 267, 280 (2012).

18. See generally, Tim Curry, *Review of Conference: International Criminal Tribunals in the 21st Century*, 13 NO. 1 HUM. RTS. BRIEF 6 (2005); see generally, Simi Singh, *The Future of International Criminal Law: The International Criminal Court (ICC)*, 10 TOURO INT'L L. REV. 1 (2000).

19. Singh, *supra* note 18, at 9.

party, or pursuant to the prosecutor's decision to initiate an investigation.<sup>20</sup> In some instances, political forces and influences may prevent the Court from investigating a case.<sup>21</sup> Finally, the ICC functions based on the "complementarity" principle"; it can only exercise jurisdiction if a state is unwilling or unable to prosecute.<sup>22</sup> Thus, national prosecutions have primacy over prosecutions in the ICC, unlike in the case of the ICTY and ICTR, where prosecutions in the *ad hoc* tribunals have primacy over any national prosecution.<sup>23</sup> In some instances, the ICC has been criticized as impeding peace by promoting international justice.<sup>24</sup> For example, in Uganda and Sudan, where the Court has launched investigations, some have argued that its involvement has contributed toward further ethnic conflict and violence, and that other modes of accountability would have been better suited for such volatile situations.<sup>25</sup> Thus, the model of hybrid tribunals has developed as a supplemental mechanism of justice in areas outside of the ICC's reach and in situations where ICC involvement would not be beneficial for a variety of geo-political reasons.<sup>26</sup>

### B. *Hybrid Tribunals*

Hybrid tribunals are courts that combine elements of international and national prosecutions. They employ a mix of international and national judges; they apply both international and domestic criminal laws; they may be located in a host country whose violent past they may be attempting to address; and they strive to fulfill goals of international justice while also helping to promote the growth of the local judiciary, court system, and civil society in general.<sup>27</sup> Recent examples of these hybrid tribunals include the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Panels for Serious Crimes (SPSC) of the

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20. *Id.* at 8–9 (discussing the limitations of the ICC).

21. *Id.* at 9.

22. Tolbert *supra* note 1, at 1288.

23. *Id.* at 1288–89 (noting that "the ICC is the reverse of the situation of the ICTY and ICTR, which have primacy over local jurisdiction," because of the "complementarity principle.").

24. *Id.* at 1291 ("[I]t is argued that by insisting on the primacy of ICC investigations, peaceful resolutions of disputes can be discouraged, as leaders facing war crimes investigations or charges are unlikely to agree to make peace, because they have little incentive to do so.").

25. *Id.*

26. *See generally, id.* at 1285.

27. *See generally, Raub, supra* note 5, at 1023–25.

Dili District Court (East Timor), the Special Tribunal for Lebanon (STL), and the Kosovo Regulation 64 Panels.<sup>28</sup>

The Special Court for Sierra Leone was established in 2002, through an international agreement between the United Nations and Sierra Leone, the host country.<sup>29</sup> The Court has jurisdiction over atrocities that took place in 1996 during Sierra Leone's civil war.<sup>30</sup> It is located in Freetown, the capital of Sierra Leone, but employs a mix of international and local judges.<sup>31</sup> Its statute includes both international law offenses and crimes derived from Sierra Leone, which are specific to the conflict that ravaged this small nation for many years.<sup>32</sup> The most prominent defendant prosecuted in the Special Court is Charles Taylor, the former President of Liberia, who was accused of supporting violent rebel groups in Sierra Leone during the 1990s.<sup>33</sup> Although the Special Court had formulated a firm completion strategy, the tribunal has extended its own existence several times and is, as of today, still operational.<sup>34</sup> Many have described the Court as a model hybrid tribunal. Some scholars have hailed it as a successful model of international justice, which has managed to overcome many short fallings of true international tribunals, like the ICTY or ICTR.<sup>35</sup>

The ECCC was established in 2003, through an agreement between the United Nations Secretary-General and the Cambodian government in order to try the former leaders of the Khmer Rouge regime for atrocities committed between 1975 and 1979 when Pol Pot ruled Cambodia and orchestrated a series of devastating policies, which resulted in the death of almost a third of the country's population.<sup>36</sup> The ECCC is composed of a Pre-Trial Chamber, a Trial Chamber, and a Supreme Court Chamber; all the chambers consist of international as well as Cambodian judges.<sup>37</sup> The Court also has an international and a domestic prosecutor.<sup>38</sup> The Court's

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28. *Id.*

29. *Id.* at 1034.

30. *Id.* at 1035.

31. *Id.* at 1034–35.

32. Statute of the Special Court for Sierra Leone, *available at* <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176> (last visited Feb. 23, 2013); Dickinson, *supra* note 1, at 300.

33. Raub, *supra* note 5, at 1035.

34. *Id.* at 1035–36.

35. *See generally, id.* at 1015.

36. *Id.* at 1031–32.

37. *Id.* at 1033.

38. Raub, *supra* note 5, at 1033.

statute is a mix of international and domestic law offenses,<sup>39</sup> similar to the statute of the aforementioned Special Court for Sierra Leone. Since 2009, the ECCC, located in the capital city of Phnom Penh, has prosecuted several high level members of the Khmer Rouge regime.<sup>40</sup> The ECCC is a model hybrid tribunal:

As with the hybrid institutions in Kosovo and East Timor, the weakened state of the Cambodian judiciary from years of civil war and the international nature of the crimes to be prosecuted led the government to believe that international participation was necessary to ensure that the trials met international standards of justice.<sup>41</sup>

Following the East Timorese struggle for independence from Indonesia, during which conflicts between pro-Indonesian militias and pro-independence forces resulted in violence, death, and destruction, the United Nations Transitional Administration for East Timor (UNTAET) established the SPSC to investigate and try cases related to the conflict.<sup>42</sup> The Panels were empowered with jurisdiction over genocide, crimes against humanity, war crimes, torture, sexual violence, and murder (a mix of international and domestic crimes) committed in East Timor between January 1, 1999 and October 25, 1999.<sup>43</sup> The SPSC were staffed with a mix of international and domestic judges and placed within the East Timorese domestic legal system; appeals were also structured to be lodged within the domestic appellate system.<sup>44</sup> Between 2000 and 2005, the SPSC completed fifty-five trials, and in 2005, the United Nations Security Council decided to close down this tribunal, although several investigations were still pending.<sup>45</sup> The UNTAET has provided various forms of assistance to the SPSC over the years,<sup>46</sup> and this Tribunal, like the Special Court for Sierra Leone and the ECCC, represents a model of hybrid justice—a tribunal created within a

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39. Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), available at [http://www.eccc.gov.kh/sites/default/files/legal-documents/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf).

40. Raub, *supra* note 5, at 1032.

41. *Id.* at 1033.

42. David Cohen, “Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future, 43 STAN. J. INT’L L. 1, 8 (2007).

43. *Id.*

44. Raub, *supra* note 5, at 1030.

45. Cohen, *supra* note 42, at 9.

46. Raub, *supra* note 5, at 1029.

domestic system of a post-war nation assisted by the international community.<sup>47</sup>

The STL was created in 2007 by the Security Council to try persons responsible for assassinations, and those attempted, of prominent Lebanese political and media figures since 2004.<sup>48</sup> In particular, the STL is investigating the assassination of former Prime Minister Rafiq Hariri.<sup>49</sup> Because of security concerns, the STL is located at The Hague, unlike the aforementioned tribunals, which have all been located in host countries.<sup>50</sup> The Tribunal is composed of both international and Lebanese judges, but it will apply Lebanese law.<sup>51</sup> Also, unlike the aforementioned hybrid tribunals, which have jurisdiction over both international and national crimes, the STL has jurisdiction solely over national crimes, as they relate to the Hariri assassination and other assassination attempts.<sup>52</sup> Thus, this Tribunal will not investigate “traditional” international crimes, such as genocide, war crimes, or crimes against humanity, but instead will focus on terrorism.<sup>53</sup> The STL has a three-year mandate, which can be extended by the Security Council upon review.<sup>54</sup> The Tribunal began its work in 2009, and it has already investigated several individuals and issued one indictment.<sup>55</sup> The STL is different from the hybrid tribunals because it was created through the Security Council Chapter VII powers, but contains similarities because its creation was requested by the Lebanese government and because the tribunal employs so many features of domestic Lebanese law.<sup>56</sup>

After years of conflict in Kosovo, the United Nations Missions in Kosovo (UNMIK) “passed several regulations permitting foreign judges to sit alongside domestic judges on existing Kosovar courts and allowing

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47. *Id.* at 1041–43.

48. *See* S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007); *see also* International Center for Transitional Justice, Handbook on the Special Tribunal for Lebanon 10, available at <http://www.ictj.org/images/content/9/1/914.pdf> (last visited Feb. 18, 2013).

49. Kim Ghattas, Lebanon’s Groundbreaking Tribunal, BBC News, Apr. 21, 2006, available at [http://news.bbc.co.uk/2/hi/middle\\_east/4926536.stm](http://news.bbc.co.uk/2/hi/middle_east/4926536.stm) (last visited Feb. 18, 2013).

50. Raub, *supra* note 5, at 1038.

51. *Id.*

52. *Id.* at 1039

53. *Id.* at 1038.

54. *See* S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007), art. 21.

55. The Special Tribunal for Lebanon’s pre-trial judge confirmed an indictment in the case of Ayyash et al., STL-11-01, on June 28, 2011, *see* Special Tribunal for Lebanon, The Cases, available at <http://www.stl-tsl.org/en/the-cases> (last visited Feb. 18, 2013).

56. Raub, *supra* note 5, at 1039.

foreign lawyers to partner with domestic lawyers to prosecute and defend the cases.”<sup>57</sup> Under UNMIK Regulation 2000/64, the Special Representative of the Secretary-General obtained the authority to appoint an international prosecutor, judge, or panel of judges, upon the request of a prosecutor, an accused, or defense counsel, resulting in the creation of a Regulation 64 Panel.<sup>58</sup> Thus, the Kosovar Regulation 64 Panels are unlike the hybrid tribunals because they do not derive their authority from treaty law or from Security Council resolutions; instead, their authority is based on UNMIK regulations.<sup>59</sup> These Panels are similar to other hybrid tribunals because they apply a blend of international and domestic law and because international judges and prosecutors have worked alongside Kosovar Albanian colleagues. The Panels have been overseen by UNMIK authorities and are accordingly financed.<sup>60</sup> As of 2002, the Kosovo Panels have held seventeen war crimes trials.<sup>61</sup> Some have argued that the Kosovo Regulation 64 Panels represent a somewhat successful model of hybrid tribunals: “The presence of international judges imparted an air of credibility to these trials that would have been missing without international involvement while at least some Kosovar judges have benefited from exposure to their international counterparts.”<sup>62</sup>

### C. *Internationally-Supported Domestic Chambers*

In addition to hybrid tribunals, which reflect a *mélange* of international law and domestic law, another model of delivering justice for war crimes and other types of atrocities has developed over the last decade: Internationally-supported domestic chambers or “internationalized” domestic tribunals. Examples include the Iraqi Special Court, the Bosnian War Chamber, and the recent Somali piracy prosecutions in Kenya and the Seychelles.

In order to prosecute Saddam Hussein, the deposed leader of Iraq, as well as other members of his regime, the Iraqi Special Tribunal was established in 2003 through an Iraqi law approved by the United States.<sup>63</sup>

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57. *Id.* at 1026.

58. OXFORD, INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 34, (Cesare P. R. Romano, Andre Nollkaemper, & Jann K. Kleffner eds., 2004).

59. Raub, *supra* note 5, at 1027.

60. *Id.* at 1027–28.

61. Dickinson, *supra* note 1, at 297.

62. Raub, *supra* note 5, at 1028.

63. See Cherif M. Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT’L L. J. 327, 335–36 (2005).

Located in Baghdad, the Court is a domestic tribunal that employs domestic judges, prosecutors, defense attorneys, and applies Iraqi law.<sup>64</sup> The tribunal was heavily supported by the international community, particularly the United States, which provided various forms of support and training for the Court's personnel.<sup>65</sup> Thus, this tribunal is a model of an "internationalized" domestic court: A justice mechanism embedded in the domestic system of the relevant nation, aided by various international organizations and authorities in order to enhance its effectiveness.<sup>66</sup> The Iraqi Special Tribunal successfully convicted Saddam Hussein, and in addition, has prosecuted several other members of the deposed Ba'athist regime.<sup>67</sup>

The Bosnian War Chamber is a specialized domestic chamber that handles various war crimes cases, either handed down by the ICTY as part of its completion strategy, or investigated on its own.<sup>68</sup> These cases stem from the civil war in the former Yugoslavia during the 1990s.<sup>69</sup> The Chamber is a domestic tribunal within the Bosnian judicial system; it applies local law and it is located in capital city of Sarajevo.<sup>70</sup> The Chamber, however, employs a mix of international staff, as well as local Bosnian Serbs, Croats, and Muslims.<sup>71</sup> Like the Iraqi Special Tribunal, the Bosnian War Chamber has benefitted from generous international support, and its processes have been "internationalized" to ensure procedural quality of prosecutions and to guarantee the delivery of justice pursuant to international standards.<sup>72</sup>

Finally, more recent examples of internationalized domestic chambers include special piracy courts in Kenya and the Seychelles, where captured Somali pirates are being transferred for prosecution under the national

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64. See generally, *id* at 346.

65. *Id.* at 341 (discussing the role of American jurists in the Iraqi Special Tribunal).

66. See generally, *id.* at 346.

67. Saddam Hussein Sentenced to Death, BBC NEWS [http://news.bbc.co.uk/2/hi/middle\\_east/6117910.stm](http://news.bbc.co.uk/2/hi/middle_east/6117910.stm) (last updated on Nov. 5 2006).

68. Tolbert, *supra* note 1, at 1294 (noting that the ICTY has transferred a number of low and mid-level cases to national courts and that most of these cases went to the Bosnian war chamber, which is a national hybrid court).

69. *Id.* at 1285.

70. See generally, Institute for War and Peace Reporting, Introduction to Balkan War Crimes Court, available at <http://iwpr.net/programme/international-justice-icty/introduction-balkan-war-crimes-courts> (last visited Feb. 23, 2013).

71. Curry, *supra* note 18, at 18.

72. *Id.* (noting that the Bosnian war crimes trials have been monitored by the Organization for Security and Cooperation in Europe, and that the experiment was successful).

systems of these two countries.<sup>73</sup> A piracy chamber has developed in Mombasa, Kenya, where several successful prosecutions have taken place since 2006.<sup>74</sup> Kenyan piracy courts are domestic; they also employ Kenyan lawyers, apply Kenyan law, and are located in this host nation.<sup>75</sup> In the Seychelles, piracy prosecutions have been taking place since 2009 in the Supreme Court located in the capital city of Victoria.<sup>76</sup> The Seychellois prosecutions are conducted using local law by Seychellois judges, prosecutors, and defense attorneys.<sup>77</sup> The piracy prosecutions in both Kenya and the Seychelles have benefited from international assistance by the United Nations Office of Drugs and Crime, which has provided both monetary and logistical support, as well as personnel in the form of “loaned” prosecutors, defense attorneys, translators, and interpreters.<sup>78</sup> In this sense, piracy prosecutions in Kenya and the Seychelles, although conducted in national courts, have been “internationalized,” due to support and involvement by the United Nations.

Hybrid tribunals and internationalized domestic chambers have supplemented available mechanisms of justice in international criminal law, specifically international tribunals.<sup>79</sup> The Nuremberg model of international war crimes prosecutions has been appended in modern times with innovative prosecutorial models, which mix international and domestic law and may be oriented toward both restoring justice and rebuilding peace in war-torn areas.<sup>80</sup>

### III. THE FUTURE: A MÉLANGE OF INTERNATIONAL, *AD HOC* HYBRID, AND “INTERNATIONALIZED” DOMESTIC TRIBUNALS

Is the ICC a panacea for international criminal justice, or does the future hold room and space for other kinds of tribunals, including *ad hoc* hybrid courts and internationalized domestic chambers? The latter is most likely true.

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73. For a general discussion of piracy prosecutions in Kenya and the Seychelles, see Milena Sterio, *Piracy Off the Coast of Somalia: The Argument for Pirate Prosecutions in the National Courts of Kenya, The Seychelles, and Mauritius*, 4 AMSTERDAM LAW FORUM 104 (2012).

74. *Id.* at 112.

75. *See generally, id.* at 112–13.

76. *Id.* at 115.

77. *Id.* at 115–16.

78. UNODC and Piracy, available at <http://www.unodc.org/unodc/en/piracy/index.html?ref=menuaside> (last visited Feb 18, 2013).

79. *See generally, id.*

80. *See generally, Tolbert, supra* note 1.

Each of the three models of delivering international justice offer both advantages and disadvantages. International tribunals provide a mode of delivering true international justice based on international law and carried out by the most experienced and influential international lawyers.<sup>81</sup> Their general deterrent effect, impact, and legacy are potentially tremendous, and their case law may form the basis for developing international criminal law in the future.<sup>82</sup> International tribunals, however, have limited resources but demand extremely expensive prosecutions; typically, they are structured to prosecute only those who bear the highest level of responsibility in any conflict, and they may be divorced from the reality of any situation that they are investigating because of their physical distance from the conflict at hand and their disconnect with local law.<sup>83</sup> Moreover, international tribunals generally only have jurisdiction over three international offenses: genocide, crimes against humanity, and war crimes.<sup>84</sup> Thus, these tribunals may not be able to investigate other important crimes which may have taken place during a conflict, further contributing to a perception of disconnect between the tribunal and the affected country.<sup>85</sup> Finally, international tribunals are typically not concerned with rebuilding civil society in war-ravaged countries that they investigate; instead, their focus is on prosecuting the offenders and satisfying the goals of international justice.<sup>86</sup> Particularly with the ICC, scholars have argued that in some instances, its investigations have undermined the stability and peace-building processes in target nations.<sup>87</sup> Many have argued that the ICTY and ICTR have had a very limited influence on the rebuilding of stability and

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81. See generally, International War Crimes Tribunals, Beyond Intractability, July 2003 available at <http://www.beyondintractability.org/bi-essay/int-war-crime-tribunals> (last visited on Feb. 23, 2013).

82. Lieber Code, available at <http://www.liebercode.org/2012/03/precedent-and-stare-decis-at.html> (last visited on Feb. 23, 2013) (noting the potential for "stare decises" at the international tribunals); see also, International Criminal Law Developments in the Case Law of the ICTY (Gideon Boas & William A. Schabas eds., 2003).

83. See, e.g., Tolbert, *supra* note 1, at 1287 (noting that international tribunals are "expensive and slow and have no real connection to the affected communities, because they are far away from the locations where the crimes have been committed;" noting also that "their impact on, and support of, the development of local judicial infrastructure has been limited.").

84. *Id.* at 1286.

85. See generally, *id.* at 1287.

86. *Id.* at 1291 (describing the "peace versus justice" debate as it relates to international tribunals).

87. *Id.*

society in the former Yugoslavia and Rwanda.<sup>88</sup> Thus, while offering certain advantages, international tribunals present challenges and insufficiencies in terms of delivering justice for all on a global scale.

Hybrid tribunals offer advantages inherent to their approach of integrating aspects of international prosecutions with national justice systems.<sup>89</sup> Typically, hybrid tribunals are located in the host nations, and therefore can function in tune with the needs of the local society.<sup>90</sup> They often contribute toward the growth of the local judiciary and the redevelopment of the national criminal justice system.<sup>91</sup> Similarly, they often provide the host nation with much-needed infrastructure, such as new buildings, courthouses, and detention facilities.<sup>92</sup> Hybrid tribunals are less expensive than international tribunals, they can arguably prosecute more offenders, and they can tailor their statutes to existing conflicts by incorporating country-specific offenses.<sup>93</sup> Hybrid tribunals, however, are not immune to criticism. They may lack in legacy and standing when compared to international tribunals, in particular the ICC.<sup>94</sup> They may deliver justice at a sub-international level, and their focus on rebuilding civil society may detract them from focusing on the actual prosecutions.<sup>95</sup> They may be inadequately funded and experience internal tension due to conflicts between the international and domestic court personnel.<sup>96</sup>

Finally, internationalized domestic chambers offer advantages such as the ability to prosecute lower-level offenders, handling a large volume of cases, contributing toward rebuilding the local judiciary, and existing in sync with the needs of the local population.<sup>97</sup> Such chambers typically deliver justice at much lower costs and at much higher speed compared to

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88. See generally, Ivana Nizich, *International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal*, 7 *ILSA J. INT'L & COMP. L.* 353 (2001).

89. See generally, Dickinson, *supra* note 1.

90. *Id.*

91. *Id.*

92. *Id.*

93. See Raub, *supra* note 5, at 1023 (noting that the budget of the ICTY for 2009-2010 was approximately \$173.7 million per year, and that the budget of the ICTR for the same year was approximately \$133.7 million per year); Dickinson, *supra* note 1, at 1025 (noting that the Special Court for Sierra Leone had a budget of approximately \$89 million per year); see also Tolbert, *supra* note 1, at 1287 (noting that hybrid tribunals have operated at lower cost than international tribunals because the former employ national staff in lower-cost environments).

94. See generally, Raub, *supra* note 5.

95. *Id.* at 1025.

96. See, e.g., Dickinson, *supra* note 1, at 300-05 (discussing three general problems related to hybrid tribunals: legitimacy; capacity-building; and norm-penetration).

97. See generally, *Id.* at 308-09.

international and hybrid tribunals. Yet, such chambers raise challenging issues as well. Some have questioned their ability to implement prosecutions that are adequate under the standards of international justice. For example, European nations withdrew their support for the Iraqi Special Court because they argued that its adoption of the death penalty was contrary to human rights law.<sup>98</sup>

In addition, domestic chambers can be prone to corruption. In Kenya, the UNODC donated millions of dollars to support piracy prosecutions in Mombasa, but allegations surfaced that Kenyan politicians mishandled the money and greedily demanded more.<sup>99</sup> Domestic chambers do not necessarily contribute toward the development of international criminal law because they function within domestic legal systems and apply purely domestic law. Some have argued that the international community, instead of supporting domestic prosecutions, should contribute directly to the rebuilding of these war-torn areas by developing the local economy, infrastructure, and educational institutions.<sup>100</sup>

Ultimately, the model of justice that should be employed for a given country or region depends on the circumstances of each situation. While the ICC may be the best prosecutorial option for high-profile conflicts and offenders, such as genocide or crimes against humanity, other conflicts may necessitate the creation of *ad hoc* international tribunals, such as the ICTY and ICTR, or *ad hoc* hybrid tribunals, like the Special Court for Sierra Leone, the ECCC, the East Timor, or Kosovo courts. Other conflicts may warrant the creation of a specialized and internationally supported domestic war crimes chamber, such as in the case of the Iraqi Special Court, the Bosnian War Crimes Chamber, and the Somali piracy prosecutions in the national courts of Kenya and the Seychelles. In light of the different demands of each conflict, is it unlikely that the existence of the ICC will preclude the establishment of other types of hybrid or internationalized domestic tribunals.<sup>101</sup>

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98. Neil MacDonald, *Iraq Tribunal Struggles for Credibility*, FT.COM, June 10, 2005, available at <http://www.ft.com/intl/cms/s/1/fbc3ae76-d94d-11d9-8403-00000e2511c8.html#axzz2LjuFZTJ9> (last visited Feb. 23, 2013.)

99. Sterio, *supra* note 73, at 113–14 (discussing alleged corruption issues in Kenya).

100. See e.g., Dickinson, *supra* note 1, at 308 (describing that some critics have labeled hybrid courts as “a mere second best alternative to international courts.”).

101. *Id.* at 308–10 (outlining instances in which the establishment of hybrid courts may be warranted).

#### IV. CONCLUSION

The goals of international justice are broad and necessitate different approaches for different situations. While the creation of the ICC may have been a welcomed development in the field of international criminal law, this Tribunal should not prevent the possible establishment of other future tribunals necessary for various types of conflicts, crimes, and offenders.

# SEXUAL VIOLENCE, THE *AD HOC* TRIBUNALS AND THE INTERNATIONAL CRIMINAL COURT: RECONCILING *AKAYESU* AND *KUNARAC*

*Caleb J. Fountain*\*

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## I. INTRODUCTION

The International Criminal Court (ICC) will soon be the dominant international forum adjudicating allegations of international crimes, as those currently in operation are projected to complete their mandates in the next few years. Because the Court is at an early stage of development, the substantial body of case law developed at the *ad hoc* tribunals will remain significant reference points; the International Criminal Tribunals for the former Yugoslavia (ICTY) and International Criminal Tribunals for Rwanda (ICTR) will be particularly important. Notably, the ICC has only begun to interpret their codes regarding sexual violence, and in doing so, the Court has already relied upon the findings of the *ad hoc* tribunals.<sup>1</sup> There will be many further opportunities to do so, with at least five of the twelve warrants of arrest issued since July 2010 including counts of rape.<sup>2</sup>

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1. See Situation in Darfur, the Sudan, Case No. ICC-02/05-56, Prosecutor's Application under Article 58(7), ¶¶ 23, 28, 119, 371, 385 & 393 (Feb. 27, 2007). For a discussion of the limited extent to which the ICC has actually begun to interpret their code as relates to sexual violence, see K. Alexa Koenig, et al., *The Jurisprudence of Sexual Violence* (Human Rights Ctr. of UC Berkeley, Sexual Violence & Accountability, Working Paper, May 2011).

2. Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Second Warrant of Arrest (July 12, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>; Prosecutor v. Hussein, Case No. ICC-02/05-01/12, Warrant of Arrest (Mar. 1, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1344965.pdf>; Prosecutor v. Gbagbo, Case No. ICC-02/11-01/12, Warrant of Arrest (Feb. 12, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1344439.pdf> (last visited Feb. 23, 2013).

It is therefore important to take stock of the *ad hoc* tribunal's findings on sexual violence.

A voluminous and dynamic debate has developed in academia and the international judiciary around how the international criminal law regime ought to define rape. Conflicts over competing definitions have found clear expression in international scholarship and within the chambers of the *ad hoc* tribunals and, more lately, the Pre-Trial Chambers of the ICC. These decisions are all the more impactful because of the influence each judgment affects throughout the international criminal law regime. This paper will define in clear terms the two prevailing definitions of rape in the Tribunals, and will put forward an explanation, using a procedural illustration to bring the point home, as to why the courts have come to conclusions at variance with one another. Finally, I will address the implications of the previous argument upon the prospect of overlapping charges. In doing so, I will suggest what might occur should a defendant be accused of sexual violence as a crime of genocide and as a crime against humanity.

The debate has essentially centered on what I shall call consent-dominant and coercion-dominant definitions of rape. The former, which has arguably come to characterize the prevailing trend in the law, is most succinctly articulated in the famous case, *Kunarac*, handed down by the ICTY in 2001. I am excited that counsel for the prosecutor in that case, Peggy Kuo, is with us this afternoon. The coercion-dominant definition, touted by Catherine MacKinnon as "the first time rape was defined in law as what it is in life,"<sup>3</sup> was first articulated in the equally famous but less influential case *Akayesu*, delivered by the ICTR in 1998.

## II. PROSECUTOR V. AKAYESU

Jean-Paul Akayesu, an ethnic Hutu, was a municipal administrator in the Taba Commune in central Rwanda during the Rwandan Genocide. He was arrested in 1995 on charges, *inter alia*, of genocide and crimes against humanity. Akayesu was found to have instigated a number of incidents of rape as part of a larger effort to eradicate the Tutsi, with the Trial Chamber determining that the act fell within the ambit of the genocide provision in the Tribunal's statute.<sup>4</sup> For the first time, rape was considered a weapon of genocide.

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3. Catherine MacKinnon, *Defining Rape Internationally*, 44 COLUM. J. TRANSNAT'L L. 940, 944 (2006).

4. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 731 (Sept. 2, 1998):

With regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as

The *Akayesu* decision was considered revolutionary because it abandoned “mechanical” descriptions of rape, which generally required a certain degree of penetration and, most critically, a particular state of mind on the part of the victim (that is, of non-consent). Rather, the Trial Chamber held, rape is better determined as “physical invasion of a sexual nature, committed under circumstances that are coercive.”<sup>5</sup> In putting the elemental emphasis on force, and, furthermore, the force of the circumstances, the Trial Chamber made a strong case for abandoning consent entirely: Any consent the defense could claim would be invalidated by the genocidal violence attending the act. Prior to *Akayesu*, charges of rape had not figured into the prosecution of charges of genocide,<sup>6</sup> but after the judgment was handed down this changed considerably. These new charges were in turn often used as chips in plea bargaining agreements.<sup>7</sup> While *Akayesu* remained influential at the ICTR, a case at the ICTY, *Kunarac*, would change the way both *ad hoc* tribunals approached the question.

### III. PROSECUTOR V. KUNARAC

The three defendants in *Kunarac* were ethnic Serbs charged with rape, torture, enslavement, and outrages upon personal dignity, all related to their participation in a campaign to cleanse Muslims from a municipality then

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any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such . . . [s]exual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.

5. *Id.* at ¶ 597, 687 (noting that consent is only mentioned when noting that a word the victims used to describe the rapes, “kunargora,” is “used regardless of whether the woman is married or not, and regardless of whether she gives consent or not.”).

6. Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 47 MCGILL L.J. 217, 236. Cf. Binaifer Nowrojee, *Your Justice is Too Slow: Will the ICTR Fail Rwanda’s Rape Victims?*, Occasional Paper No. 10, UNRISD, at 3:

The ICTR is feted by lawyers for its first landmark judgment in the case of *Akayesu* that expanded international law on rape—a point of pride that the ICTR officials always cite as a manifestation of their commitment to prosecute sexual violence. Yet as ground-breaking as the *Akayesu* judgment is, it increasingly stands as an exception, an anomaly (citations omitted).

This may well be true considering the influence of the *Kunarac* decision discussed below. But it remains true that *Akayesu* opened the door to the broader use of rape charges in indictments at the ICTR; it is questionable whether the judgments handed down thereafter followed in *Akayesu*’s spirit, however.)

7. See Doris E. Buss, *Rethinking “Rape as a Weapon of War,”* 17 FEM. LEG. STUD. 145, 151 (2009).

known as Foča. As Judge Florence Mumba noted in the sentencing hearing, “even the town’s name was cleansed,” referred to now as Srbinje. Serbs rounded up Muslims in Foča, killing most of the men on the spot and sending most of the women to collection points outside of the municipality. Kunarac, Kovač, and Vuković were found guilty of employing rape as an instrument of terror at these collection points, and that the instances of rape were systemically related to the overarching purpose of the Serbian presence in Foča, making them crimes against humanity.<sup>8</sup>

The judgment represents a milestone at the ICTY: Until that point no convictions of rape were ever rendered at the Tribunal. However, the definition of rape established at the court was controversial for manifestly ignoring the precedent offered by *Akayesu*. Rather than defining rape according to something akin to a strict liability standard (that is, with reference only to the circumstances of the crime rather than whether the defendant thought the alleged victim consented) the *Kunarac* court determined the definition of rape to turn on the question of consent abandoned at the ICTR three years before.

Claiming that no workable definition of rape in international law existed, the Trial Chamber sought a “lowest common denominator” element upon which to base their own definition by reviewing a diverse array of domestic criminal codes from around the world.<sup>9</sup> While a fairly standard method of judicial interpretation, it carries an inherent danger in the context of defining sexual violence, particularly at a war crimes tribunal. Notwithstanding the meaningful differences in rape definitions across jurisdictions (civil law historically carrying a broader definition of what types of penetration may constitute rape than common law, for example),<sup>10</sup> these domestic laws were formulated for adjudicating crimes in times of peace. It can, of course, be argued that the conditions established in the Serb detention camp have potential to be created in a jurisdiction not beset with conflict. A man might kidnap, unjustly detain, and rape several women in any jurisdiction. This was, perhaps, the logic the Trial Chamber followed in *Kunarac*. But as Judge Chile Eboe-Osuji, recently elected to a judgeship at the ICC, and Professor Anne-Marie de Brouwer have argued, the intended purpose of domestic rape law cannot be said to adequately match the intended purpose of international rape law, the latter of which

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8. See, e.g., Prosecutor v. Kunarac, et al., Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 759 (Feb. 22, 2001).

9. *Id.* at ¶ 439 *passim*.

10. MARIA ERIKSSON, DEFINING RAPE: EMERGING OBLIGATIONS FOR STATES UNDER INTERNATIONAL LAW? 129 (2010).

generally deals with broad-conflict situations.<sup>11</sup> In these cases, rape would not have reasonably occurred but for the conflict, which adds, to my mind, sufficient justification to privilege “contexts of force” over “non-consent.”

The trial judgment was upheld on appeal, with the Appeals Chamber agreeing with my central proposition above. It noted that, while “inferring” non-consent from surrounding violent circumstances must be done with care, it is hardly unreasonable in light of rape during times of war.<sup>12</sup> The Appeals Chamber elaborated on the definition of rape as a war crime and emphasized that in order to be classified, it must be established that “but for” the armed conflict, the rape would not have been committed.<sup>13</sup> This might be read as a criticism of the Trial Chamber’s use of domestic law as the source of their definition of rape, but it is important to remember that it is the Trial Chamber’s formula that has been subsequently discussed in the literature and utilized as precedent in the courts. Notwithstanding the criticism from above, the Trial Chamber’s formula has endured, perhaps as a consequence of a misreading of the Appeals Chamber’s binding judgment.

#### IV. RECONCILING *AKAYESU* AND *KUNARAC*

Over the years, scholars of international criminal law have used *Akayesu* and *Kunarac* to legitimize coercion-dominant and consent-dominant definitions of rape respectively. The two have been set up against each other in efforts to demonstrate one’s superiority.<sup>14</sup> It is largely overlooked, however, that each adjudicated different overarching crimes: In *Kunarac*, rape fell under the rubric of crimes against humanity; in *Akayesu*, rape ultimately fell under the rubric of genocide.<sup>15</sup> This distinction may elucidate how the respective Trial Chambers decided on definitions of rape at variance with one another. They essentially defined subtly different crimes. Because the evidentiary standards for crimes against humanity are less strict than those for genocide, insofar as a charge

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11. ANNE-MARIE DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR, 116 (2005); Chile Eboe-Osuji, *Rape as Genocide: Some Questions Arising*, 9 J. GENOCIDE RES. 251, 258 (2007).

12. Prosecutor v. Kunarac, et al., Case No. IT-96-23-T & IT-96-23/1-A, Appeal Judgment, ¶ 218 (June 12, 2002).

13. *Id.* at ¶ 58.

14. *E.g.*, Eboe-Osuji, *supra* note 11, at 251.

15. *See* Prosecutor v. Akayesu, Case No. ICTR 96-4-I, Amended Indictment, Counts 13, 15 (Jan. 1, 1996) (noting that because prosecutors could only charge the accused with rape via crimes against humanity, Akayesu’s indictment only named rape as a crime against humanity. The Trial Chamber nevertheless found rape to be a crime of genocide for the purposes of the case.).

of genocide can only succeed with proof of the requisite genocidal *mens rea*,<sup>16</sup> perhaps the respective Chambers came to conclusions they thought best calibrated to the overarching crime at bar.

Akayesu himself conceded immediately that genocide occurred in Rwanda in 1994. While the debate over whether genocide occurred in the Balkan conflict of the 1990s continues to this day, the courts in The Hague (the ICTY, the International Court of Justice in *Bosnia v. Serbia*) have consistently found that genocide did not occur.<sup>17</sup> It may be erroneous, therefore, to impose the evidentiary standard of *Akayesu* on *Kunarac* as Judge Eboe-Osuji and many others consistently do. Eboe-Osuji wrote in 1997:

[T]he very nature of the circumstances in which rape occurs in the context of genocide makes inquiry into consent almost wholly out of place. Rape as an act of genocide is predicated on the special intent to destroy a group in whole or in part, the victim of rape being part of the group targeted for such destruction . . . . In these circumstances, it is curious to import into the inquiry tenets of domestic law that were originally designed to ensure that a complainant had not merely changed her mind after the fact of a consensual “sexual activity . . . .” This is the major flaw in *Kunarac*, given its heavy reliance on domestic law.<sup>18</sup>

As this passage indicates, part of the impetus to emphasize coercion over consent relies on the context of the crime in genocide; yet nothing in the Trial Chamber’s deliberations over *Kunarac* indicated that genocide was a circumstance attending the crime, qualifying the crime, or motivating the defendants’ behavior. While this is not the time to elaborate on the difference between genocide and the crimes against humanity (for which *Kunarac* was in fact charged), the fact that the *Kunarac* trial chamber was dealing with a different over-arching crime should indicate that perhaps a different *mens rea*, one less inclined toward strict liability perhaps, would have been more appropriate. None of this amounts to anything if “genocide” and “crimes against humanity” are blended together; some

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16. See Rome Statute of the International Criminal Court, July 17, 1998, arts. 6–7, U.N. Doc. A/CONF.183/9 (1998) (noting that the ICC Statute offers prevailing definitions of the two crimes) [hereinafter Rome Statute].

17. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, I.C.J. Reports 2007. Cf. Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, ¶¶ 1–38 (Feb. 22, 2001) (affirming Trial Chamber’s finding that genocide occurred in Srebrenica).

18. E.g., Eboe-Osuji, *supra* note 11, at 258.

scholars have been willing to take this step for purposes of defining rape.<sup>19</sup> Perhaps they should not be, as the requirements of proof for the *mens rea* of genocide and crimes against humanity are substantially different.

Again, notwithstanding the Chamber's long proof of the fact in their opinion,<sup>20</sup> genocide was a foregone conclusion in *Akayesu*; the defendant never denied the existence of genocide. Once this threshold question was affirmatively answered, requiring the demanding proof of specific intent to destroy, in whole or in part, a protected group, it is my opinion that the Chamber then defined rape in a broad manner that lowered the evidentiary standards for the prosecution.<sup>21</sup> *Kunarac*, on the other hand, never alleged genocidal intent and the standard of proof is much lower. Rather than specific intent, crimes against humanity requires proof of knowledge that a protected group will be compromised as a result of their acts.<sup>22</sup> The *Kunarac* Chamber seems to respond to this lower threshold of proof by raising the evidentiary standard for rape by requiring "explicit and affirmative inquiry into the consent of the victim."<sup>23</sup> Under the *Akayesu* regime, it seems that because the demanding *mens rea* requirement of genocide has already been met, the definition of rape may tend more toward a strict liability standard, holding any genocidaire who has sexually engaged a protected group member under conditions of genocide criminally liable for rape due to the overarching presence of coercion. Sex with a genocidaire under conditions of genocide, *Akayesu* affirms, cannot be consented to, so non-consent is not an element of the crime. Under *Kunarac*, with crimes against humanity serving as the template upon which the judgment shall read its definition of rape, courts will tend to enforce the non-consent requirement, as the culpability of the accused has not already been determined to be the highest possible. Sex with someone accused of crimes against humanity, *Kunarac* seems to say, may not be unequivocally a weapon of the crime and the Court must look toward other standards of culpability, such as non-consent.

#### V. *IN CAMERA* HEARINGS

Discussing *in camera* hearings, a procedural device meant to assess the appropriateness of consent defenses in criminal trials involving rape at

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19. Wolfgang Schomburg & Ines Peterson, *Genuine Consent to Sexual Violence Under International Law*, 101 AMER. J. INT'L L. 121, 123–24 (2007).

20. *Akayesu*, Case No. ICTR 96-4-I, Amended Indictment, ¶¶ 112–29.

21. Rome Statute, *supra* note 16, art. 6.

22. *Id.* art 7(b).

23. Koenig, *supra* note 1, at 12.

the *ad hoc* tribunals and the ICC, may help to clarify the points I made so far. *In camera* hearings allow the defendant to provide private testimony to be held in the judges' chambers so as to alleviate pressure on alleged victims of sexual violence during litigation. While not a novel practice in American criminal law, *in camera* hearings were introduced to the ICTY's amended Rules of Procedure and Evidence in 1995. The rule sought to protect the rights of victims and witnesses by having the accused introduce any consent-related defenses in a private hearing before the judges in their chambers. If the judges determine the defense to be untenable, the defense cannot be admitted in trial. If it is deemed tenable, the defendant may bring it forward as an affirmative defense.<sup>24</sup> The ICC inherited this procedural safeguard in Rule 72 of its Rules of Procedure and Evidence. While it seems well intended on its face, a proponent of a coercion-dominant definition of rape might raise concerns that it reflects a potential lack of confidence in a strong, violence-based definition. For those who tend toward favoring a consent-dominant definition of rape, the procedure might appear as a premature determination on the merits, which may prejudice the defendant's case.<sup>25</sup>

The debate I described a moment ago as to whether allegations of rape should be treated the same if there were no question of fact as to the overarching presence of genocide on the one hand, or crimes against humanity on the other may shed some light on this. Let us suppose that the fact of genocide is unquestioned before the court (as in *Akayesu*). Non-consent might be abandoned entirely as a possible defense. If the fact of genocide is in question, *in camera* hearings become more appropriate, with

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24. R. P. EVID. for the former Yugoslavia, Rule 96(ii)(a-b) (amended May 3, 1995); R. P. EVID. for the former Yugoslavia, Rule 96(iii) (revised Jan. 3, 1995). They read as follows, and are repeated verbatim in the Rules of Procedure and Evidence for the ICTR:

- (ii) consent shall not be allowed as a defence if the victim
  - (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
  - (b) reasonably believed that if the victim [*'she'* in previous versions] did not submit, another might be so subjected, threatened or put in fear;
- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber *in camera* that the evidence is relevant and credible.

The language change in (ii)(b) may have been in anticipation of the *Tadic* indictment, which included charges of sexual assault against a male. Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on Defense Motion on Form of the Indictment (Nov. 14, 1995).

25. See, e.g., Kelly Dawn Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AMER. J. OF INT'L L. 97, 104 (1999); DE BROUWER, *supra* note 11, at 121 (seeming to suggest the *in camera* rule may rule out consent). For more background on the origins of the rule at the ICTY, see MacKinnon, *supra* note 3, at 945.

non-consent acting as an affirmative defense granted by the judge by shifting the burden of proof onto the defendant. And finally, if the fact of genocide is not even brought to bar, consent may become an element of the crime of rape (as in domestic jurisdictions) and the burden shifts back to the prosecution to prove non-consent beyond a reasonable doubt.

This does not answer the question as to what should constitute consent or non-consent in the context of ethnic cleansing, but it does go some way to explain the trend in the case law. The *Akayesu* and *Kunarac* courts seem to be pointing two different crimes: Rape as a weapon of genocide and rape as a crime against humanity. The debates over *Akayesu* and *Kunarac* and their progeny may not have taken sufficiently into consideration this factor. The courts seem to have caught hold of this and calibrated their judgments according to the situation in which the crime was committed. Professors MacKinnon and de Brouwer and Judge Eboe-Osuji demand from these opinions a settled, singular definition of rape, but the courts seem to want to define rape along a spectrum, with the type of over-arching crime as a reference point.<sup>26</sup>

Looking at it this way also helps to explain the discomfort many of the commentators on the subject felt when the ICTR, a tribunal dealing almost exclusively with genocide claims, handed down several decisions that utilized *Kunarac*'s requirement of non-consent as an element of the crime of rape. For example, *Semanza* and *Kajelijeli*,<sup>27</sup> two cases heard at the ICTR, applied the *Kunarac* standard, though, in Professor MacKinnon's words, "there was no implication that the women who were sexually violated before they were murdered might have consented."<sup>28</sup> If the standards seem appropriate to their particular contexts, applying them elsewhere is not always sensible. In fact, it may indicate that the situations in which they are applied are elementally different, by virtue of the variable *mens rea* (though not necessarily variable results) and that the definitions themselves must accommodate to the situations accordingly.<sup>29</sup>

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26. See MacKinnon, *supra* note 3, at 940; DE BROUWER, *supra* note 11, at 116; Eboe-Osuji, *supra* note 11, at 251.

27. Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, ¶ 344 (May 15, 2003); Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment ¶ 911 (Dec. 1, 2003).

28. MacKinnon, *supra* note 3, at 952.

29. The *mens rea*, again, being the chief distinguishing factor between genocide and the crime against humanity of ethnic cleansing. The result elements of the crimes—potentially the targeting and elimination of members of a protected group—may be the same.

## VI. OVERLAPPING CHARGES

If it may be accepted that judges at the ICTR and the ICTY have sought to calibrate the definition of rape according to the predicate crime of which it is a part, it becomes unclear whether a judge would privilege one over the other if the defendant before her has been accused of both rape as a weapon of genocide and as a crime against humanity. At the ICTR this has actually been common practice. Rape has appeared on indictments as an act of genocide and as a crime against humanity repeatedly since *Akayesu* was handed down.<sup>30</sup> The problem this presents with regard to the thesis put forward here is why should the definition of rape be different according to whether it is alleged to have been part of a genocide or as a crime against humanity, since the *actus reus* remains the same regardless? That is, rape will consist of the same physical act whether it is a function of genocide, crimes against humanity, or war crimes. It may therefore be unclear why the variant *mens rea* would demand a different evidentiary standard for an identical act.

We have a glimpse how this may operate, however, in a case we have already discussed: *Akayesu* was indicted on charges of rape as a crime against humanity and on charges of genocide.<sup>31</sup> The Trial Chamber found him guilty of both, but determined the acts of rape fell also under the charge of genocide, and in doing so applied the standard discussed above. The Trial Chamber discussed the problem that arose from concurrent charges, based on the same set of facts, as follows.

The question which arises at this stage is whether, if the Chamber is convinced beyond a reasonable doubt that a given factual allegation set out in the indictment has been established, it may find the accused guilty of all of the crimes charged in relation to those facts or only one. The reason for posing this question is that it might be argued that the accumulation of criminal charges offends against the principle of double jeopardy or a substantive *non bis in idem* principle in criminal law. Thus, an accused who is found guilty of both genocide and crimes against humanity in relation to the same set of facts may argue that he has been twice judged for the same offence, which is generally considered impermissible in criminal law.<sup>32</sup>

The Chamber went on to explain that it was permissible to find the accused guilty of overlapping charges over the same acts, provided each charge consisted of a crime possessing different elements. Concluding that

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30. See Buss, *supra* note 7, at 151; see also Nowrojee, *supra* note 6, at 3.

31. *Akayesu*, Case No. ICTR 96-4-I, Amended Indictment, counts 1, 13.

32. *Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 462. The Trial Chamber relies on *Tadic*, Case No. IT-94-1-T, Decision on Defense Motion on Form of the Indictment.

the offences under its statute “have different elements and, moreover, are intended to protect different interests,” the Chamber found that “multiple convictions for these offences in relation to the same set of facts is permissible.”<sup>33</sup> The *Akayesu* Chamber indicates that irrespective of the underlying factual allegations, genocide and crimes against humanity are fundamentally different crimes, neither of which are subsumed into the other or considered, for purposes of the Statute, greater or lesser than the other.<sup>34</sup> Rape, it would follow, as an expression of these crimes, may carry with it differing elements according to the overarching crime.

The ICC’s Pre-Trial Chamber encountered a version of this problem in rendering its initial negative determination regarding the prosecutor’s application for a warrant of arrest for President al-Bashir of Sudan. The prosecutor sought charges of genocide, crimes against humanity, and war crimes, using the same underlying allegations of widespread rape to support all three. The Chamber rejected the prosecutor’s “reliance on the nature and extent of the war crimes and crimes against humanity allegedly committed by [the Government of Sudan] forces as evidence of [the Government’s] genocidal intent.”<sup>35</sup> The prosecutor was, however, using the same factual background to allege the commission of a separate crime unrelated, as an elemental matter, to the other crimes. Kelly Askin has suggested that widespread rape may in itself serve as evidence of genocidal intent,<sup>36</sup> and ultimately the Appeals Chamber agreed, remanding the prosecutor’s application.<sup>37</sup> From this it can be ascertained that, just as crimes against humanity and genocide are discretely different crimes, rape may carry different definitions calibrated to the greater crime of which it is a part. The facts regarding an incident of rape underlying a charge of genocide or crimes against humanity will be the same, of course. Rape is alleged either way. But the contextual elements and varying mental state requirements of the crimes of genocide or crimes against humanity may militate in favor of approaching the underlying facts with different *mens rea* requirements.

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33. *Id.* at ¶¶ 469–70.

34. *Id.*; see also PAYAM AKHAVAN, REDUCING GENOCIDE TO LAW: DEFINITION, MEANING, AND THE ULTIMATE CRIME (2012).

35. Prosecutor v. Bashir, Case No. ICC 02/05-01/09, Decision on the Prosecution’s Application of Arrest, §§ 190–201 (Mar. 4, 2009); see also Situation in Darfur, The Sudan, Case No. ICC 02/05-157, Public Redacted Version of the Prosecutor’s Application under Article 58, §§ 76–209 (July 14, 2008).

36. Kelly Dawn Askin, *Holding Leaders Accountable in the International Criminal Court (ICC) for Gender Crimes Committed in Darfur*, 1 GENOCIDE STUD. & PREVENTION 13, 20 (2006).

37. See *Bashir*, Case No. ICC 02/05-01/09, Decision on the Prosecution’s Application of Arrest.

As the above suggests, concurrent charges of rape as an act of genocide and rape as a crime against humanity may pose procedural difficulties. What should be done if evidence of consent is considered unilaterally irrelevant for purposes of the genocide charge, but not for the crime against humanity charge, as *Akayesu* and *Kunarac* imply? The answer would seem to lie in *Akayesu* and *al-Bashir*: If the fact of genocide had been established *ex ante*, or if there is reason to believe there existed the requisite *mens rea* of genocide in early investigation, few procedural difficulties to this end will be encountered. With the Pre-Trial Chamber having finally permitted the prosecutor's application to go through with a genocide charge attached,<sup>38</sup> the prosecutor's office will have the opportunity to begin establishing through investigation whether genocide occurred in the Sudan or not, the result of which will affect the manner of the proceedings upon al-Bashir's arrest.

## VII. CONCLUSION

The foregoing argument has sought to articulate a central tension in the precedent established at the *ad hoc* tribunals with regard to the crime of rape. The tension exists between coercion-dominant and consent-dominant definitions of rape as articulated in the leading cases *Akayesu* and *Kunarac* respectively. I have suggested that the definitions put forward in these cases must be read in relation to the predicate crime of which rape was a part: Genocide in the first and crimes against humanity in the second. I have also argued that much of the scholarly literature on the subject may have overlooked this distinction. I then explored two possible implications of this interpretation through the use of *in camera* hearings and overlapping charges. In spite of the voluminous commentary on the issue, it is clear that the definition of rape is far from settled. In the years ahead, the Court will have many opportunities to develop a more workable definition than the ones currently available. With the fate of international criminal justice essentially resting in their hands, it is their responsibility to do so.

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38. Prosecutor v. Bashir, Case No. ICC 02/05-01/09, Second Warrant of Arrest (July 12, 2010) (noting that the Pre-Trial Chamber affirmed the charges of genocide, though they were founded upon the same factual background as the other charges).

# INTERNATIONAL LAW WEEKEND, AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION PERSPECTIVES ON CRIMES OF SEXUAL VIOLENCE IN INTERNATIONAL LAW

*Susana SáCouto\**

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## I. INTRODUCTION

Sexual and gender-based violence (SGBV) during conflict and periods of repression has been a problem in every region of the globe.<sup>1</sup> Historically, these crimes were rarely prosecuted, particularly when government leaders were responsible for tolerating, encouraging, or orchestrating these crimes.<sup>2</sup> However, the last two decades have seen an incredible transformation in the treatment of SGBV under international law. Great strides have been made in the investigation and prosecution of sexual and gender-based crimes, particular by the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda, and the Special Court for

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1. *Rape as a Weapon of War: Accountability for Sexual Violence in Conflict: Hearing on S. Before the Subcomm. on Human Rights and the Law Comm. on the Judiciary*, 110th Cong. (2008) (statement of Dr. Kelley Dawn Askin, Senior Legal Officer, Open Society Justice Initiative) [hereinafter Askin Testimony]. Although recent literature challenges the magnitude of the problem, see HUMAN SECURITY RESEARCH GROUP, HUMAN SECURITY RESEARCH REPORT 2012: SEXUAL VIOLENCE, EDUCATION AND WAR: BEYOND THE MAINSTREAM NARRATIVE (2012) (even these sources generally acknowledge that rape and other forms of sexual and gender-based violence continue, in the words of one source, “to pose a grave threat to human security in today’s wars”).

2. Askin Testimony, *supra* note 1 (“There was widespread acknowledgment that atrocities such as massacres, torture, and slave labor were prosecutable, but there was skepticism, even by legal scholars and military officials, as to whether rape was sufficiently serious to be prosecutable in an international tribunal set up to redress the worst crimes.”); Cate Steains, *Gender Issues*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 357, 358 (Roy S. Lee ed., 1999) (“[I]t was only in relatively recent times that sexual and gender violence in armed conflict shifted from the periphery of the international community’s focus towards the centre of debate, and was recognized as an important issue in serious need of redress.”).

Sierra Leone.<sup>3</sup> This essay examines the way in which the world's permanent International Criminal Court (ICC)—which this year celebrates its tenth anniversary—has addressed these crimes and focuses on the impact that the investigative practices of the ICC's Office of the Prosecutor (OTP) have had on the investigation and prosecution of such crimes to date.

## II. PROVISIONS WITHIN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT REGARDING SEXUAL AND GENDER-BASED VIOLENCE

The 1998 Rome Statute establishing the ICC enumerates a broad range of sexual and gender-based offenses as war crimes and crimes against humanity. The Rome Statute includes rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization under both the war crimes and crimes against humanity provisions and a residual “sexual violence” clause that allows the Court to exercise jurisdiction over other serious sexual assaults of comparable gravity to the named gender-based crimes.<sup>4</sup> Moreover, for the first time, the Rome Statute includes “gender” within the list of prohibited grounds of persecution as a crime against humanity.<sup>5</sup> Additionally, the Court's Elements of Crimes recognizes that although rape is not listed as a form of genocide under the Rome Statute, genocide committed by acts causing “serious bodily or mental harm” may include “acts of torture, rape, sexual violence or inhuman or degrading treatment.”<sup>6</sup>

Although this list was far more extensive than the list of gender crimes in the statutes of the *ad hoc* tribunals, drafters of the Rome Statute expressed concern that the effective investigation, prosecution, and trial by

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3. See U.N. DEP'T OF PEACEKEEPING OPERATIONS, REVIEW OF THE SEXUAL VIOLENCE ELEMENTS OF THE JUDGMENTS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, AND THE SPECIAL COURT FOR SIERRA LEONE IN THE LIGHT OF SECURITY COUNCIL RESOLUTION 1820 (2010).

4. Rome Statute of the International Criminal Court, art. 7(1)(g), Jul. 17, 1998, UN Doc A/CONF.183/9, 2187 UNTS 90, [hereinafter Rome Statute] (defining crime against humanity as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population . . . (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”); *id.* art. 8(2)(b) (defining war crimes as “any of the following acts: . . . (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.”). Article 8(2)(e)(vi) enumerates the same crimes as Article 8(2)(b)(xxii) committed in the context of non-international armed conflicts.

5. *Id.* art. 7(h).

6. International Criminal Court Elements of Crimes, art. 6(b), Sept. 9, 2000, UN Doc PCNICC/2000/1/Add.2 [hereinafter ICC Elements of Crimes].

the Court of sexual and gender-based crimes “would not necessarily flow automatically from the inclusion of crimes of sexual and gender violence in the Statute.”<sup>7</sup> Thus, the drafters of the Rome Statute included an additional series of structural provisions designed to ensure that such crimes would be given adequate attention by the Court. For instance, Article 54(1)(b) requires that the Prosecutor “take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children,” to ensure the “effective investigation and prosecution of crimes within the jurisdiction of the Court.”<sup>8</sup> The Rome Statute also provides that State Parties responsible for nominating and electing the Court’s judges “take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.”<sup>9</sup> Similarly, the Prosecutor and the Registrar are to consider the importance of legal expertise on violence against women in hiring staff within their respective organs.<sup>10</sup> At the same time, the Prosecutor must appoint “advisers with legal expertise on specific issues, including . . . sexual and gender violence,”<sup>11</sup> while the Victims and Witnesses Unit must include staff with expertise in “trauma related to crimes of sexual violence.”<sup>12</sup> Finally, in determining appropriate protective measures for victims and witnesses, the Court as a whole is required to take into account such factors as gender and “the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.”<sup>13</sup>

### III. ICC INVESTIGATION AND PROSECUTION OF SGBV

Despite the extensive substantive and procedural provisions in the Rome Statute relating to SGBV, the ICC’s record with respect to the investigation and prosecution of sexual and gender-based crimes has been mixed in its first ten years of operation. Positive developments show that thirteen of the eighteen cases that have come before the Court (about 72%) have included allegations of sexual and/or gender-based crimes. Specifically, in the *Kony* case, which is the only case brought to date in the Uganda situation, Joseph Kony, Commander-in-Chief of the Lord’s

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7. Steains, *supra* note 2, at 375.

8. Rome Statute, *supra* note 4, art. 54(1)(b).

9. *Id.* art. 36(8)(b).

10. *Id.* art. 44(2).

11. *Id.* art. 42(9).

12. *Id.* art. 43(6).

13. Rome Statute, *supra* note 4, art. 68(1).

Resistance Army (LRA), was charged with rape and sexual enslavement as a crime against humanity and a war crime.<sup>14</sup>

Crimes of sexual violence have also been alleged in three of the five cases pursued by the Prosecutor in the Darfur situation, including the case against sitting head of state, Omar Hassan Ahmad Al Bashir. Significantly, the arrest warrant against President Al Bashir includes allegations not only of rape as a crime against humanity,<sup>15</sup> but also of sexual violence causing serious bodily or mental harm as an act of genocide.<sup>16</sup> Additionally, the arrest warrants against Ahmad Muhammad Harun, former Minister of State for the Interior and Minister of State for Humanitarian Affairs, and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), leader of the Janjaweed militia, include allegations of rape and outrages upon personal dignity as war crimes and rape as a crime against humanity, as well as persecution by means of sexual violence as a crime against humanity.<sup>17</sup>

The third case involving allegations of sexual violence in the Darfur situation was against Abdel Raheem Muhammad Hussein, current Minister of National Defence, former Minister of the Interior and former Sudanese President’s Special Representative in Darfur and included allegations of rape and outrages upon personal dignity as war crimes and rape as a crime against humanity.<sup>18</sup>

Four of the five cases launched in connection with the situation in the Democratic Republic of Congo (DRC) have included allegations of sexual and gender-based crimes. Charges in the joint case against Germain Katanga, former commander of the Force de Résistance Patriotique en Ituri, and Mathieu Ngudjolo Chui, former leader of the Front des Nationalistes et Intégrationnistes, included sexual slavery and rape, both as a war crime and

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14. Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, ¶¶ 4–5, 7 (Sept. 27, 2005) [hereinafter Warrant of Arrest for Joseph Kony]. Note that charges of sexual enslavement as a crime against humanity and rape as a war crime were also included in the arrest warrant against Vice-Chairman and Second-in-Command of the Lord’s Resistance Army, Vincent Otti, Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Vincent Otti, ¶ 42 (Jul. 8, 2005) [hereinafter Warrant of Arrest for Vincent Otti], though he is believed to be deceased.

15. Prosecutor v. Al Bashir, Case No. 02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ¶ 17(b) (Mar. 4, 2009).

16. Prosecutor v. Al Bashir, Case No. 02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Jul. 10, 2012).

17. Prosecutor v. Harun & Kushayb, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun, ¶¶ 1, 4, 8–9, 29–30 (Apr. 27, 2007); Prosecutor v. Harun & Kushayb, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb, ¶¶ 1, 8–9, 14–15 (Apr. 27, 2007).

18. Prosecutor v. Hussein, Case No. ICC-02/05-01/12, Case Information Sheet, ¶1 (Jun. 15, 2012).

as a crime against humanity.<sup>19</sup> Although the Prosecutor failed to include any reference to SGBV in its initial application for a warrant of arrest against Bosco Ntaganda, former Deputy Chief of the General Staff of the Forces Patriotiques pour la Libération du Congo,<sup>20</sup> the Pre-Trial Chamber recently granted a request from the Prosecutor to add the charges of, *inter alia*, rape and sexual enslavement as crimes against humanity and as war crimes to the case against the accused.<sup>21</sup>

Furthermore, while charges against Callixte Mbarushimana, Executive Secretary of the Forces Démocratiques pour la Libération du Rwanda (FDLR), were ultimately not confirmed,<sup>22</sup> the arrest warrant against him contained the broadest range of sexual and gender-based crimes against any ICC suspect to date, including allegations of rape, torture, mutilation, and inhuman treatment as war crimes and rape, torture, and other inhumane acts and gender-based persecution as crimes against humanity.<sup>23</sup> The most recent case in the DRC situation against Sylvestre Mudacumura, Supreme Commander of the FDLR, includes allegations of mutilation and torture by means of sexual violence and rape as war crimes.<sup>24</sup> Additionally, charges of rape as a war crime and a crime against humanity have been confirmed in the case against Jean-Pierre Bemba Gombo, President and Commander-in-chief of the Mouvement de Libération du Congo and the only suspect identified thus far in the Central African Republic (CAR) situation.<sup>25</sup>

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19. Prosecutor v. Katanga & Ngdjulo, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 6, 9, 574, 576 (Sept. 30, 2008) (finding, by a majority of the court, “there is sufficient evidence to establish substantial grounds to believe” that the accused jointly committed the crimes of sexual slavery and rape through the acts of others in the attack on Bogoro village). Note that on 21 November 2012, Trial Chamber II severed the charges against Mathieu Ngudjolo Chui and Germain Katanga., and that on 18 December 2012, Trial Chamber II acquitted Mathieu Ngudjolo Chui of the charges of war crimes and crimes against humanity and ordered his immediate release. The Office of the Prosecutor has appealed the verdict. See ICC Situations and Cases, [http://icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) (last visited Feb. 23, 2013).

20. See generally Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06-2, Warrant of Arrest for Bosco Ntaganda (Aug. 22, 2006).

21. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision on the Prosecutor's Application under Article 58, ¶ 44 (Jul. 13, 2012).

22. See Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges (Dec. 16, 2011) [hereinafter Prosecutor v. Mbarushimana].

23. Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Warrant of Arrest for Callixte Mbarushimana, ¶ 10 (Sept. 29, 2010).

24. Prosecutor v. Mudacumura, Case No. ICC-01/04-01/12, Decision on the Prosecutor's Application under Article 58, ¶ 49 (Jul. 13, 2012).

25. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba

Similarly, charges of rape and persecution by means of rape as crimes against humanity have been confirmed in one of the two cases arising out of the situation in Kenya, namely the joint case against Francis Kirimi Muthaura, former Head of the Public Service and Secretary to the Cabinet of the Republic of Kenya, and Uhuru Muigai Kenyatta, Deputy Prime Minister and former Minister for Finance.<sup>26</sup> In the Côte d'Ivoire situation, two arrest warrants have been issued to date, notably against former President, Laurent Gbagbo, and his wife Simone Gbagbo, for charges including rape and other forms of sexual violence as crimes against humanity.<sup>27</sup>

Of the eight situations currently before the court, Libya and Mali are the only ones that do not currently include any cases with allegations of sexual or gender-based crimes. Thus, the majority of cases that have come before the Court have included allegations of SGBV. More importantly these cases all involve senior level accused, meaning that the ICC is pursuing accountability for SGBV at the highest levels of authority in a majority of its cases.

Nevertheless, the ICC's OTP has suffered criticism regarding its approach to sexual violence and gender-based crimes. With respect to charging, for instance, human rights groups criticized former Prosecutor Luis Moreno Ocampo for failing to include SGBV charges in the indictment against Congolese rebel leader Thomas Lubanga Dyilo (the first person tried by the ICC), despite evidence that girls kidnapped into Lubanga's militia were often raped and/or kept as sex slaves.<sup>28</sup> Although the Pre-Trial Chamber confirmed charges against Lubanga for the limited war crimes of enlisting and conscripting children, and using them to participate actively in hostilities,<sup>29</sup> several attempts were subsequently made to introduce the issue of SGBV during the trial, including:

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Gombo, ¶¶ 160, 285–86 (Jun. 15, 2009).

26. Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶¶ 18, 22 (Jan. 23, 2012).

27. Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Warrant of Arrest for Laurent Koudou Gbagbo, ¶ 8 (Nov. 23, 2011); Prosecutor v. Gbagbo, Case No. ICC-02/11-01/12, Warrant of Arrest for Simone Gbagbo, ¶ 7 (Feb. 29, 2012, reclassified as public Nov. 22, 2012).

28. Avocats Sans Frontières, *Joint Letter to the Chief Prosecutor of the International Criminal Court*, D.R. CONGO: ICC CHARGES RAISE CONCERN (2006), [http://hrw.org/english/docs/2006/08/01/congo13891\\_txt.htm](http://hrw.org/english/docs/2006/08/01/congo13891_txt.htm); Brigid Inder, *Letter from Women's Initiatives for Gender Justice to Mr. Luis Moreno Ocampo, Chief Prosecutor, International Criminal Court* (2006), [http://www.iccwomen.org/documents/Prosecutor\\_Letter\\_August\\_2006\\_Redacted.pdf](http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf) (last visited Feb. 23, 2013).

29. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 319 (Jan. 29, 2007).

- 1) By the Prosecutor and the legal representatives of victims in their opening statements;<sup>30</sup>
- 2) Through the testimony of several Prosecution witnesses<sup>31</sup> and the expert testimony of United Nations Special Representative for the Secretary General for Children in Armed Conflict;<sup>32</sup> and
- 3) Through an unsuccessful attempt by the legal representatives of victims participating in the case to broaden the charges to include charges of sexual slavery and inhuman or cruel treatment.<sup>33</sup>

Despite these efforts, the Trial Chamber, in its final judgment against the accused, held that the Prosecution's failure to include SGBV charges in its charging document meant the Chamber could not make "any findings of fact on the issue [of sexual violence], particularly as to whether responsibility is to be attributed to the accused."<sup>34</sup> Judge Odio Benito dissented from the majority opinion, arguing that the Chamber should have clarified that sexual violence is included within the concept of the "use to participate actively in the hostilities," even if the Chamber's decision on the guilt of the accused was limited to the facts and circumstances described in the charging document.<sup>35</sup> Despite Judge Odio Benito's interpretation of the Chamber's role and the efforts to introduce evidence of SGBV during the trial, the *Lubanga* case demonstrates that the failure to charge SGBV from the outset may lead to the absence of accountability for such crimes. Significantly, Lubanga was not held responsible for any SGBV crimes and the Trial Chamber declined to consider sexual violence as an aggravating factor for the purposes of sentencing him, noting that the Prosecutor had

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30. See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Prosecution's Closing Brief, ¶10 (Jun. 1, 2011); see also Women's Initiatives for Gender Justice, *DRC: Trial Chamber I issues first trial Judgment of the ICC—Analysis of sexual violence in the Judgment*, LEGAL EYE ON THE ICC eLETTER, SPECIAL ISSUE #1 (May 2012), <http://www.iccwomen.org/news/docs/WI-LegalEye5-12-FULL/LegalEye5-12.html> (last visited Feb 23, 2013) [hereinafter WIGJ] (discussing opening statements by Prosecutor and legal representative of victims).

31. See WIGJ, *supra* note 30 (discussing witness testimony by former child soldiers describing acts of sexual violence, primarily against girl soldiers).

32. *Id.*

33. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment on the appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 ¶¶ 57–59 (Dec. 8, 2009).

34. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Trial Judgment, ¶29 (Mar. 14, 2012) [hereinafter Lubanga Trial Judgment].

35. Lubanga Trial Judgment, *supra* note 34, at ¶¶ 16–17 (Separate and Dissenting Opinion of Judge Odio Benito).

failed to establish a sufficient link between the accused and sexual violence in the context of the charges against him.<sup>36</sup>

Even in cases in which SGBV charges have been included, observers have highlighted that the charges have sometimes been too limited. For instance, although Joseph Kony was charged with sexual enslavement and rape as crimes against humanity and rape as a war crime,<sup>37</sup> and Vincent Otti was charged with sexual enslavement as a crime against humanity and rape as a war crime,<sup>38</sup> Brigid Inder, recently-appointed Special Gender Advisor to the ICC Prosecutor,<sup>39</sup> has observed that “each of the [five] indicted LRA commanders could have been charged with rape as a crime against humanity because they were all active in overseeing and enforcing this act.”<sup>40</sup> Others have noted that SGBV charges are often vulnerable to being withdrawn because of the limited nature of the evidence supporting them. For example, in the *Katanga & Ngudjolo* case, the Prosecutor dropped charges of sexual slavery as both a war crime and a crime against humanity after a Pre-Trial Chamber judge excluded the statements of witnesses supporting those charges on the grounds that the witnesses were not adequately protected.<sup>41</sup> Although the situation was ultimately resolved after the witnesses were eventually accepted into the Court’s Witness Protection Programme<sup>42</sup>—and the Prosecution amended its charges not only to

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36. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Sentence pursuant to Article 76 of the Statute, ¶ 75 (Jul. 10, 2012). It is worth noting, however, that the Trial Chamber later suggested that victims of sexual violence may be among the beneficiaries of a reparations order. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations, ¶¶ 200, 207 (Aug. 7, 2012) (noting the importance of taking into account the needs of victims of sexual and gender-based violence when formulating and implementing reparations awards).

37. See Warrant of Arrest for Joseph Kony, *supra* note 14, at ¶ 42.

38. See generally, Warrant of Arrest for Vincent Otti, *supra* note 14.

39. Press Release, International Criminal Court, Office of the Prosecutor, *ICC Prosecutor Fatou Bensouda Appoints Brigid Inder, Executive Director of the Women’s Initiatives for Gender Justice, as Special Gender Advisor*, ICC-OTP-20120821-PR833 (Aug. 21, 2012), <http://www.icc-cpi.int/NR/exeres/D053D941-1C4E-44CA-BEDC-AA289B4EDA96.htm> (last visited Feb 23, 2013)[hereinafter ICC-OTP].

40. Katy Glassborow, *ICC Investigative Strategy Under Fire*, INSTITUTE FOR WAR & PEACE REPORTING (Oct. 27, 2008), <http://iwpr.net/report-news/icc-investigative-strategy-under-fire> (last visited Feb 23, 2013).

41. Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07, Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, ¶ 39 (Apr. 25, 2008) (allowing the testimony of a witness for whom the Prosecution could show adequate protection, but barring the statements of two other witnesses who had not been included in the Witness Protection Programme).

42. Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07, Decision on Prosecution’s

reinstate those relating to sexual slavery but also to include allegations of rape as a war crime and a crime against humanity<sup>43</sup>—observers have noted that the Prosecutor’s reliance on a limited number of witnesses to sustain SGBV charges render them vulnerable to being withdrawn or dismissed.<sup>44</sup>

Moreover, there are cases in which SGBV charges have been alleged by the Prosecution, but some or all of the relevant charges have not survived the confirmation process<sup>45</sup> often because of insufficiency of the evidence put forward by the Prosecutor in support of the charges.<sup>46</sup> According to the Women’s Initiatives for Gender Justice (WIGJ), a nongovernmental organization that monitors the investigation and prosecution of sexual and gender-based crimes by the ICC:

[R]esearch has shown that more than 50% of the charges for gender-based crimes in cases for which confirmation hearings have been held, have been dismissed before trial, making gender-based crimes the most vulnerable category of crimes at the ICC . . . . With more than half of all charges for gender-based crimes which reach the confirmation stage . . . not being successfully confirmed, no other category of charges before the ICC faces this level of dismissal and contention.<sup>47</sup>

A few examples illustrate the point. For instance, in the *Katanga & Ngudjolo* case, the Pre-Trial Chamber declined to confirm the charge of outrages upon personal dignity as a war crime, which was based in part on

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Urgent Application for the Admission of the Evidence of Witnesses 132 and 287, ¶¶ 6–7 (May 28, 2008).

43. Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07, Submission of Amended Document Containing the Charges Pursuant to Decision, ¶¶ 32–33 (Jun. 26, 2008).

44. Susana SáCouto & Katherine A. Cleary, *The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court*, 17 AM. U. J. GENDER, SOC. POL’Y & L. 337, 342 (2009).

45. Pursuant to Article 61 of the Rome Statute, a Pre-Trial Chamber must determine whether “there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged” before committing that person to trial. Rome Statute, *supra* note 4, at art. 61(7).

46. Women’s Initiatives for Gender Justice, *Legal Eye on the ICC* (March 2012), <http://www.iccwomen.org/news/docs/WI-LegalEye3-12-FULL/LegalEye3-12.html#footnote-66> (last visited Feb. 23 2013) [hereinafter *Legal Eye on the ICC*] (noting concern about the fact that in a number of instances “charges appear to have been constructed based on a desk review of open-source information, including from UN reports, NGO reports or information provided by governments, press clippings or newspaper articles” and finding “a liberal use of open source material in cases for which charges have been dismissed, as in the Mbarushimana case”).

47. *Id.* (noting that, “[o]f the cases including charges gender-based crimes for which confirmation of charges hearings have been held (Katanga & Ngudjolo, Bemba, Mbarushimana, and Muthaura) 14 out of 29 charges of gender-based crimes have been successfully confirmed”).

the allegation that a woman “was stripped and forced to parade half naked in front” of combatants belonging to the militia led by the accused.<sup>48</sup> Specifically, while the Chamber determined that this incident had occurred and that it rose to the level of outrages upon personal dignity as a war crime,<sup>49</sup> it also found that “the Prosecution brought *no evidence* showing that the commission of [the crime] was intended by the [accused] as part of the common plan to ‘wipe out’ Bogoro village,”<sup>50</sup> or that the relevant acts would have occurred “in the ordinary course of events” as a result of the implementation of the accused’s common plan.<sup>51</sup> In the *Muthaura et al.* case, the Pre-Trial Chamber significantly narrowed the “geographic scope” of the alleged SGBV charges in issuing the Summons to Appear because, “the Prosecution failed to provide evidence of their commission in certain locations, as well as the individual criminal responsibility of [the three accused] for gender-based crimes committed in other locations.”<sup>52</sup> Furthermore, the Pre-Trial Chamber declined to confirm any of the thirteen charges in the *Mbarushimana* case, including eight charges for sexual and gender-based crimes, after concluding that the Prosecution had not presented sufficient evidence to establish substantial grounds to believe either that the alleged crimes were committed or that the accused bore responsibility for the crimes.<sup>53</sup>

#### IV. RECOMMENDATIONS

As discussed by the War Crimes Research Office (WCRO) in its recent report on *Investigative Management, Strategies, and Techniques of the International Criminal Court’s Office of the Prosecutor*, “[o]ne explanation for the OTP’s failure to sufficiently investigate SGBV in a way that will ensure relevant acts are not only charged, but also survive to trial, [may be the ICC’s first] Prosecutor’s strategy of short, focused investigations . . . .”<sup>54</sup> As the report notes, Martin Witteveen, a former

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48. Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 366 (Sept. 30, 2008).

49. *Id.* at ¶¶ 374–77.

50. *Id.* at ¶ 570 (emphasis added).

51. *Id.* at ¶¶ 571–72.

52. Women’s Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court*, 126 (2011) [hereinafter *Gender Report Card*].

53. See generally, Prosecutor v. Mbarushimana, *supra* note 23.

54. See War Crimes Research Office, INVESTIGATIVE MANAGEMENT, STRATEGIES, AND TECHNIQUES OF THE INTERNATIONAL CRIMINAL COURT’S OFFICE OF THE PROSECUTOR 48 (Oct. 2012) [hereinafter WCRO] (citing INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, REPORT ON THE ACTIVITIES PERFORMED DURING THE FIRST THREE YEARS (June 2003–June 2006), at 8 (12 Sep.

investigator in the Uganda situation, “complained in 2008 that the scope of the investigation in that country was finalized by prosecutors too early,” adding that “in Uganda, more evidence of sexual crimes could have been gathered had the investigation been broadened.”<sup>55</sup> As he explained,

We interviewed a number of ‘wives’ (girls forced to live with senior LRA men) but questions were focused on their relationship to commanders, not on rape and sexual enslavement . . . . We should not have limited ourselves to this kind of witness—we should have widened it out to speak to other victims of sexual violence [i.e., those who were not LRA ‘wives’].<sup>56</sup>

Another explanation posited in the WCRO report mentioned above is a lack of adequate resources allocated for such investigations.<sup>57</sup> As the Women’s Initiatives for Gender Justice has argued, the high rate at which gender-based charges have been dismissed at the confirmation stage of proceedings “can be attributed in part to the Prosecution’s use of open-source information and failure to investigate thoroughly.”<sup>58</sup>

Based on these possibilities, the OTP’s investigation of sexual and gender based violence would improve if the OTP implements several recommendations that would also arguably benefit its investigations more broadly, including: Providing investigators more time and greater flexibility on the ground and expanding the size of investigation teams.<sup>59</sup> Another solution that might help—particularly with respect to ensuring that SGBV crimes are charged *from the outset*—is adopting certain changes to the OTP’s process of conducting preliminary investigations into a situation *before* a decision is made to formally open an investigation. Unlike its current practice of relying primarily on secondary sources,<sup>60</sup> the OTP’s grasp of what is actually happening on the ground would likely improve if

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2006); INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, REPORT ON PROSECUTORIAL STRATEGY, at 5 (14 Sep. 2006) (“The second principle guiding the Prosecutorial Strategy is that of focused investigations and prosecutions.”). See also INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, PROSECUTORIAL STRATEGY: 2009–2012, ¶ 20 (Feb. 2010).

55. WCRO, *supra* note 54, at 48 (citing Katy Glassborow, *ICC Investigative Strategy Under Fire*, INSTITUTE FOR WAR & PEACE REPORTING (27 Oct. 2008)).

56. *Id.* (citing Glassborow, *supra* note 55).

57. *Id.* at 48–49.

58. Women’s Initiatives for Gender Justice, *Legal Eye on the ICC*, <http://www.iccwomen.org/news/docs/WI-LegalEye3-12-FULL/LegalEye3-12.html#footnote-66> (last visited February 11, 2013).

59. See WCRO, *supra* note 54, at 7.

60. *Id.* at 41.

the OTP sent analysts to the country under examination for some period of time prior to the formal opening of an investigation, the idea being to enhance the OTP's understanding of the context in which the crimes took place and its ability to gain the trust of those who may be in a position to provide useful information.<sup>61</sup> As the WCRO report notes, "[t]he need to establish trust among the affected community may be particularly important in situations involving crimes of sexual violence."<sup>62</sup>

Yet, another solution that would likely improve the OTP's record in this area would be ensuring that the right staff, including one or more gender crimes experts, is in place on each investigation team and that this staff reflect an appropriate number of both male and female investigators.<sup>63</sup> Importantly, as the WCRO report suggests, "an absence of female investigators may make gender-based crime victims refrain from coming forward from the beginning,"<sup>64</sup> which may limit the potential witness pool. Finally, ongoing and mandatory training aimed at increasing all of its staff's competency in gender issues would also likely help.<sup>65</sup>

Of course, in some circumstances, it is not possible to gather sufficient evidence from SGBV victims to substantiate a charge of sexual violence as genocide, crimes against humanity, or war crimes against the type of high-level suspects that are likely to be the subject of ICC prosecutions. However, as the WCRO report suggests, even in instances where direct victim testimony regarding SGBV is unavailable, it may still be possible to successfully investigate and prosecute sexual and gender-based crimes.<sup>66</sup> For instance, "the Prosecution may attempt to establish its case through hospital records, forensic evidence, and the testimony of doctors, insider witnesses, international observers, and eyewitnesses to the sexual

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61. The idea is explored with respect to investigations more generally in the WCRO INVESTIGATIONS REPORT, *supra* note 54, at 43.

62. *Id.* at 43–44 n. 129 (citing Laurel Fletcher, *Human Rights Violations Against Women*, 15 WHITTIER L. REV. 319, 371 (1993) ("Many survivors [of rape and other sexual assault] are more likely to recount their experiences to someone with whom they have already developed an ongoing relationship based upon trust than to a complete stranger.")). Of course, where state cooperation is not forthcoming, perhaps the OTP could develop, as the WCRO report suggests, other means of deepening its understanding of the country's culture, politics, history, and other dynamics prior to launching a formal investigation by, for instance, sending someone to a country near the conflict, spending more time getting to know and working more closely with local actors and/or hiring country experts as consultants for the period of the preliminary examination.

63. WCRO, *supra* note 54, at 7.

64. *Id.* at 50.

65. *Id.*

66. *Id.* at 51.

violence.”<sup>67</sup> Significantly, there is some precedent for such prosecutions. For example, in the *Bagosora, et al.* case, the ICTR Prosecutor “successfully secured a conviction for the crime against humanity of rape against Colonel Théoneste Bagosora, despite the fact that only one of 242 witnesses in the case testified about her own sexual victimization.”<sup>68</sup>

Finally, as the WCRO report notes, absent alternatives, where investigating and/or prosecuting SGBV is not possible due to security concerns and/or the unavailability of necessary evidence, it is important that the OTP clearly communicate these factors to the public.<sup>69</sup>

## V. CONCLUSION

To summarize, while the ICC has made significant progress in this area, the OTP has in various ways adopted approaches that have impeded the effective investigation and prosecution of sexual and gender-based crimes. Improving investigative practices may go a long way toward ensuring that SGBV allegations are charged, and survive to trial.

On a final and positive note, the Court’s second Prosecutor, Fatou Bensouda, recently nominated WIJG executive director, Brigid Inder, as Special Gender Advisor to provide strategic advice to the Office of the Prosecutor on gender issues.<sup>70</sup> Hopefully, this will lead to a more intensive review and improvement of the practices and procedures of the OTP relating to the investigation and prosecution of SGBV crimes in the months ahead.

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67. *Id.* at 51–52.

68. WCRO, *supra* note 54, at 53 (citing Prosecutor v. Théoneste Bagosora, Judgment and Sentence, ICTR-98-41-T, at 568 (ICTR Trial Chamber, 18 December 2008)). Notably, Lubanga, the first person to be convicted at the ICC, was convicted despite the fact that the Trial Chamber excluded all testimony provided by direct victim-witnesses from its deliberations on the guilt of the accused. Prosecutor v. Thomas Lubanga Dyilo, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, ¶ 480 (Trial Chamber I, 14 March 2012). While Lubanga was not charged with SGBV crimes, his conviction demonstrates the possibility of establishing the guilt of the accused without direct victim-witness testimony regarding the crimes with which an accused is charged.

69. WCRO, *supra* note 54, at 54.

70. ICC-OTP, *supra* note 39.



# **DOES THE INTERNATIONAL CRIMINAL COURT HAVE JURISDICTION OVER THE RECRUITMENT AND USE OF CHILD PIRATES AND THE INTERFERENCE WITH THE DELIVERY OF HUMANITARIAN AID BY SOMALI PIRATES?**

*Duncan Gaswaga\**

Maritime piracy is a very unique offence planned on dry land and executed on the high seas, a place falling under the jurisdiction of no state, by men and boys recruited and facilitated by pirate kingpins and financiers.

Moreover, piracy is a crime of universal jurisdiction and Article 105 of the United Nations Convention on the Law of the Sea (UNCLOS) 1982, urges the capturing or flag state of the victim vessel to prosecute the defendants since pirates are enemies to all human kind. This author argues that although the International Criminal Court (ICC) is not a state, it should prosecute pirates given that piracy is a grave offence with serious and far-reaching effects, even for a single incident, which falls under the category of crimes against humanity characterized by murder, torture, detention, serious attacks, and injuries on civilian population, etc., dealt with by the ICC. That being so, the kingpins and financiers who recruit and facilitate pirates with skiffs, weapons, and supplies could be equally prosecuted as aiders and abettors of piracy if they are citizens of states party to the Rome (ICC) Statute. The article also draws an analogy between the Prosecutor vs. Lubanga case judgment (No. ICC -01/04-01/06) and piracy, concluding that the recruitment and use of child pirates under the age of fifteen is similar to enlisting and conscripting child soldiers, which the ICC has already held to be an offence committed at the time of the child joining the group irrespective of the existence of an armed conflict. Finally, it is contended that by intercepting the delivery of humanitarian aid to Somalia, the pirates could be found individually criminally liable for violating international humanitarian law and prosecuted accordingly by the ICC.

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## I. INTRODUCTION

The prosecution of financiers and kingpins of piracy continues to be one of the most elusive things due to happen in the jigsaw puzzle of the fight against maritime piracy. This article analyzes the role played by the kingpins and financiers of piracy, especially in the recruitment and use of child pirates in light of the pertinent provisions of the Rome Statute (used interchangeably with the ICC Statute). It also examines the possibilities of prosecuting the kingpins and financiers of piracy before the ICC, and the pirates for intercepting and capturing the ships delivering humanitarian aid to Somalia. The following two major issues are accordingly discussed: (1) whether the recruitment and use of child pirates by kingpins or financiers of piracy who are nationals of state parties to the Rome Statute could be categorized as crimes against humanity and prosecuted before the ICC; and (2) whether the pirates could be found individually criminally liable for violating international humanitarian law by intercepting the delivery of humanitarian aid to Somalia.

Lately, a growing number of child pirates have been encountered in most of the arrests and prosecutions<sup>1</sup> conducted in the Indian Ocean off of the coast of Somalia.<sup>2</sup> Many of the people in charge of piracy operations are not physically out on the seas, but on shore,<sup>3</sup> in their homes in Somalia, a non-state party to the Rome Statute, or Kenya, which is a state party. The people they actually send out to do the dangerous stuff are young children and youths.<sup>4</sup> Moreover, the ransom money collected is shared by the leaders and financiers with part of it going to the funding of terrorist activities of the Al-Shabaab.<sup>5</sup> Piracy is a well-organized, coordinated, and financed crime that involves a lot of planning, funding, and facilitation before execution. It requires the promoters to assemble a team with a leader, attack skiffs, hooked ladders, weapons, satellite phones, Global Positioning Systems (GPS), and other piratical paraphernalia and supplies

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1. *Somali Pirates Sentenced to 10 Years in Seychelles*, BBC NEWS (July 26, 2010, 12:05 AM), <http://www.bbc.co.uk/news/world-africa-10763605> (last visited Feb. 23, 2013) (stating that the convicted children were part of a group of 11 individuals sentenced to 10 years in prison).

2. *See, e.g., Rep. v. Liban Mohammed Dahir & Twelve Others*, Supreme Court, Criminal Side No.7 of 2012 (Seychelles).

3. *Child Pirates: A New Child Rights Challenge for Somalia*, SOSCHILDRENVILLAGES.CA, <http://soschildrensvillages.ca/news/news/child-charity-news/pages/child-pirates-somali-rights-462.aspx> (last visited Oct. 1, 2012).

4. *Id.*

5. Ould-Abdallah, Ambassador Ahmedou, *Piracy off the Somali Coast*, Rep. of the Workshop Commissioned by the Special Representative of the Secretary-General of the U.N. to Somalia, at 20, Nairobi (Nov. 21, 2008), available at <http://www.asil.org/files/SomaliaPiracyIntlExpertsreportconsolidated1.pdf> (last visited Feb. 23, 2013).

to sustain the pirates while at sea. But these pirate kingpins or funders are not yet known since they mostly pay agents to carry out the actual recruitment while the money is sent from abroad by *hawala*.<sup>6</sup> If known, they have not yet been prosecuted.

So, this research works on the assumption that the pirate kingpins or financiers are known and that some are citizens of states' parties to the Rome Statute while others belong to non-state parties. Also, some of the examples cited in this article are born of the author's personal experiences in adjudicating piracy cases in the Supreme Court of Seychelles where he had almost no precedent, so to speak, to fall on for guidance.

## II. JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT OVER CRIMES AGAINST HUMANITY

The ICC enjoys jurisdiction over crimes against humanity, genocide, and war crimes committed by individuals directly, as well as those who may be liable for aiding, abetting, or otherwise assisting in the commission of the crimes.<sup>7</sup>

The Court exercises jurisdiction if the following conditions are met: The accused is a national of a state party; the crime took place on the territory of a state party or a state otherwise accepting the jurisdiction of the Court; or the United Nations Security Council (UNSC) has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.<sup>8</sup>

This means that if the acts of recruiting child pirates and/or financing piracy are found to be crimes against humanity that could be prosecuted by the ICC, it would then be immaterial whether the offence(s) is committed on the soil of a state party to the Rome Statute or a non-state party, provided that the offender is a national of a state party.<sup>9</sup> Piracy is a very unique offence. It occurs on the high seas, beyond the jurisdiction of any state, while the planning and coordination, facilitation, aiding and abetting by way of financing, and recruitment of pirates is done on dry land. Interestingly, piracy *jure gentium* is a crime of universal jurisdiction where a pirate is treated as an "enemy of all mankind—*hostis humani generis*,"<sup>10</sup>

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6. *Hawala Definition*, WIKIPEDIA.ORG, <http://en.wikipedia.org/wiki/Hawala> (last visited Jan. 23, 2013).

7. Rome Statute of the International Criminal Court, July 17, 1998, arts. 5, 7, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

8. *Id.* arts. 12–14, 25.

9. *Id.* art. 12.

10. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 249 (Sept. 7).

whom any nation may, in the interest of all, capture, prosecute, and punish<sup>11</sup> in line with the United Nations Convention on the Law of the Sea (UNCLOS).<sup>12</sup> In addition, under the Complementarity Principle, the ICC would only be able to exercise jurisdiction over piracy if the state where the pirate kingpin or financier is located is unwilling or unable to prosecute that kingpin/financier under its universal jurisdiction.<sup>13</sup> But just as the ICC can fill the impunity gap for crimes already within its jurisdiction, it can also fill the impunity gap for piracy.

### III. RECRUITMENT AND USE OF CHILD PIRATES AND THE INTERFERENCE WITH DELIVERY OF HUMANITARIAN AID

#### A. *The Recruitment and Use of Child Pirates*

For purposes of this paper and pursuant to the provisions of the United Nations Convention on the Rights of the Child (CRC)<sup>14</sup> and the Additional

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11. Rep. v. Nur Mohamed Aden & Nine Others, Supreme Court, Criminal Side No.75 of 2010, ¶ 24 (Seychelles). Per Judge Gaswaga:

[That] [i]n the famous case of *In re Piracy Jure Gentium*, 1934 page 586 the Privy Council held that a person guilty of piracy at the high seas places himself beyond the protection of any state and is considered to be *hostis humani generis* (enemy of humanity). Therefore, under customary international law, a pirate is subject to universal jurisdiction or justiciable by any state anywhere since the crime of *piracy jure gentium* is taken to be a contravention of *jus cogens* (compelling law). Seychelles has since the 17th of March, 2010 amended the relevant law incorporating a detailed definition of piracy, as laid out in the United Nations Convention on the Law of the Sea, 1982 (UNCLOS), and properly prescribing the jurisdiction of its courts as seen from the above provisions. In short, this court has jurisdiction to try any piracy crime committed on the high seas, like the one on hand, or anywhere else, but outside the jurisdiction of any other state. Therefore, the objection by defence counsel regarding lack of jurisdiction to hear this case is dismissed.

12. United Nations Convention on the Law of the Sea art. 105, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

13. See *Jurisdiction and Admissibility*, INTERNATIONAL CRIMINAL COURT (Jan. 26, 2013, 7:13 PM), <http://www2.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Jurisdiction+and+Admissibility.htm> (last visited Feb. 23, 2013). In general, a case will be inadmissible if it has been or is being investigated or prosecuted by a State with jurisdiction.

The Court's jurisdiction is further limited to events taking place since 1 July 2002. In addition, if a State joins the Court after 1 July 2002, the Court only has jurisdiction after the Statute entered into force for that State. Such a State may nonetheless accept the jurisdiction of the Court for the period before the Statute's entry into force.

14. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, art. 38, ¶ 2–3, available at <http://www2.ohchr.org/english/law/crc.htm> (last visited Feb. 23, 2013); see also Optional

Protocol II to the 1949 Geneva Conventions,<sup>15</sup> a child shall be considered any person under the age of fifteen.

In Somalia, children are recruited to engage in the high risk and dangerous crime of piracy because they have a less developed sense of danger. Unfortunately, in the piracy theatre, the children, just like the adults, are exposed to the real danger of hostilities.<sup>16</sup> The children are so vulnerable because they have been abandoned in urban areas; they loiter as street children with no food, housing, parental or family care and support, source of income, or a decent livelihood.<sup>17</sup> The perpetrators take advantage and make money out of this miserable and hopeless situation by easily picking these children off of the streets to be enlisted or recruited as child soldiers with militant groups or child pirates.<sup>18</sup>

### *B. Interference with the Delivery of Humanitarian Aid by Pirates*

Whereas the delivery of United Nations (UN) humanitarian assistance is vital for millions of Somalis who chronically suffer from food shortages and wholly depend on the World Food Program, it is perturbing to find that the money gained, as well as the food or arms stolen, is often transferred to warlords.<sup>19</sup> “Since 2007, different actors, like Canada, the Netherlands, and the North Atlantic Treaty Organization (NATO) (in Operation Allied Provider) have escorted UN/World Food Program ships to Somalia through the unsafe pirate infested areas, until the European Union Naval Force took

Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, art. 1–3, U.N. Doc. A/RES/54/263 (May 25, 2000); African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, art. 22, ¶ 2 (1990) (“State parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.”).

15. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(3)(c), June 8, 1977, 1125 U.N.T.S. 3 (children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities).

16. Anita Snow, UN Envoy: Rehabilitate Child Pirates, ARAB NEWS.COM (Nov. 9, 2010), <http://www.arabnews.com/node/360064> (last visited Feb. 23, 2013).

17. See Danielle Fritz, *Child Pirates From Somalia: A Call for the International Community to Support the Further Development of Juvenile Justice Systems in Puntland and Somaliland*, 44 CASE W. RES. J. INT’L L. 891, 895 (2012).

18. JAY BAHADUR, THE PIRATES OF SOMALIA: INSIDE THEIR HIDDEN WORLD 36 (2011) (“For the masses of unemployed and resentful youth, piracy was a quick way to achieve the respect and standard of living that the circumstances of their birth denied them.”).

19. Michael E. Smith, EU Grand Strategy and the Ethics of Military Force: The Case of EUNAVFOR-Atalanta, 11, (Sept. 2012) (unpublished paper, University of Aberdeen) (on file with author), available at <http://events.uaces.org/documents/papers/1201/smithme2.pdf> (last visited Feb. 23, 2013).

over this task in December 2008.”<sup>20</sup> This problem is real and ongoing. Lately, non-state actors such as pirates, who are not parties to treaties, are increasingly affecting attacks on humanitarian aid workers and sometimes taking them hostage; these actions, depending on the circumstances, are to be treated as piracy, war crimes, or crimes against humanity under international law.<sup>21</sup>

#### IV. THE INTERNATIONAL CRIMINAL COURT STATUTE’S DEFINITION OF CRIMES AGAINST HUMANITY

A crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack:

- a) Murder;
- b) Extermination;
- c) Enslavement;
- d) Deportation or forcible transfer of population;
- e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f) Torture;
- g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- i) Enforced disappearance of persons;
- j) The crime of apartheid;
- k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>22</sup>

It should be stressed that the above listed crimes are disjunctive and proof of any one of them would suffice. Therefore, only those crimes relevant or connected to the offence of piracy will be discussed.

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20. *Id.*

21. Rome Statute, *supra* note 7, art. 8(2)(b)(xxiv); *see also* S.C. Res. 1502, U.N. Doc. S/RES/1502 (Aug. 23, 2003), *available at* <http://www.unhcr.org/refworld/pdfid/3f5359780.pdf> (last visited Feb. 23, 2013).

22. Rome Statute, *supra* note 7, art. 7(1)(a)-(k).

A. *Acts Constituting State or Organizational Policy*

The ICC, unlike the International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>23</sup> and the International Criminal Tribunal for Rwanda (ICTR)<sup>24</sup>, specifically provides for and requires proof of the element of “state or organizational” plan in crimes against humanity. It has been held by the ICC in *Prosecutor v. Katanga* that:

[T]he policy may be: made either by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be explicitly defined by the organizational group. Indeed, an attack which is planned, directed or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion . . . [and that] . . . there was sufficient evidence demonstrating a “common policy and an organized common plan,” due to the fact that violence directed against a civilian village by members of a militarized ethnic group (the *Forces de Resistance Patriotiques en Ituri*) was part of a “larger campaign of reprisals” specifically directed against a different ethnic group, which was intended to fragment ethnic alliances and secure control and access to transit through the area.<sup>25</sup>

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23. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), *amended by* S.C. Res. 1877, U.N. Doc. S/RES/827 (July 7, 2009); *see also* *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 98 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002), <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf> (last visited Feb. 23, 2013) (noting that “the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime”).

24. Statute of the International Tribunal for Rwanda, art. 3, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), *amended by* S.C. Res. 1901, U.N. Doc. S/RES/1901 (Dec. 16, 2009); *see also* *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 580 (Int’l Trib. for Rwanda Sept. 2, 1998), <http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf> (last visited Feb. 23, 2013) (noting that “common policy involving substantial public or private resources” is part of element of widespread or systemic attack, and that “there is no requirement that this policy must be adopted formally as the policy of a state” but that there must be “some kind of preconceived plan or policy.”).

25. *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 396 (Sept. 30, 2008), <http://www.icc-mpi.int/iccdocs/doc/doc571253.pdf> (last visited Feb. 23, 2013). Stating that:

Such a policy may be made either by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population). The policy need not be explicitly

It has been resolved that acts of piracy may satisfy the definition of an organizational policy set forth in *Katanga*. While lacking the ethnic component present in *Katanga*, the victims of piracy would, nonetheless, typically satisfy the requirement that they be civilians. Of course, while the specific facts of any particular case will inform the legal analysis of the nature of the alleged crime, it could be argued that Somali pirates “govern [or, at least, exercise effective control over] a specific territory” and that, even if there is no codified policy, their attacks against civilians passing through an ever-expanding area off the coast of eastern Africa are “planned, directed or organized”<sup>26</sup> pursuant to internal organizational policy.<sup>27</sup>

### B. *The Elements of Widespread and/or Systematic Attack*

The long-standing elements in the phrase “widespread or systematic attack”<sup>28</sup> transform domestic crimes into a subject of international concern and jurisdiction, and into attacks against humanity rather than isolated

defined by the organizational group. Indeed, an attack which is planned, directed or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.

26. Memorandum of Baker & McKenzie Working in Partnership With PILPG and the PILPG High Level Working Group on Piracy 13–14 (May 2011) (on file with author) [hereinafter Baker & McKenzie Memo] (quoting Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 396 (Sept. 30, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf> (last visited Feb. 23, 2013)).

27. See sources cited *supra* note 26, at 15. Stating that:

A number of commentators have noted that the language of the Rome Statute should be read broadly to include non-state actors (i.e. criminal groups, terrorist groups and other organized non-state actors), and that the reference to state or organizational plan or policy in Article 7(2) should probably be construed broadly to encompass entities that act like States, even if they are not formally recognized as such.

28. Catherine R. Blanchet, *Some Troubling Elements in the Treaty Language of the Rome Statute of the International Criminal Court*, 24 MICH. J. INT’L L. 647, 655 (2003). Stating that:

All of the State negotiators agreed that inhumane acts had to pass a certain threshold to become a crime against humanity in the international setting. Criminalization of murder, for instance, was not the issue. Instead, the issue was determining at what point the international community had the right and the obligation to step in and prosecute murders committed by an actor. One group of States initially argued for the approach taken by the International Criminal Tribunal for the Former Yugoslavia, which had no statutory jurisdictional threshold. However, the delegates eventually agreed that the threshold test should incorporate terms used in previous jurisprudence and commentary, namely “widespread” and “systematic.”

See also Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT’L L.J. 73, 109 (2004).

violations of the rights of particular individuals.<sup>29</sup> As seen from the jurisprudence of the international criminal adjudicating bodies, starting with the ICTY and ICTR<sup>30</sup> to the ICC,<sup>31</sup> the two elements convey a different though somewhat related meaning, and customary law requires that the act be part of a widespread or systematic attack and need not be a part of both.

### 1. Widespread

The element or term “widespread” in Article 7 of the Rome Statute connotes the number of victims or the magnitude of the acts. It can also be viewed as a massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.<sup>32</sup> However, the ICTY<sup>33</sup> has held the word to mean the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.<sup>34</sup> There is no doubt that repetitive piracy

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29. Badar, *supra* note 28, at 109 (“One of the distinguishing features of ‘crimes against humanity’ is their pattern of occurrence. The ‘widespread or systematic’ requirement is fundamental in distinguishing crimes against humanity from common crimes, which do not rise to the level of crimes under international law.”).

30. Margaret M. deGuzman, *The Road from Rome: The Developing Law of Crimes Against Humanity*, 22 HUM. RTS. Q. 335, 364 (2000) (stating that the ICTR was the first binding international legal instrument to include the language “widespread or systematic attack” in its definition).

31. *Id.*; see also Rome Statute, *supra* note 7, art. 7(1).

32. *Report of the International Law Commission*, U.N. GAOR, 48th Sess., Supp. No. 10, art. 18, cmt. (4), U.N. Doc. A/51/10 (1996) [hereinafter *ILC Report*]. Commentary (4) read in part:

The second alternative requires that the inhumane acts be committed “on a large scale” meaning that the acts are directed against a multiplicity of victims . . . . Nonetheless the Nuremberg Tribunal further emphasized that the policy of terror was “certainly carried out on a vast scale” in its consideration of inhumane acts as possible crimes against humanity . . . . This term was replaced by the term “large scale” which is sufficiently broad to cover various situations involving multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.

33. Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment, ¶ 179 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), [http://www.icty.org/x/cases/kordic\\_cerkez/tjug/en/kortj010226e.pdf](http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kortj010226e.pdf) (last visited Feb. 23, 2013).

34. Rome Statute, *supra* note 7, art. 7(2)(a) (referring to a course of conduct involving the multiple commission of such acts); Badar, *supra* note 28, at 110 (stating that while the Rome Statute requires the commission of multiple acts, customary international law does not. As an example, the execution by Soviet authorities of Hungarian leader Imre Nagy was a crime against humanity despite the fact that there was only one victim. Even though the inhumane act was not on a “vast scale,” the fact that it was a political leader meant that the goal was to injure an entire population.).

attacks, even a single incident, could have such grave effects on humanity, whether directly or indirectly, resulting in murder in extreme cases.

## 2. Systematic

Badar defines the “systematic” element as a pattern of conduct or methodical plan.<sup>35</sup> The implementation of the preconceived plan or policy could result in the repeated or continuous commission of inhumane acts, which, according to the Nuremberg Tribunal, were committed as a part of the policy of terror.<sup>36</sup> It was said by the ICTY that the term “systematic” requires the offender to be thoroughly organized, following a regular pattern on the basis of a common policy involving substantial public or private resources.<sup>37</sup> Piracy is a well-orchestrated and privately sponsored offence committed in particular areas of the high seas, especially shipping lanes/corridors, during that season of the year when the sea is calm. The method of the attacks employed is systematic.

## 3. Attack

The term “attack” has been described as a course of conduct involving the commission of acts of violence.<sup>38</sup> However, under the context of crimes against humanity, the ICTY<sup>39</sup> took the view that the term should not be limited to conduct of hostilities only. Listing murder and extermination as examples of unlawful attacks, the ICTR<sup>40</sup> further observed that an attack

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35. Badar, *supra* note 28, at 111; *see also* Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 203 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf> (last visited Feb. 23, 2013).

36. *ILC Report*, *supra* note 32, art. 18, cmt. (4).

37. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 648 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> (last visited Feb. 23, 2013).

38. Badar, *supra* note 28, at 105, and M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 201 (2d. rev. ed. 1999).

39. Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 416 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf> (last visited Feb. 23, 2013) (Stating that it may also include situations of mistreatment of persons taking no active part in hostilities, such as someone in detention. However, both terms are based on a similar assumption, namely that war should be a matter between armed forces or armed groups and that the civilian population cannot be a legitimate target.).

40. *Akayesu*, Case No. ICTR-96-4-T, ¶ 581. Stating that:

The concept of attack' may be defined as a unlawful act of the kind enumerated in Article 3(a) to (D) of the Statute, like murder, extermination, enslavement etc. An attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid

may also be non-violent in nature. Piracy attacks are characterized by violence against the victims aimed at not only instilling fear, but also coercing them into total submission.

#### 4. Any “Civilian Population”

According to the ICC Statute,<sup>41</sup> the attack in a crime against humanity should be directed against any “civilian population,”<sup>42</sup> whether stateless, or of a different or same nationality as the perpetrators. As opined by the ICTR<sup>43</sup> and ICTY,<sup>44</sup> the term must be broadly rather than narrowly interpreted to encompass different categories of victims and all nationalities since pirates do not discriminate but launch attacks against any civilian voyagers. Further, save for the situation in *Rep. v. Mohamed A. Dahir*<sup>45</sup>

Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.

41. Rome Statute, *supra* note 7, art. 7(1).

42. *Akayesu*, Case No. ICTR-96-4-T, ¶ 582. Stating that:

The Chamber considers that an act must be directed against the civilian population if it is to constitute a crime against humanity. Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause. Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character.

43. Guénaël Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT’L L.J. 237, 257 (2002).

44. Badar, *supra* note 28, at 102 (citing Prosecutor v. Mile Mksic, Miroslav Radic, and Veselin Sljivancanin, Case No. IT-95-13-R 61, Review of the Indictment Pursuant to Rule 61 of the Rules and Procedure and Evidence, ¶ 29 (Apr. 3, 1996) (Stating that although crimes against humanity must target a civilian population, individuals who at one time performed acts of resistance may in certain circumstances be victims of crimes against humanity).)

45. *Rep. v. Mohamed Ahmed Dahir & Ten Others*, Supreme Court, Criminal Side No.51 of 2009, ¶ 42 (Seychelles). Per Judge Gaswaga:

Like I have already stated intention can be inferred from the facts and surrounding circumstances. However, I see no pertinent concrete facts to base such requisite logical and irresistible inference here. This decision is fortified by the evidence on record. Both parties accept that pirates hijack ships for a financial ransom. On the fateful day they were on the high seas waiting to chance on any ship that came by and not in particular the “*Topaz*”. No evidence on record tends to suggest that “*Topaz*” or the government of Seychelles was being targeted. “*Topaz*” was not even expected in that area at the time of the incident, it had been called upon and directed there by the maritime aircraft. The Captain of “*Topaz*”, Major Simon Laurencin’s testimony is pertinent in strengthening this

where a war ship “Topaz” was mistaken for a cargo vessel because of its lights, pirates only target civilian vessels and crew. They have nothing to do with navy or coastguard vessels and the officers on board, whether or not they are armed. While their actions have far-reaching effects on human kind, pirates are not combatants but more of sea brigands, pursuing a common purpose of seizing vessels, cargo, and crew for a ransom using force and arms to subdue their victims.

Unsuspecting captains and crews of various nationalities plying the international shipping lanes on the high seas, which are heavily infested with pirates, are the primary victims of piracy as they go about their innocent business. At this point the vessels are more vulnerable, and the pirates, who are well organized and systematic in the manner they carry out their savage attacks, will strategically lie in wait for their prey. They operate in groups, covering a wide area and applying a similar pattern to launch attacks continuously,<sup>46</sup> which the international community has, until now, failed to contain. The foregoing satisfies the legal requirement of any “civilian population.”

### C. *The Subjective Element*

The requirement of a subjective element, *mens rea*, is mandatory for all the offences in Article 7 of the Rome Statute. It requires proof that the

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position. He stated that unless one is close and well informed about ships, it's difficult to tell at night whether “Topaz” is a war ship or passenger ship especially when the lights are on. According to him, had the accused known that “Topaz” was a war ship they would not have attacked it.

46. Rep. v. Mohamed Ahmed Ise & Four Others, Supreme Court, Criminal Side No.76 of 2010, ¶ 29 (Seychelles). Per Judge Gaswaga:

The above arrangement, size and number of skiffs fits the classic make up and description of a typical piracy attack group. That is why the witnesses opined that it had all the relevant characteristics. Witnesses herein, consisting of sailors and experts have stated that a PAG usually consists of the mother skiff, two smaller attack skiffs, and at times, a mother ship especially if they have already captured one. Rossignol said that the mother skiff carries fuel, food and other supplies on which all the group depends. That it has an inboard engine and usually travels at a speed of around 10 knots. It tows the attack skiffs with a rope and frees them when going to attack, as it holds off at a safe distance. It was also Rossignol's testimony that attack skiffs have an outboard engine and are pretty fast with a speed of between 20 and 25 knots. The occupants of the attack skiffs execute the actual attack and carry weapons including automatic rifles and RPG's, ladders with hooks used to climb on the ship, fuel cans etc. A PAG would consist of usually a minimum of ten people who travel on the mother skiff and only maneuver the attack skiffs at the time of attack. Each attack skiff would have four armed persons, as was seen in the case at hand, and the rest remain on the mother skiff. Case law clearly demonstrates this arrangement.

perpetrator acted with knowledge that the offence in question was part of a widespread or systematic attack against a “civilian population.”

#### D. *Murder*

Murder has been defined under the ICC elements of crime to include:

[That] the victim must have died; that his/her death must be caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and the act was done, or the omission was made, with an intention to kill or to inflict serious injury in reckless disregard of human life.<sup>47</sup>

The act of murder is clearly understood and prohibited in every national law.<sup>48</sup>

After citing the definition of piracy as enshrined in Article 15 of the Convention on the High Seas (CHS), it was concluded that “by any measure, murder falls within the definition of any illegal acts of violence.”<sup>49</sup>

The said definition reads thus:

Piracy consists of any of the following acts:

- 1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

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47. ILIAS BANTEKAS & SUSAN NASH, *INTERNATIONAL CRIMINAL LAW* 129 n.16 (New York: Routledge-Cavendish, 3rd ed. 2007).

48. *Akayesu*, Case. No. ICTR-96-4-T, ¶¶ 587–88. Stating that:

The Chamber considers that murder is a crime against humanity, pursuant to Article 3 (a) of the Statute. The International Law Commission discussed the inhumane act of murder in the context of the definition of crimes against humanity and concluded that the crime of murder is clearly understood and defined in the national law of every state and therefore there is no need to further explain this prohibited act. The Chamber notes that article 3(a) of the English version of the Statute refers to "Murder", whilst the French version of the Statute refers to "Assassinat". Customary International Law dictates that it is the act of "Murder" that constitutes a crime against humanity and not "Assassinat". There are therefore sufficient reasons to assume that the French version of the Statute suffers from an error in translation.

49. Baker & McKenzie Memo, *supra* note 26, at 32.

- 2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- 3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article . . .

. . . [i]f during the course of committing piracy, a murder was committed by a pirate with the knowledge that their conduct was intended to be part of a widespread or systematic attack against a civilian population, the crime would arguably fall within the ambit of murder in the context of crimes against humanity.<sup>50</sup>

#### E. *Deportation or Forcible Transfer of Population*

“‘Deportation or forcible transfer of population’ means forced displacement of the concerned parties by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”<sup>51</sup>

The crime requires the following elements:

[T]he perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another state or location, by expulsion or other coercive acts; such person or persons were lawfully present in the area from which they were so deported or transferred; the perpetrator was aware of the factual circumstances that established the lawfulness of such presence; the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and the perpetrator knew that the conduct was part of, or intended the conduct to be part of, a widespread or systematic attack directed against a civilian population.<sup>52</sup>

A definition has been assigned to the term “forcibly” as to include “threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power . . . or by taking advantage of a coercive environment; this definition is not necessarily restricted to physical force.”<sup>53</sup>

“Deported or forcibly transferred,” which is interchangeably used with “forcibly displaced” is, “the act or an instance of removing a person to

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50. *Id.* at 31–32.

51. Rome Statute, *supra* note 7, art. 7(2)(d).

52. Baker & McKenzie Memo, *supra* note 26, at 32–33.

53. *Id.* at 33.

another country; especially the expulsion or transfer of an alien from a country.”<sup>54</sup>

An argument was made that Article 7(1)(d) requires a transfer of an individual from his place of residence to another place of residence; yet piracy does not result in the transfer of the victim’s residence. Further, if this were the case, acts of piracy would likely not constitute Deportation or Forcible Transfer of Population under Article 7(1)(d). On the other hand, acts of piracy often involve the forcible transfer of persons to another location by coercive acts. The victims are lawfully present in the area from which they are being transferred and the pirates are aware that the victims are lawfully in the area. Thus, there is an argument that acts of piracy could be characterized as Deportation or Forcible Transfer of Population.<sup>55</sup>

Piracy attacks, by their very nature, satisfy the requirements of Article 7(1)(d) of the Rome Statute since they involve the use of coercive means, direct and indirect force or threats, which create fear in the concerned population, thereby compelling them to leave the area against their will. Sometimes, this involves chasing after the victim’s vessel with speedboats while firing rifles, which may result in death or serious injury if the victims do not flee in time.<sup>56</sup> Moreover, the pirates know that their victims are in these locations lawfully, fishing or transporting merchandise. That is why they know exactly when, where, and who to attack.

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54. BLACK’S LAW DICTIONARY 504 (9th ed. 2009).

55. Baker & McKenzie Memo, *supra* note 26, at 33.

56. *Ise*, Supreme Court, Criminal Side No.76 of 2010, ¶¶ 26–27 (Seychelles). Per Judge Gaswaga:

It does not appear to be in dispute that on the 17th there was an attack on the *Cap Ste Marie* and the *Talenduic* by two skiffs with four men on each. The eye witnesses; Geniez, Fantino, Marrec, Charier and Kostrazwa narrated how the skiffs attacked, from the same direction, moving at the same speed, side by side close to each other and separating at some point when they approached the *Talenduic*, one going on the left and the other on the right side of the *Talenduic*, and thereafter advancing towards the *Cap Ste Marie*. More planning and coordination of the whole exercise is exhibited not only in the manner in which they retreated after defeat in the first attempt but also when they regrouped at some distance, spoke to each other for a short time before speeding off for a second attack on both vessels. This was a concerted effort. Again, common intention of the assailants is reflected in the fact that they had fired at the same time and object, ceased the attack at once and left the scene together in the same direction. None of them returned. This was at about 06:17 GMT and shortly thereafter, at 07:14 GMT, the maritime patrol aircraft spotted a mother skiff towing, as already established, the two attack skiffs that had just finished attacking the *Talenduic* and *Cap Ste Marie*. Photograph No. 9 of Report 1 shows attack skiffs pulled closer and some men getting off and boarding the mother skiff.

*F. Imprisonment or Other Severe Deprivation of Physical Liberty in Violation of Fundamental Rules of International Law*

This crime concerns deprivation of physical liberty without legal justification, including an act or omission that results in arbitrary deprivation of physical liberty, or that is reasonably likely to affect that result.<sup>57</sup> Directly flowing from the foregoing, it should be noted that once an attack is successful, fishermen and crews are locked up in the cabins and together with their vessels forcefully taken to Somalia and illegally held until a ransom is paid for their release.

*G. Torture*

Article 7(2)(e) of the ICC defines torture as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”<sup>58</sup> The elements of the crime of torture are as follows:

- 1) That the perpetrator inflicted severe physical or mental pain or suffering on a person;
- 2) Such person was in the custody or under the control of the perpetrator; and
- 3) Such pain and suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.

The offence could be committed by both state and non-state actors,<sup>59</sup> like pirates. The point was aptly captured in the case of *Rep. v. Nur Mohamed Aden*,<sup>60</sup> where the pirates locked up the victims in different cabins for days

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57. WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE* 205 (Cambridge University Press, 2006). *See also Kordić*, Case No. IT-95-14/2-T, ¶ 302 (The Chamber has confirmed that the crime against humanity of imprisonment “should be understood as contemplating arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population.”).

58. Rome Statute, *supra* note 7, art. 7(2)(e).

59. *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 90 (Roy S. Lee et al. eds., 2001).

60. *Aden*, Supreme Court, Criminal Side No. 75 of 2010, ¶ 28 (Seychelles). Per Judge Gaswaga:

I am convinced beyond doubt that upon boarding the *Faith* the accused harassed and assaulted the crew, shouted and threatened them with guns until they were subdued. They instilled fear in the crew, took complete control of the *Faith* and

and harassed and tormented them with death threats if their government did not pay the ransom money. In *Rep. v. Abdugar Ahamed*,<sup>61</sup> a gun was placed on the head of the victim and then fired. The victims were also used as human shields and exposed to live fire. These acts squarely fit in the aforementioned definition of torture.<sup>62</sup>

#### H. *Forced Disappearance*

Forced disappearance is defined as follows:

[T]he arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.<sup>63</sup>

The basic elements of the crime of forced disappearance are the following:

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commandeered it. There is ample evidence to show that during the four days only the accused determined the direction and destination of the *Faith*, when to let the crew walk around the vessel, have meals, go to the bathroom and when to lock them up in the sleeping quarters. All this was against the witnesses' will. They were not free men at all. Not even the Stephan Barbe who was maneuvering the *Faith*.

61. *Rep. v. Abdugar Ahmed & Five Others*, Supreme Court, Criminal Side No.21 of 2011, ¶ 8 (Seychelles). Per Judge Gaswaga:

Francois Souffe had stated that he was asleep when the fire exchange started and Shaffi Abdullahi (A6) woke him up and ordered all the fishermen, save for Benard Reginald (PW3) who was at the time steering the *Gloria*, to sit on the ice box next to the assailants. Here, they were quite exposed to the fire. That Abdugar Ahmed (A1) put his gun on Francois Souffe's head and then started firing in the air. Abudnnur Haji Aden (A4) was holding the Rocket Propelled Grenade (RPG) on his shoulder while standing next to the ice box but was on various occasions stopped from firing it by Mohamed Mohamud (A2) and Shaffi Abdullahi (A6). Benard Reginald stated that the seven men were aggressive. It was the testimony of Frank Orphee (PW4) that after forcing him to cook, the assailants ate their food, and then Mohamed Mohamud (PW2) placed a gun on his head with the barrel pointing skywards and fired it. The old man felt so confused for some time. Egbert Dorizo (PW5) said that the spent cartridges fell on them as the men fired their rifles which they sometimes pointed at them and also forced them into the cabin.

62. *Id.*

63. Rome Statute, *supra* note 7, art. 7(2)(i).

- 1) That the perpetrator arrested, detained or abducted a person;
- 2) That such deprivation of liberty was followed by a refusal to acknowledge that deprivation of liberty or give information about the whereabouts of such person;
- 3) That the perpetrator was aware that such deprivation of liberty would be followed by a refusal to acknowledge that deprivation of liberty or give information about the whereabouts of such person;
- 4) Such deprivation of liberty was “carried out by, or with the authorization, support, or acquiescence of a State or political organization;”
- 5) That the refusal to acknowledge that deprivation of liberty or give information about the whereabouts of such person was carried out by, or with the authorization, support, or acquiescence of a state or political organization; and
- 6) The perpetrator intended to remove such person from the protection of the law for a prolonged period of time.<sup>64</sup>

Clearly, pirates can neither be categorized as state agents nor political organs. Moreover, their aim is to acknowledge the deprivation of the victim’s liberty and provide information regarding the whereabouts of the pertinent persons available to negotiate a ransom.<sup>65</sup> However, their activities seem to satisfy most of the ingredients of forced disappearance outlined above. It has been opined that “provided it can be argued that pirates are a qualifying ‘State or political organization,’ the acts committed by pirates would likely be available for prosecution under the Rome Statute.”<sup>66</sup>

#### *I. Other Inhumane Acts*

The Rome Statute provides that “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” fall within the category of crimes against humanity.<sup>67</sup>

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64. THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, *supra* note 59, at 98.

65. *See Aden*, Supreme Court, Criminal Side No. 75 of 2010, ¶ 28 (Seychelles).

66. Baker & McKenzie Memo, *supra* note 26, at 38.

67. Rome Statute, *supra* note 7, art. 7(1)(k).

The required elements of this crime is as follows:

[T]he perpetrator inflicted great suffering or serious injury to body or to mental or physical health, by means of an inhumane act; such act was of a character similar to any other act referred to in article 7 paragraph 1 of the Statute; the perpetrator was aware of the factual circumstances that established the character of the act; the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and the perpetrator knew that the conduct was part of, or intended the conduct to be part of, a widespread or systematic attack directed against a civilian population.<sup>68</sup>

This provision is a catchall clause, which has been criticized for its generality and lack of precision and for being contrary to the “specificity” of criminal law.<sup>69</sup> There is a view expressed that if piracy fell under this category of crimes, it should have been listed as such since it has been in existence for thousands of years.<sup>70</sup> On the other hand, piracy results in murder, kidnapping, theft, and other atrocities on a widespread basis. Besides, the time of the drafting of the Rome Statute, piracy attacks had almost disappeared. Moreover, Somali pirates are only active when the sea is calm, which reduces the visibility of their acts on the global scene year round.

On whole, given the serious nature of the crime of piracy and its far-reaching effects on humanity, it is opined that it could satisfy the requirements of the catchall provision. In addition, modern piracy involves most of the aforementioned violent and cruel acts like murder, kidnapping,

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68. Baker & McKenzie Memo, *supra* note 26, at 38–39 (“Article 7(1)(k) [of the Rome Statute] was included as a catch-all clause for acts that do not squarely fall within Article 7(1)(a)-(j). The drafters recognized that it is impossible to exhaustively enumerate every kind of inhumane act which could constitute a crime against humanity.”).

69. Prosecutor v Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 563 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf> (last visited Feb. 23, 2013). The Tribunal cited to the 1958 International Committee of the Red Cross (ICRC) commentary on the IVth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Aug. 12, 1949) on what would constitute a violation of the obligation to provide “humane treatment” contained in common Article 3 of the Geneva Conventions:

It is always dangerous to try to go into too much detail—especially in this domain. However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible and, at the same time, precise.

70. Baker & McKenzie Memo, *supra* note 26, at 40.

and hostage-taking that are used to commit genocide, crimes against humanity, and war crimes over which the ICC has jurisdiction. The prosecution is duty bound to prove all the pertinent elements required for a crime against humanity, to wit: Acts of murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; enforced disappearance of persons; or other inhumane acts of a similar character were committed as a widespread or systematic attack directed against any civilian population with knowledge of that attack.

Piracy action groups have an internal organizational policy and their attacks are well planned and directed towards a civilian population that is lawfully fishing or transporting merchandise on the high seas. Though small, the groups are many and launch systematic, well-orchestrated, violent, and persistent attacks that forcefully displace a civilian population in fear of capture, possible torture, and illegal detention from a large territory. At times, the attacks result in murder or serious injuries and the effects, even for a single incident, are far-reaching. Piracy incidents have been widely publicized and the perpetrators have knowledge on how lucrative the venture is.

#### V. INTERCEPTION OF THE DELIVERY OF HUMANITARIAN AID AS A VIOLATION OF INTERNATIONAL HUMANITARIAN LAW (IHL)

During the Somali conflict in the early 1990s, the United Nations Operation in Somalia (UNOSOM) was set up to facilitate humanitarian aid to people trapped by civil war and famine. As the hostilities intensified, UNOSOM provided strong military escort and security to deter attacks on personnel and relief supply convoys from the seaports and airports of Mogadishu to the four and a half million people who were threatened with starvation, severe malnutrition, and related diseases. The UNSC unanimously adopted Resolution 794, operational paragraph 5 that reads:

[The UN] strongly condemns all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population, and affirms that those who commit or order the commission of such acts will be held individually responsible in respect of such acts.<sup>71</sup>

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71. S.C. Res. 794, ¶ 5, U.N. Doc. S/RES/794 (Dec. 3, 1992).

The magnitude of human tragedy caused by the conflict in Somalia further exacerbated by the obstacles being created to the distribution of humanitarian assistance by the warlords constituted a threat to international peace and security.

Though at sea, the pirates intercept and capture ships delivering supplies to Somalia and take humanitarian aid workers hostage for ransom. Therefore, the intentional interference with delivery of foreign humanitarian aid by international agencies contributes to immense human suffering, starvation, death, and contributes to instability in already impoverished and unstable nations like Somalia. Such interferences have been overwhelmingly condemned and unanimously categorized as a violation of humanitarian law by the U.N. Security Council in Somalia between 1992 and 1993. These actions clearly constitute a violation of international humanitarian law and the individual criminal liability element in UNSC Resolution 794 should also apply to the pirates.

#### VI. RECRUITMENT OF CHILDREN: DRAWING ANALOGY WITH THE LUBANGA CASE

Thomas Lubanga was a founding member and President of Union des Patriotes Congolais (UPC) created on the fifteenth of September in 2000 in the Democratic Republic of Congo (DRC). The UPC and its military wing, the Force Patriotique pour la Liberation du Congo (FPLC), took power in Ituri in September, 2002. Thomas Lubanga was indicted before the ICC and the charges against him included three distinct criminal acts. The ICC Trial Chamber I (the Chamber) concluded that the crimes of conscription and enlistment are committed at the moment a child under the age of fifteen is enrolled into or joins an armed force or group, with or without compulsion. Further:

The evidence [] confirmed [beyond a reasonable doubt] that the accused and his co-perpetrators agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri, [a province of the DRC, and that] in the ordinary course of events, this resulted in the conscription and enlistment of boys and girls under the age of [fifteen], and their use to participate actively in hostilities.<sup>72</sup>

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72. See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Summary of the Judgment Pursuant to Article 74 of the Statute, ¶¶ 34–42 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379843.pdf>. Paragraph 37 further states:

The facts of the *Lubanga* case concerning the recruitment and use of child soldiers, just like the involvement of children in acts of piracy dealt with children under the age of fifteen who had been conscripted or enlisted into groups that would ultimately expose them to some kind of danger or hostilities.

A. *Under the Lubanga Case, Does the Crime of Recruiting and Using Child Soldiers Only Apply to Situations of Armed Conflict Such That it is Not a Good Analogy for Recruiting and Using Child Pirates?*

Thomas Lubanga was indicted for crimes against humanity, but not war crimes which have to be committed during armed conflict.<sup>73</sup> The ICC Statute does not list armed conflict as a requirement for crimes against humanity.<sup>74</sup> Although in *Lubanga* the facts reveal a connection with armed conflict, it should be stressed that the recruitment and enlisting of child soldiers is a distinct offence that can occur on its own without a war or armed conflict. It has been concluded by the ICC “that the crimes of conscription and enlistment are committed at the moment a child under the age of 15 is enrolled into or joins an armed force or group . . . .”<sup>75</sup> One could argue that the offence can occur any time before, during, or even after a war. Therefore, it cannot be said that on this matter the *Lubanga* case is not a good analogy for the situation giving rise to the offence of recruiting and using child pirates. It is also worth mentioning that in regards to the offence of using children under the age of fifteen years to participate actively in hostilities, the ICC concluded the following:

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The accused and at least some of his co-perpetrators were involved in the takeover of Bunia in August 2002. Thomas Lubanga, as the highest authority within the UPC/FPLC, appointed Chief Kahwa, Floribert Kisembo and Bosco Ntaganda to senior positions within the UPC/FPLC. The evidence has established that during this period, the leaders of the UPC/FPLC, including Chief Kahwa, and Bosco Ntaganda, and Hema elders such as Eloy Mafuta, were active in mobilisation drives and recruitment campaigns in order to persuade Hema families to send their children to join the UPC/FPLC. Those children recruited before the formal creation of the FPLC were incorporated into that group and a number of military training camps were added to the original facility at Mandro. The Chamber has concluded that between 1 September 2002 and 13 August 2003, a significant number of high-ranking members of the UPC/FPLC and other personnel conducted a large-scale recruitment exercise directed at young people, including children under the age of 15, on both voluntary and coercive bases.

73. Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, 3 (Can.); *see also* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 81–84 (Oxford University Press 2nd ed. 2008).

74. *See* Rome Statute, *supra* note 7, art. 7.

75. *Dyilo*, Case No. ICC-01/04-01/06, Summary of the Judgment Pursuant to Article 74 of the Statute, ¶ 23.

[It] includes a wide range of activities, from those children on the front line (who participate directly) through the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target.<sup>76</sup>

The theatre in which acts of piracy take place is hostile, involving exchanges of live fire and high speed chases. This environment exposes the actors, most especially the children, to high levels of risk. There are a lot of similarities between child soldiers and child pirates when it comes to dealing with their disadvantaged backgrounds and the manner in which they are recruited to the tasks they are assigned to perform. Following this discourse, it becomes very clear that the recruitment and use of children for purposes of serving as child pirates is criminal, just like in the case of child soldiers, and the perpetrators of this crime, if citizens of a state party to the Rome Statute, could be properly prosecuted by the ICC.

*B. Does the Lubanga Case Suggest That the International Criminal Court Can Only Prosecute a Crime Against Humanity if it is Committed by a State?*

As already stated, unless soldiers have mutinied and turn against the captain of their vessel,<sup>77</sup> piracy is committed by private individuals and for private ends<sup>78</sup> while crimes against humanity are said to be committed by a

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76. *Id.* ¶ 24.

77. PROSECUTING INTERNATIONAL CRIMES IN AFRICA 235 (Chacha Murungu & Japhet Biegon eds., 2011) (stating that “[p]iracy could also be committed by a warship, government ship or government aircraft whose crew has mutinied.”); *see also* UNCLOS art. 102.

78. *Abdukar*, Supreme Court, Criminal Side No.21 of 2011, ¶ 21 (Seychelles). Per Judge Gaswaga:

On the second query of the element of ‘private ends’, we should bear in mind that according to the definition provided in law, one will notice that piracy is a war-like act committed by non-state actors (private parties not affiliated with any government) against other parties at sea. So, in common parlance, piracy is generally understood as violence or depredation or detention on the seas for private ends without authorization by public authority. Therefore, such bands of sea brigands commit these atrocities at their own will and for their own ends. This could however be further distinguished from privateering which was common in the 17th and 18th Centuries, but lost international sanction under the Declaration of Paris in 1856. A privateer or corsair used similar methods to a pirate, but acted while in possession of a commission or letter of marque from a government or monarch authorizing the capture of merchant ships belonging to an enemy nation. For instance, the United States’ Constitution of 1787 specifically

government actor or other entities with an organizational policy.<sup>79</sup> But the state or organizational policy, which is admittedly not fully developed as it currently stands in the ICC jurisprudence, must actively promote or encourage such attacks against a civilian population.<sup>80</sup> The said attack need not constitute a military attack. Besides, this study has already observed that an act of piracy is not merely an isolated incident but a crime against many individuals, and each incident forms part of a broader context of the widespread and systematic acts of crimes against humanity targeting a civilian population.

In line with the articulation in *Katanga*,<sup>81</sup> where the ICC seemed to be more liberal on that policy, it is submitted that the various groups of pirates situated in the Indian Ocean off the coast of Somalia have made it scary, dangerous, and almost impossible for the crews of fishing and commercial vessels to continue operating their business. In essence, the pirates are in control of this territory with the capability to commit a widespread and systematic attack against the civilian population. In this regard, there is no need for the pirates to explicitly define their policy. Indeed, their *modus operandi*, involving systematic, clearly planned, directed, organized, and concentrated attacks in a particular area (as opposed to spontaneous or isolated acts of violence) no doubt demonstrate an implementation of a common policy and an organized common plan.<sup>82</sup> Hence, a liberal interpretation of Article 7(2) should, as also suggested by some commentators,<sup>83</sup> accommodate acts of piracy as fulfilling the element of organizational policy. The case of *Blaškić*<sup>84</sup> is supportive of this reasoning. In this case, it was stated, “[t]he plan need not be developed at ‘the highest level of the state machinery,’ and that ‘individuals with *de facto* power or organized in criminal gangs’ are just as capable . . . of implementing a large-scale policy of terror and committing mass acts of violence.”<sup>85</sup> In a nutshell, it cannot be said that the ICC can only prosecute a crime against

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authorized Congress to issue letters of marquee and reprisal. The letter of marquee was recognized by international convention and meant that a profiteer could not technically be charged with piracy while attacking the targets named in his commission.

79. Rome Statute, *supra* note 7, art. 7(2)(a).

80. International Criminal Court, *Elements of Crimes*, at 5, 2011, available at <http://www.unhcr.org/refworld/docid/4ff5dd7d2.html> (last visited Feb. 23, 2013) (referring to Article 7 of the Rome Statute).

81. *Katanga*, Case No. ICC-01/04-01/07, ¶ 396.

82. See Baker & McKenzie Memo, *supra* note 26, at 14.

83. See *id.*

84. *Blaškić*, Case No. IT-95-14-T, ¶ 205.

85. *Id.*

humanity if it is committed by a state and the holding of *Lubanga* does not suggest this to be the case.

*C. How Can One Prove That a Pirate Kingpin or Financier Had Knowledge of the Widespread and Systematic Use of Child Pirates and Aided and Abetted That Practice?*

The whole venture of piracy is viewed as a lucrative business by the perpetrators, whereby the financiers assemble a group of pirates (including children under fifteen who are more vulnerable and available due to the breakdown of family and governance systems in Somalia, and also considered to be fearless) and provide facilitation with the aim of coining a profit. It is commonplace that certain parts of the Indian Ocean, especially off of the coast of Somalia, are infested with groups of pirates who systematically and persistently continue to launch attacks against innocent sea voyagers. Knowledge is not easy to prove with direct evidence because perpetrators of crimes rarely document or voice their intentions and plans. The common adage goes that “actions speak louder than words;” therefore, such knowledge can only be inferred from their conduct and surrounding circumstances. This is reflected in the testimony of one captured and tried pirate who explained the breakdown of the ransom as he understood it as follows: 20% goes to the bosses of the organization; 20% goes to investment in future missions (guns, fuel, cigarettes, food, etc.); 30% goes to the gun men; and 30% goes to government officials.<sup>86</sup> Financiers are aiders and abettors and ought to know what the venture is like and what is likely to happen when they send out pirates, such as murder, capture of human beings, unlawful detention and false imprisonment, torture, kidnapping, stealing/robbery and destruction of property, use of victims as human shields, and a lot of other inhumane treatment.

It has been stated that “the perpetrator’s knowledge may also be inferred from public knowledge based on the extent of media coverage, the scale of the acts of violence, and the general historical and political environment in which the acts occurred,” and that the indicia of knowledge should be assessed as a whole.<sup>87</sup>

Therefore the financiers of piracy, as facilitators of the whole criminal enterprise, cannot feign ignorance of what is likely to happen at sea after assembling a Pirate Attack Group (PAG) and triggering it into motion to hit the high seas. Moreover, they keep monitoring the activities of the PAG by using mobile communication gadgets and await feedback.

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86. Ould-Abdallah, *supra* note 5, at 17 n.4.

87. Mettraux, *supra* note 43, at 262.

It is submitted that a person planning and facilitating the commission of such offence and expecting to get a profit or share of the proceeds of that crime (ransom) should be held criminally responsible for that criminal venture even if they did not participate in the completion of the crime. It is immaterial whether they planned and facilitated the crime from dry land, which was later executed at sea, because their acts are part of the whole attack and were committed with a common intention and purpose.

*D. ICC Mens Rea Requirement in Aiding and Abetting Cases*

According to Article 25(3)(a) of the Roman Statute:

[A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the court in accordance with the statute if that person commits such a crime, whether as an individual, jointly with another, or through another person, regardless of whether that person is criminally responsible.<sup>88</sup>

Kingpins and financiers of piracy clearly fall under this category as well as under Article 25(3)(b) for their role in inducing and soliciting men and children to form a PAG and facilitating their activities. In addition, by assembling and facilitating a PAG, all the persons involved act intentionally and with a common purpose and aim of furthering that criminal activity. Moreover, the person's further contributions in any other way "to the commission or attempted commission of such a crime by a group of persons acting with a common purpose" shall be considered intentional if it "be made with the aim of furthering the criminal activity or criminal purpose of the group . . . or be made in the knowledge of the intention of the group to commit the crime."<sup>89</sup> A person will also be responsible for attempts to commit such a crime where they take action that commences its execution by means of a substantial step as depicted in the recruitment, preparation, and facilitation of a PAG.<sup>90</sup>

This discourse satisfies both the mental elements of intent and knowledge required under Article 30,<sup>91</sup> as well as the purpose *mens rea* under Article 25.<sup>92</sup> So long as the person has initiated or contributed to the crime by means of a substantial step, it is immaterial whether the crime is

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88. Rome Statute, *supra* note 7, art. 25(3)(a).

89. *Id.* art. 25(d)(i)–(ii).

90. *Id.* art. 25(3)(f).

91. *Id.* art. 30.

92. *Id.* art. 25.

completed or not, unless the crime does not occur because of circumstances independent of that person's intentions or the person has completely and voluntarily given up the criminal purpose and prevents the completion of the crime.<sup>93</sup>

## VII. CONCLUSION

Children under fifteen are recruited and used as pirates, thereby exposing them to hostilities. Their recruitment, which is unlawful, is done on dry land. The piracy itself, which includes violence, interference, and interception of humanitarian aid, is committed on the high seas—a place falling under the jurisdiction of no state.

Applying the holding in the *Lubanga* case regarding the enlisting and conscription of child soldiers, the pirate kingpins and financiers could be held equally liable for the crime of recruiting and using child pirates. It is also important to take note of the fact that considering the recruitment of child pirates or piracy generally as a crime against humanity does not necessarily require the existence of an armed conflict because these are offences that are committed at the moment the child under fifteen is recruited and joins the group. The perpetrators have knowledge on how widespread and systematic the problem of recruitment and use of child pirates is. If it is demonstrated that the perpetrator is from a state party to the Rome Statute or its accepted jurisdiction or was referred by the Security Council and/or committed the offence in a state party to the Rome Statute, then the ICC would have jurisdiction to try him as long as the matter is not already under investigation or trial in any state.

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93. Rome Statute, *supra* note 7, art. 25(3)(f).

**ESTABLISHMENT OF A SPECIAL ANTI-PIRACY  
TRIBUNAL: PROSPECTIVE AND REALITY**

**THE CHALLENGES ASSOCIATED WITH  
PROSECUTING SOMALI PIRATES IN A SPECIAL  
ANTI-PIRACY TRIBUNAL**

*Sandra L. Hodgkinson\**

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During the past several years, piracy off of the coast of Somalia increased, despite efforts of the international community to support piracy prosecutions in national and international courts. While some recent data indicates an improvement in the number of attacks, it may be too soon to tell the overall trend. In 2011, there were 286 piracy attacks,<sup>1</sup> which was higher than in each of the three previous years, which had ranged from

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1. U.N. Secretary-General, *Report of the Secretary-General on Specialized Anti-Piracy Courts in Somalia and Other States in the Region*, ¶ 7, U.N. Doc. S/2012/50 (Jan. 20, 2012) [hereinafter Jan. 2012 Report].

140–160 attacks.<sup>2</sup> In 2010–2011, Somali pirates reportedly caused more than \$25 billion in losses<sup>3</sup> and pirates became one of the largest obstacles to the delivery of food aid to Somalia.<sup>4</sup> Furthermore, piracy has threatened the livelihood of African states, such as the Seychelles, by increasing costs at ports, and affecting fishing and tourism.<sup>5</sup> Along with the increase in attacks, the level of violence and mistreatment per attack has also risen in certain cases, as has the average length of detention of victims by the pirates.<sup>6</sup> In Somalia, where most of the attacks are launched from, piracy continues to fuel the economy,<sup>7</sup> and pirates benefit from a level of support from part of the population.<sup>8</sup> In some coastal communities, an entire trade is developing around the logistics that support piracy and approximately twenty percent of the ransom monies are re-invested into the community,

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2. See generally James Kraska, *Coalition Strategy and the Pirates of the Gulf of Aden and the Red Sea*, 28 COMP. STRATEGY 197, 197-216 (2009); Jim Michael, *Pirates' New Tactics Make Navies' Job Harder*, USATODAY.COM Jan. 7, 2011, available at [http://usatoday30.usatoday.com/printedition/news/20110107/pirates07\\_st.art.htm](http://usatoday30.usatoday.com/printedition/news/20110107/pirates07_st.art.htm) (last visited Jan. 30, 2013).

3. See Roger L. Phillips, *Upcoming Event: Panel on Establishment of a Special Anti-Piracy Tribunal: Prospects and Reality*, PIRACY-LAW.COM Feb. 5, 2012, available at <http://piracy-law.com/2012/02/05/upcoming-event-panel-on-establishment-of-a-special-anti-piracy-tribunal-prospects-and-reality/> (last visited Jan. 30, 2013).

4. U.N. Secretary General, Letter dated 24 January 2011 from the Secretary-General addressed to the President of the Security Council (Somalia—Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia), U.N. Doc. S/2011/30, Jan. 25, 2011, at 14 [hereinafter Jack Lang Report].

5. Jack Lang Report, *supra* note 4, at 16; Victor Erofejev, *Save the Seychelles From Pirates*, NYTIMES.COM Jan. 11, 2011, available at [http://www.nytimes.com/2011/01/12/opinion/12iht-ederofeyev12.html?\\_r=0](http://www.nytimes.com/2011/01/12/opinion/12iht-ederofeyev12.html?_r=0) (last visited Jan. 30, 2013); see also Allan Jacob, *US Expresses Concern About Maritime*, KHALEEJTIMES.COM Feb. 15, 2011, available at [http://www.khaleejtimes.com/DisplayArticleNew.asp?xfile=/data/middleeast/2011/February/middleeast\\_February515.xml&section=middleeast](http://www.khaleejtimes.com/DisplayArticleNew.asp?xfile=/data/middleeast/2011/February/middleeast_February515.xml&section=middleeast) (last visited Jan. 30, 2013) (quoting a U.S. counter-piracy official, Donna L. Hopkins, as stating, “[w]e are very concerned that pirate ransom money is actually undermining the development of sustainable legitimate economic activity such as fisheries and normal maritime trade.”).

6. See Jack Lang Report, *supra* note 4, at 17.

7. Jack Lang Report, *supra* note 4, at 17; see also Kathryn H. Floyd, *Somalia's Stability and Security Situation in Review*, INT'L CTR. FOR POLITICAL VIOLENCE AND TERRORISM RESEARCH (July 2010). In 2009, piracy raised as much as \$200 million, making it one of Somalia's most profitable businesses; Douglas A. McIntyre, *Somali Pirates Are Getting Rich: A Look at the Profit Margin*, TIME.COM Apr. 15, 2009, available at <http://www.time.com/time/business/article/0,8599,1891386,00.html> (last visited Jan. 31, 2013).

8. See U.N. Secretary-General, *Report of the Secretary-General on the Modalities For the Establishment of Specialized Somali Anti-Piracy Courts*, U.N. Doc. S/2011/360, June 15, 2011, at 27 [hereinafter June 15 Report].

minimizing local interest in accountability.<sup>9</sup> This has created mixed incentives for the Somali government, both nationally and locally in taking steps to prevent piracy and hold individuals accountable.

As one of many steps taken to address this piracy phenomenon, the United Nations (U.N.) Secretary General appointed Jack Lang (Lang), the former Minister of Culture and Education in France, as Special Advisor on legal issues related to piracy and asked him to identify steps which could improve piracy prosecutions.<sup>10</sup> Lang completed his report in January, 2011.<sup>11</sup> His recommended “first step” as part of an overall “emergency plan” was the establishment of specialized piracy tribunals in Somalia and Tanzania.<sup>12</sup> He argued that these specialized piracy tribunals would be consistent with the “‘Somalization’ of solutions.”<sup>13</sup> This article will describe the development of the Lang Proposal over the past year; further the article will address whether this Somalization is viable or whether a variation on his theme is warranted.

#### I. JACK LANG’S PROPOSAL: TWO SPECIALIZED SOMALI COURTS AND ONE EXTRATERRITORIAL COURT

To address the growing piracy threat and respond to the Secretary General’s request, Lang proposed the creation of two specialized Somali piracy courts: One in Puntland and one in Somaliland.<sup>14</sup> These courts would be standalone courts, solely handling piracy cases.<sup>15</sup> Additionally, Lang proposed the creation of an extraterritorial Somali piracy court to be temporarily located in Arusha, Tanzania.<sup>16</sup> This court would also only handle piracy cases and use Somali law, rather than Tanzanian or international law.<sup>17</sup> Lang further proposed that as a cost saving measure, this court could be co-located in the facilities of the International Criminal

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9. *Lack of Effective Somali Government Root of Piracy Problem, Experts Say*, VOANEWS.com, Nov. 2, 2009, available at <http://www.voanews.com/content/a-13-2009-04-16-voa47-68733422/409931.html> (last visited Jan. 31, 2013) [hereinafter *Lack of Effective Somali Gov’t*].

10. U.N. Secretary-General, Letter dated 25 August 2010 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2010/451 (Aug. 25, 2010).

11. See Jack Lang Report, *supra* note 4, at 1.

12. *Id.* at 28, 38–39.

13. *Id.* at 28.

14. *Id.* at 38.

15. See *id.* at 38–39.

16. Jack Lang Report, *supra* note 4, at 38–39.

17. *Id.*

Tribunal for Rwanda.<sup>18</sup> Once the security situation in Mogadishu improves, the court would move there.<sup>19</sup>

To help strengthen their ability to handle the piracy cases, these three courts would each operate in the Somali language and use Somali judges,<sup>20</sup> who would hopefully have access to and training from international judges and lawyers. The courts in Puntland and Arusha would have universal jurisdiction over the crime of piracy under a new counter-piracy law, which would require new legislation and training on how to implement these new laws.<sup>21</sup> With an improved privacy law, the Somaliland court would continue to focus only on piracy acts committed by the people of Somaliland or acts committed in its territorial waters.<sup>22</sup> The Somaliland court currently prosecutes acts of pirates for crimes other than piracy.<sup>23</sup> Ensuring passage of these new laws would be an essential step in furthering Lang's proposal.

Lang estimated that the cost of the tribunal for three years would be approximately \$25 million.<sup>24</sup> Funding sources included several nations, U.N. agencies, such as the U.N. Office of Drugs and Crime (UNODC), and "states that have contributed to the trust fund created by the Contact Group on Piracy off the Coast of Somalia in January 2010."<sup>25</sup> In June 2011, approximately \$908,567 had been received; however, since then, fundraising efforts have brought in millions more.<sup>26</sup> Nevertheless, continued fundraising efforts are still necessary.

UNODC has already taken the lead on assisting third world countries, such as Kenya and the Seychelles, to strengthen their ability to prosecute

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18. *Id.* This court is only using the ICTR facilities as a cost-saving measure while the ICTR is in the wind-down process and the jurisdiction for the ICTR does not cover the crime of piracy.

19. *Id.* at 38–39.

20. *Id.* at 40.

21. Jack Lang Report, *supra* note 4, at 39.

22. *Id.* In Somaliland, the local government is only willing to take on piracy cases affecting its citizens or on its territory or in its territorial waters.

23. *See* June 15 Report, *supra* note 8, at 5.

24. Jack Lang Report, *supra* note 4, at 44.

25. *Id.* at 45. The trust fund created by the Contact Group on Piracy off the Coast of Somalia was known as "The Trust Fund Supporting the Initiatives of States Countering Piracy off the Coast of Somalia." *Id.* at 27. This estimate does not include the cost of bringing international judges into Somalia and Tanzania to provide mentoring and capacity-building assistance. *See id.* at 43–45.

26. June 15 Report, *supra* note 8, at 11; *See also* U.N. Secretary-General, *Report of the Secretary-General Pursuant to Security Council Resolution 1950 (2010)*, U.N. Doc. S/2011/662, Oct. 25, 2011, at 6 (However, pledges to the Trust Fund had been higher, indicating that about \$8.3 million had been received as of October 4, 2011.).

piracy cases.<sup>27</sup> Much of Lang's proposal appears to leverage this existing assistance. To increase detention capacity near the newly proposed, specialized anti-piracy courts in Somalia, Lang's proposal also included the construction of new prisons in Puntland and Somaliland.<sup>28</sup> The prisons would receive corrections training from UNODC and would be subject to local human rights monitoring.<sup>29</sup> Additionally, the Proposal established a reintegration program by which former pirates would be provided the opportunity to secure lawful employment upon release from any sentence served.<sup>30</sup>

On April 11, 2011, the U.N. Security Council endorsed the recommendation in Resolution 1976 by deciding "to urgently consider the establishment of specialized Somali courts to try suspected pirates both in Somalia and in the region, including an extraterritorial Somali specialized anti-piracy court."<sup>31</sup> The Security Council challenged the Secretary General to report on ways to accomplish this, including international participation, support and assistance for the courts. Over the next two months, Lang and a U.N. team examined the various aspects of his proposal and assisted in preparation of the follow-up report, which was issued on June 15, 2011.

## II. MODALITIES FOR THE ESTABLISHMENT OF SPECIALIZED SOMALI-ANTI-PIRACY COURTS

In the June 15 report, the Secretary-General asserted that the guiding principle of Lang's report was "*strengthening the rule of law in Somalia*."<sup>32</sup> In discussing the modalities necessary to operate these new specialized piracy courts, the June 15 report acknowledged the requirement for a new Constitutional and legislative framework.<sup>33</sup> Specifically, it raised concern over the consistency between the proposed new piracy laws as applied domestically and extraterritorially, the 1960 Constitution for the Somali Republic, and the 2004 Transitional Federal Charter for the Somali

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27. See United Nations Office on Drugs and Crime, Counter Piracy Programme, November 2009, available at [www.unodc.org/document/easternafrika/piracy/UNODC\\_Counter\\_Piracy\\_Programme.pdf](http://www.unodc.org/document/easternafrika/piracy/UNODC_Counter_Piracy_Programme.pdf) (last visited Feb. 3, 2013).

28. Jack Lang Report, *supra* note 4, at 37.

29. *Id.*

30. *Id.*

31. S.C. Res. 1976, at 5, U.N. Doc. S/RES/1976 (Apr. 11, 2011).

32. June 15 Report, *supra* note 8, at 1 (emphasis added).

33. *Id.* at 4.

Republic.<sup>34</sup> To amend the 2004 Transitional Federal Charter, the June 15 report noted that one-third of the Transitional Federal Parliament would have to make a motion to pass the amendment and two-thirds of its members would have to support it.<sup>35</sup> This could be very difficult to accomplish in the current Somali political environment.<sup>36</sup>

The Lang Proposal made some recommendations that were already consistent with ongoing training in Somalia. For instance, the U.N. Development Program (UNDP) and UNODC had already been providing assistance for piracy prosecutions in Somaliland and Puntland.<sup>37</sup> They did so by using the *existing* court system and *existing* law in cooperation with the Transitional Federal Government and regional authorities in Somalia.<sup>38</sup> These efforts have contributed to a number of piracy prosecutions which are already underway in Somalia.<sup>39</sup> The piracy prosecutions taking place in Puntland are based on a definition of “piracy” law that differs from the U.N. Convention on the “Law of the Sea” definition.<sup>40</sup> On the other hand, prosecutions taking place elsewhere in Somalia are generally for crimes other than piracy, such as illegal possession of weapons.<sup>41</sup> As such, the new piracy laws created to strengthen prosecutions within Somalia are critical.

The current UNDP and UNODC plans for assistance are designed to strengthen Somaliland and Puntland’s ability to prosecute twenty more cases per year, with an average of ten pirates per case.<sup>42</sup> These existing UNDP and UNODC programs have also initiated construction of new secure courthouses in both regions; however, they will still require additional new equipment from donors, enhanced measures for court security, and judicial training in criminal law and piracy.<sup>43</sup> Given the current level of training and education within the Somali court system, future efforts to ensure international participation and expertise will be essential. While international judges and prosecutors could travel to Somalia to conduct training, any effort that involves their participation in

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34. *Id.*

35. *Id.*

36. *Id.*

37. June 15 Report, *supra* note 8, at 2.

38. *Id.* at 3 (emphasis added).

39. *Id.* at 4.

40. *Id.* at 4–5.

41. *Id.* at 5.

42. June 15 Report, *supra* note 8, at 3. This would allow for prosecution of nearly 200 pirates more.

43. *Id.* at 5–6, 8.

the court process would require a new legislative basis.<sup>44</sup> In addition to the courts, the UNODC is already working to strengthen the capacity and standards within existing prison system facilities while concurrently developing two new prisons over the next two years.<sup>45</sup> Each new prison is designed to hold 500 additional persons and comply with international standards.<sup>46</sup>

Since it is more likely foreign judges and prosecutors who would come to Tanzania rather than Somalia, the extraterritorial Somali court located in Arusha, Tanzania, is envisioned to further strengthen the rule of law in Somalia by encouraging regional and international assistance to come to the region.<sup>47</sup> The June 15 report further noted that the establishment of a *new* extraterritorial Somali court would require a new Constitutional and legislative framework (similar to creating a specialized *new* piracy court within Somalia), and would require similar analysis regarding consistency with the 1960 Somali Constitution and Transitional Federal Charter.<sup>48</sup> Alternatively, locating an *existing* Somali federal court outside of Somalia would only require adoption of a Somali Constitution and the parliament's establishment of a judiciary.<sup>49</sup> While both measures require additional legal authorities, the latter may be easier to accomplish since it uses existing courts in Somalia rather than newly-created specialized ones.

### III. STRENGTHENING THE RULE OF LAW IN SOMALIA THROUGH ESTABLISHING ANTI-PIRACY COURTS: IS THIS A VIABLE GOAL?

The Lang proposal and the existing UNDP and UNODC programs are all designed to strengthen the ability of the Somali courts to handle piracy cases and contribute to the broader and important goal of strengthening the rule of law in Somalia. To assess the likelihood of achieving this goal, it is important to look at the preferences of the Somali government and the state of the existing court system in Somalia.

To begin narrowly with the Lang proposal for specialized anti-piracy courts within Somalia, the TFG and regional authorities have expressed

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44. *Id.* at 6.

45. *Id.* at 8.

46. *Id.* at 8. This prison program may actually be the very program that Jack Lang proposes in his initial report, leveraging on the efforts already underway by the UNODC.

47. June 15 Report, *supra* note 8, at 12.

48. *Id.* at 13 (emphasis added).

49. *Id.* (emphasis added).

support for piracy courts within Somalia.<sup>50</sup> However, they stated a strong preference for strengthening the *existing* Somali court structures rather than establishing *new* standalone Somali anti-piracy courts.<sup>51</sup> Specifically, the Somaliland Minister for Foreign Affairs stated that Somaliland would only agree to prosecute cases in *existing* Somali courts rather than specialized anti-piracy courts.<sup>52</sup> This statement appeared to support efforts to strengthen and increase the existing UNDP and UNODC programs rather than the Lang proposal.

As for the establishment of an extraterritorial Somali anti-piracy court to be located in Arusha, Tanzania, the June 15 Report indicated strong opposition from the Somali government.<sup>53</sup> The U.N. consulted with the relevant authorities in Somalia, including TFG's Deputy Prime Minister and Minister for Foreign Affairs and its Deputy Prime Minister and Minister of Development, Puntland's Minister of Maritime Transport, Ports and Counter-Piracy and its Director-General for Counter-Piracy, and the region Galmaadug's Minister of Justice and of Fisheries.<sup>54</sup> All of the consultations revealed adamant opposition to a Somali court operating outside of Somalia and preferred the option of placing the court somewhere within Somalia.<sup>55</sup> Although the Somaliland Minister for Foreign Affairs did not officially oppose the extraterritorial court, he did state that he did not think it was "a good idea."<sup>56</sup>

Given the current strong Somali federal and regional government opposition to both an extraterritorial Somali court and specialized anti-piracy courts within Somalia, it seems unlikely that the Lang proposals for specialized anti-piracy courts can prevail in Somalia as a "first step" in this overall "emergency plan." That said, there may well be an appetite for morphing this proposal into an enhanced UNDP and UNODC-style capacity building plan for Somalia, leveraging the existing court structures.

Accordingly, at this time it is worth exploring how to best strengthen capacity in the existing Somalia justice system, taking a look at its courts and prosecutions. The current Somali justice system is comprised of a

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50. Margaret Besheer, *Somalia Wants Piracy Courts on its Territory*, VOICE OF AMERICA, June 20, 2011, available at <http://www.voanews.com/English/news/Africa/Somalia-Wants-Piracy-Courts-on-its-Territory-124298529.html> (last visited Feb. 3, 2013).

51. June 15 Report, *supra* note 8, at 14–15 (emphasis added).

52. *Id.* at 15. (emphasis added).

53. *Id.* at 14.

54. *Id.* at 14–15.

55. *Id.*

56. June 15 Report, *supra* note 8, at 14–15.

national court system, with both district and regional courts,<sup>57</sup> traditional tribal law and shari'a, all of which function somewhat intermittently.<sup>58</sup> Given that the current UNDP and UNODC capacity building efforts are focused on the national court system, this should be the focus of continued efforts on prosecutions. However, a relatively recent piracy law failed in Parliament due to the concern that it conflicted with shari'a law.<sup>59</sup> Furthermore, in March of 2009, the Somali TFG indicated that shari'a would be the nation's official judicial system.<sup>60</sup> The interplay between the regular court system and the influence of shari'a law is a theme that will need to be watched as these efforts move forward. Additionally, there are some concerns as to whether the Somali government will be politically or legally able to enact the new piracy laws needed to strengthen domestic piracy prosecutions.

In addition to the need for new piracy laws, the existing court system has significant challenges. The courts and prisons are vastly underfunded and poorly equipped.<sup>61</sup> Lang's report noted that only about 5% of the near 200 judges in Somaliland and Puntland had legal training.<sup>62</sup> Additionally, the UNDP assessed that less than 10% of the total judges and prosecutors in Somalia had any formal legal training.<sup>63</sup> Given the magnitude of the capacity building effort needed in Somalia, effective fundraising and a significant amount of time will be needed to enact the new piracy laws and develop a strong international judge and prosecutor training and mentorship program.<sup>64</sup>

Next, it is important to determine whether investments in Somalia's justice system will actually result in more successful prosecutions, convictions and detention of pirates, or if the government has incentives to avoid addressing the problem. There is skepticism regarding whether the current Somali government can be the willing and effective partner needed

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57. *Id.* at 31. The "assize" section where piracy cases are heard fit in the regional courts.

58. Jack Lang Report, *supra* note 4, at 34.

59. Betwa Sharma, *UN Adviser: Piracy Tribunals Needed ASAP*, HUFFINGTON POST, Jan. 25, 2011, available at <http://www.aolnews.com/2011/01/25/un-adviser-piracy-tribunals-needed-asap/> (last visited Feb. 3, 2013).

60. *History of Somalia*, WIKIPEDIA.ORG, available at [http://en.wikipedia.org/wiki/History\\_of\\_Somalia](http://en.wikipedia.org/wiki/History_of_Somalia) (last visited Feb. 3, 2013).

61. June 15 Report, *supra* note 8, at 3, 8.

62. Jack Lang Report, *supra* note 4, at 38.

63. June 15 Report, *supra* note 8, at 5.

64. See Douglas Guilfoyle, *Piracy Off the Coast of Somalia, International Cooperation in the Prosecution of Somali Pirates*, July 21, 2011, available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmcaff/writev/1318/m06.htm> (last visited Feb. 20, 2013) (written evidence provided by Dr. Guilfoyle to the UK Parliament).

for this effort,<sup>65</sup> and there has been indication that donors have been reluctant to fund a government that has not been fully accountable.<sup>66</sup>

The Somali government indicated back in 2009 that it knew who the pirate leaders were, with Somali Prime Minister Sharmarke stating “[t]here is a lot of money flowing in . . . we are following very closely how money is distributed here.”<sup>67</sup> He indicated a need for more resources and the help of the international community to locate and prosecute the pirates.<sup>68</sup> Some U.N. sources indicated in the June 15 report that the key leaders of these pirate organizations, including their locations in Somalia, are already well known; further, the key leaders have political connections.<sup>69</sup> While it is clear that international assistance will be essential in strengthening the ability of the Somali courts to handle piracy cases, there is still concern over whether Somalia’s political figures will actually carry through with the prosecutions and detentions of pirates.

#### IV. HOW DO REGIONAL PARTNERS AND INTERNATIONAL DONORS VIEW THIS PLAN?

To prepare for the June 15 report, the U.N. team met with the Minister for Foreign Affairs and International Cooperation of the United Republic of Tanzania, who expressed Tanzania’s support for hosting an extraterritorial Somali court on its territory.<sup>70</sup> He indicated the need for additional security measures, a Navy ship to defend the coast, and perhaps a few additional facilities around the country to house suspected or convicted pirates.<sup>71</sup> He also sent a letter indicating that the Arusha court should have a mandate to prosecute individuals who provide logistical support, intelligence, and financing for piracy; that the judges should include international and

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65. *Lack of Effective Somali Gov’t*, *supra* note 9; See also Peter Spiegel, *Gates Says Somalia Government is Key to Problem*, THE WALL STREET JOURNAL, Apr. 14, 2009, available at <http://online.wsj.com/article/SB123967368677815883.html> (last visited Feb. 3, 2013).

66. Khalil Senosi, *AP: Somali government knows details on pirates*, USA TODAY, Apr. 16, 2009, [http://www.usatoday.com/news/world/2009-04-16-somalia-pirates\\_N.htm](http://www.usatoday.com/news/world/2009-04-16-somalia-pirates_N.htm) (last visited Feb. 3, 2013).

67. *Id.*

68. *Id.*

69. June 15 Report, *supra* note 8, at 18. Current estimates indicate there are approximately 10–20 financiers, 50 main pirate leaders, approximately 300 leaders of attack groups and another 2,500 pirate foot soldiers. *Id.* at 27; See also Louis Charbonneau, *UN cites reports of govt links to Somalia pirates*, REUTERS, Mar. 18, 2009, available at <http://www.reuters.com/article/2009/03/18/idUSN18379298> (last visited Feb. 3, 2013).

70. June 15 Report, *supra* note 8, at 15.

71. *Id.*

Tanzanian judges as well as Somali for the best experience and diversity; and that the UN should have a clear funding mechanism and funding for the court<sup>72</sup> (presumably having concerns over the proposed “voluntary funding” mechanism).<sup>73</sup> Accordingly, if the Somalis and other regional states decide to move forward and if adequate funding is achieved, Tanzania will willingly contribute to this effort.

Among the other regional states handling piracy cases, the Seychelles indicated its desire to continue with its own national prosecutions of pirates, focusing on leaders and financiers.<sup>74</sup> Additionally, Mauritius supported an extraterritorial court, so long as it was hosted in another state in the region such as Tanzania.<sup>75</sup> No country has appeared to arm wrestle Tanzania for the opportunity to host an extraterritorial Somali court on its territory. Nevertheless, it is likely that countries will continue their own national prosecutions, hopefully with continued assistance from UNODC and others to strengthen their capacity.

International donor nations, who were necessary to fund and support the specialized piracy courts, had split views on the matter. The French and Russian governments fully endorsed the Lang Report.<sup>76</sup> However, the U.S. supported a continuation of the current UNODC court and capacity building programs within Somalia, arguing that this is the most effective way “to meet the Lang report’s goal of a ‘Somalitization’ of the anti-piracy effort.”<sup>77</sup> The U.S. did not support the extraterritorial Somali piracy court due to the opposition within Somalia itself described above and the heavy lift that would be required to establish such a court.<sup>78</sup> However, the U.S.

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72. *Id.* at 16.

73. *Id.* at 25. The ICTR has operated in Tanzania under an “assessed” UN funding mechanism, meaning that the UN member states pay for a portion of the court’s operation as a percentage as their regular UN dues. The more recently established African court, the Special Court for Sierra Leone, operated under a “voluntary” contributions basis, requiring its leadership to spend a significant portion of its time and effort raising money. The June 15 report indicates that for UN-selected judges or prosecutors, Member States could determine that funding for the international component be met using UN assessed contributions, rather than voluntary contributions.

74. *Id.* at 16.

75. June 15 Report, *supra* note 8, at 16.

76. See *Maritime Piracy, Adoption of UNSCR 1918 by the United Nations Security Council*, FRANCE DIPLOMATIE, April 28, 2010, available at <http://www.diplomatie.gouv.fr/en/global-issues/defence-security/organized-criminality/maritime-piracy/article/piracy-adoption-of-unscr-1918-by> (last visited Feb. 7, 2013).

77. David Dunn, Ambassador and U.S. Alternate Representative for Special Political Affairs to the United Nations, Remarks at a Security Council Meeting on Somalia (June 21, 2011), available at <http://usun.state.gov/briefing/statements/2011/166707.htm> (last visited Feb. 7, 2013).

78. *Id.*

would support a dedicated piracy chamber or court in a third country in the region such as in Seychelles or Tanzania, which could apply its own national laws to prosecute pirates captured by the international naval forces.<sup>79</sup> Thus far, the efforts of Seychelles, Kenya, Mauritius, and even Tanzania to prosecute piracy cases or prepare to do so have been significant.<sup>80</sup> A recent U.N. Security Council resolution co-sponsored by India urging establishment of “specialized anti-piracy courts in the region” also had unanimous support.<sup>81</sup>

#### V. WHO TO PROSECUTE?

While not addressed in the original Lang report, the June 15 report raised the question of whether the extraterritorial court would prosecute low-level “foot soldier” pirates or focus instead on high-level financiers/plotters of piracy attacks.<sup>82</sup> The report argued for the latter as a “strategically effective and cost-effective means of supplementing current prosecution efforts.”<sup>83</sup> The unanimous U.N. Security Council Resolution 2015 also supported this idea, calling for prosecution of individuals who “illicitly finance, plan, organize, facilitate, or profit from pirate attacks.”<sup>84</sup> Given the limited capacity of the current Somali system and other national systems prosecuting pirates, it makes sense to focus significant effort on the higher-ups, while continuing current efforts to stabilize Somalia. Given the Somali opposition, the future of an extraterritorial court in Arusha, Tanzania seems unlikely. The domestic Somali courts and other countries willing to prosecute piracy cases should ensure adequate laws are in place to support focused prosecutions on these higher-level individuals.

#### VI. PIRACY ELSEWHERE: DOES THIS EFFORT HELP THE BROADER FIGHT AGAINST PIRACY?

Given the current attention to creation of specialized anti-piracy courts in and around Somalia, it is worth asking what effect, if any, these courts

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79. *Id.*

80. Jan. 2012 Report, *supra* note 1, at ¶ 2.

81. S.C. Res. 2015, at 4, U.N. Doc. S/RES/2015 (Oct. 24, 2011) [hereinafter UNSCR 2015]. See also *UN Security Council Adopts India-co-Sponsored Resolution on Piracy*, THE ECONOMIC TIMES, Oct. 25, 2011, available at [http://articles.economictimes.indiatimes.com/2011-10-25/news/30320119\\_1\\_anti-piracy-piracy-operations-resolution](http://articles.economictimes.indiatimes.com/2011-10-25/news/30320119_1_anti-piracy-piracy-operations-resolution) (last visited Feb. 7, 2013).

82. June 15 Report, *supra* note 8, at 26.

83. *Id.*

84. UNSCR 2015, *supra* note 81; UN Security Council Adopts India-co-Sponsored Resolution on Piracy, *supra* note 81.

will have on piracy occurring in other parts of the world such as the South China Sea and West Africa? This is particularly important when assessing the costs, in light of limited amounts of donor funding, that may be available to fund similar efforts elsewhere. Will this investment help to deter pirate activity in other regions?

There does not appear to be empirical evidence or significant commentary on this issue. It does seem likely that any effort to prosecute pirates will contribute to a greater understanding of the crime itself and successful tactics for prosecution of piracy. The current focused effort to prosecute piracy on land, in the territorial seas of Somalia, and on the high seas off of the coast of Somalia strengthens the principle that there will be accountability for acts of piracy wherever they may occur. Further, these pirates will not be able to seek refuge in destabilized areas. The increased number of nations adopting piracy laws and exercising jurisdiction over piracy cases in this region should encourage similar global efforts in other regions affected by piracy.

Nonetheless, the current level of “tribunal fatigue”<sup>85</sup> over the *ad hoc* war crimes tribunals is a reminder that donors do tire of funding specialized justice mechanisms and efforts. Since dedicated funding and specialized piracy training may have collateral benefits for the local rule of law in Somalia, it further strengthens the case to increase piracy prosecutions in the regular court system. It is difficult to imagine a country more in need of precious rule of law assistance and funding than Somalia, particularly if you believe that the Somali government can be a willing partner in these endeavors.

## VII. CONCLUSION

A stable, economically viable Somalia remains one of the most effective ways to discourage low-level pirates from engaging in this illicit activity. Broader international efforts from the U.N. and elsewhere remain committed to this stabilization plan. However, effective efforts to prosecute pirates for these crimes have been underway in the region and have resulted in more than 1000 pirates being held in twenty countries.<sup>86</sup> This is commendable, and a great step towards strengthening the principle of accountability for acts of piracy wherever they may occur.

The Lang proposal for specialized anti-piracy tribunals may not have been implemented in its entirety, but it stimulated both debate and action on

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85. See Guilfoyle, *supra* note 64, at 98.

86. June 15 Report, *supra* note 8, at 27–28; *Somalia for Anti-Piracy Court Inside Country*, DAWN.COM, June 22, 2011, available at <http://www.dawn.com/2011/06/22/somalia-for-anti-piracy-court-inside-country.html> (last visited Feb. 7, 2013).

the very pressing issue of piracy off of the coast of Somalia. However, since November 21, 2012, the U.N. Security Council has pressed for continued consideration of the establishment of specialized anti-piracy courts.<sup>87</sup> Yet, this term has taken on a new definition of a “court operating under national law, with international assistance and with a focus on the prosecution of piracy offenses.”<sup>88</sup> Given the opposition to Lang’s proposal for specialized anti-piracy courts by the Somali federal and regional government, Lang’s proposal should be morphed into the current efforts to strengthen the capacity of the existing Somalia court system, which this new definition would support. This can be done through mainstreaming piracy in the regular courts, perhaps by creating specialized panels within these courts which are specially trained to handle piracy cases. Existing UNDP and UNODC efforts should be the continuing basis for taking this assistance forward as amplified in the Lang report. The notion of hosting an extraterritorial Somali court in Tanzania or another country should be abandoned due to opposition by the Somali government and the challenges associated with getting it done. Third world country prosecutions should continue with international assistance as they do in countries such as the Seychelles, Mauritius, and Kenya, and consideration of establishing a regional court that could operate under national legislation should remain a viable and attractive alternative. Incredible progress for these courts has occurred in the past several years, which include the establishment of a regional prosecution center in the Seychelles.<sup>89</sup> The U.N. strongly supports all of these efforts.<sup>90</sup> While the challenges associated with prosecuting piracy cases in the region are significant, this “modified” Lang Plan—a plan without specialized courts or an extraterritorial Somali court—offers the best hope for success.

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87. Press Release, Security Council, Unremitting Piracy off Somalia’s Coast Prompts Security Council to Renew ‘Authorizations’ for International Action for Another Year; Resolution Calls for Deployment of Naval Vessels, Arms, Military Aircraft, Presses Somalia to Adopt Counter-Piracy Laws, Declare Exclusive Economic Zone, U.N. Doc. SC/10824 (Nov. 21, 2013).

88. Jan. 2012 Report, *supra* note 1, at ¶ 3.

89. *Id.*

90. *See Id.*

# ANTICIPATORY SELF-DEFENSE AND THE ISRAELI-IRANIAN CRISIS: SOME REMARKS

*Charles J. Dunlap, Jr.\**

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## I. INTRODUCTION

Few contemporary issues of international security are more prominent than the dilemma posed by Iranian efforts to develop a nuclear weapon. For its part, Iran insists that its nuclear program is exclusively for peaceful purposes.<sup>1</sup> Nevertheless, the United Nations, through a number of Security Council and International Atomic Energy Agency (IAEA) actions, has found Iran in breach of its responsibilities.<sup>2</sup> Israel, along with most of the world, is convinced that beyond simply violating IAEA directives, Iran is developing nuclear weapons, and Israel is one of the main, if not *the* main target.<sup>3</sup>

In a September 2012 speech to the United Nations, Israel's Prime Minister, Benjamin Netanyahu, voiced "his fear that Iran would use a nuclear bomb to eliminate his nation."<sup>4</sup> According to Netanyahu, "[b]y next spring, at most by next summer at current enrichment rates, [Iran] will have finished the medium enrichment and move on to the final stage"

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1. *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions in the Islamic Republic of Iran*, Report of the Director, International Atomic Energy Agency, IAEA Doc. GOV/2012/55, para 9, (Nov. 16, 2012), <http://www.iaea.org/Publications/Documents/Board/2012/gov2012-55.pdf> (last visited Feb. 23, 2013).

2. *Id.* §§ A, B, L.

3. See generally, *Iran's Nuclear Program (Nuclear Talks, 2012)*, N.Y. TIMES, Updated Nov. 16, 2012, at A1, available at [http://topics.nytimes.com/top/news/international/countriesandterritories/iran/nuclear\\_program/index.html](http://topics.nytimes.com/top/news/international/countriesandterritories/iran/nuclear_program/index.html) (last visited Feb. 23, 2013) (emphasis added).

4. *At UN General Debate, Israeli Leader Calls for 'Red Line' for Action on Iran's Nuclear Plans*, UN NEWS CENTER, Sept. 27, 2012, <http://www.un.org/apps/news/story.asp?NewsID=43088&Cr=general+debate&Cr1=> (last visited Feb. 23, 2013).

needed to produce a weapon.<sup>5</sup> He said that a “red line should be drawn right here . . . [b]efore Iran gets to a point where it's a few months away or a few weeks away from amassing enough enriched uranium to make a nuclear weapon.”<sup>6</sup>

The United States (U.S.) has long asserted that it will not tolerate a nuclear-armed Iran. President Obama reiterated in October of 2012 his unequivocal declaration that “as long as [he is] president of the United States Iran will not get a nuclear weapon.”<sup>7</sup> Thus, preventing Iran from getting a nuclear weapon appears to be a nonnegotiable cornerstone of the President’s policy. In addition, he points out that Iran has said that it wants to “see Israel wiped off the map” and insists that “if Israel is attacked, America will stand with Israel.”<sup>8</sup>

These plain-spoken pronouncements suggest that the President is prepared to use any means, including military force, to prevent Iran from acquiring a nuclear weapon. That said, while America will “stand with Israel” if it is attacked, it is not clear what precisely the U.S. would do if Israel had not been attacked, *per se*, but nevertheless perceived itself at risk—if, for example, Iran reached the enrichment thresholds that Prime Minister Netanyahu sees as “red lines.”<sup>9</sup> If such red lines are reached, it would seem that Israel, if not the U.S. as well, would advance the military option even if an actual weapon had not been assembled and deployed.

Importantly, the President maintains that a nuclear Iran would be not just a threat to Israel, but also to U.S. national security.<sup>10</sup> But it further appears that, at least for now, he is satisfied with pursuing a “policy of applying diplomatic pressure and potentially having bilateral discussions with the Iranians to end their nuclear program.”<sup>11</sup> He also seems optimistic about the effectiveness of sanctions, as he has argued that Iran’s economy is “in a shambles.”<sup>12</sup> He asserts that:

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5. *Id.*

6. *Id.*

7. 2012 Presidential Debate: President Obama and Mitt Romney’s remarks at Lynn University on Oct. 22, WASH. POST, Oct. 23, 2012 (transcript) (Remarks of President Barack Obama), [http://www.washingtonpost.com/politics/decision2012/2012-presidential-debate-president-obama-and-mitt-romneys-remarks-at-lynn-university-on-oct-22-running-transcript/2012/10/22/be8899d6-1c7a-11e2-9cd5-b55c38388962\\_story.html](http://www.washingtonpost.com/politics/decision2012/2012-presidential-debate-president-obama-and-mitt-romneys-remarks-at-lynn-university-on-oct-22-running-transcript/2012/10/22/be8899d6-1c7a-11e2-9cd5-b55c38388962_story.html) (last visited Feb. 23, 2013) [hereinafter Presidential Debate].

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Presidential Debate, *supra* note 7.

[The administration] organized the strongest coalition and the strongest sanctions against Iran in history, and it is crippling their economy. Their currency has dropped 80 percent. Their oil production has plunged to the lowest level since they were fighting a war with Iraq 20 years ago. So their economy is in a shambles.<sup>13</sup>

While sanctions have certainly harmed the Iranian economy,<sup>14</sup> implementing truly draconian restrictions has proven difficult, as many countries are dependent upon Iranian oil. Accordingly, the U.S. was recently obliged to renew waivers for Iran's top oil buyers,<sup>15</sup> even as Iran continued to defy international mandates. If sanctions fail, and the "red lines" are crossed, the question then arises, what would be the legal basis for taking military action?

Since the establishment of the United Nations, member countries have agreed to forgo the use of force, or threat of the use of force, against another state.<sup>16</sup> There are two exceptions to this prohibition: 1) if the Security Council authorizes military force under Chapter VII of the Charter;<sup>17</sup> or 2) if necessary as an act of self-defense.<sup>18</sup>

As to the Security Council option, it is very unlikely any resolution authorizing a use of force against Iran for the development of a nuclear weapon will be forthcoming. For example, Russian foreign minister Sergei Lavrov indicated to reporters in late October 2012 that Russia will block

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13. *Id.*

14. *See, e.g.,* Farnaz Fassihi and Jay Solomon, *In Iran's Factories and Shops, Tighter Sanctions Exact Toll*, WALL STREET JOURNAL, Jan. 3, 2013, available at <http://online.wsj.com/article/SB10001424127887324595904578120250597512768.html> (last visited Feb. 23, 2013).

15. Timothy Gardner & Roberta Rampton, *U.S. Extends Waivers on Iran Sanctions to India, China*, REUTERS, Dec. 7, 2012, available at <http://www.reuters.com/article/2012/12/07/us-usa-iran-sanctions-idUSBRE8B615M20121207> (last visited Feb. 23, 2013).

16. U.N. Charter art. 2, ¶ 4 provides: "Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

17. *See, e.g.,* U.N. Charter art. 42, which provides:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

18. *See, e.g.,* Jeffrey H. Smith & John B. Bellinger III, *Providing a Legal Basis to Attack Iran*, WASH. POST (Sept. 27, 2012), available at [http://articles.washingtonpost.com/2012-09-27/opinions/35497254\\_1\\_military-force-president-obama-iran](http://articles.washingtonpost.com/2012-09-27/opinions/35497254_1_military-force-president-obama-iran) (last visited Feb. 23, 2013).

any resolution that “could be interpreted as authorizing military action against Iran.”<sup>19</sup> In addition, many observers believe that China would also likely exercise a veto against military action.<sup>20</sup>

As a result, any military action that might be taken against Iran would have to be justified under a theory of self-defense. Article 51 of the UN Charter provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>21</sup>

The obvious problem here is that the Charter seems to require not just the crossing of some “red line” or even the acquisition of a nuclear weapon, but rather an “armed attack.” While Israel has not been the victim of a nuclear attack, at least one commentator insists that Israel has, indeed, been the victim of an “armed attack” attributable to Iran.

Professor Alan Dershowitz of Harvard Law School, argues that Israel already has the legal right to attack Iran by claiming that Iran directed the 1992 attack on Israel’s embassy in Argentina, as well as alleging that more recently, Iran was supplying weapons to Hamas.<sup>22</sup> According to Dershowitz, the “law of war does not require an immediate military response to an armed attack,” and adds, “[t]he nation attacked can postpone its counterattack without waiving its right.”<sup>23</sup>

Professor Dershowitz’s argument is not sustainable as a matter of international law. In the 1986 *Nicaragua* case, the International Court of Justice (ICJ) found that the provision of arms to nonstate actors did not amount to an “armed attack” against the victim nation, and also concluded

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19. *Russia to Veto any UN Motion on Iran*, NOVINITE.COM (Oct. 23, 2012), available at [http://www.novinite.com/view\\_news.php?id=144421](http://www.novinite.com/view_news.php?id=144421) (last visited Feb. 23, 2013).

20. Smith, *supra* note 18.

21. U.N. Charter art. 51.

22. Alan Dershowitz, *Israel Has the Right to Attack Iran’s Nuclear Reactors Now*, HUFFINGTON POST, (Apr. 16, 2011) available at [http://www.huffingtonpost.com/alan-dershowitz/israel-has-the-right-to-a\\_b\\_836764.html](http://www.huffingtonpost.com/alan-dershowitz/israel-has-the-right-to-a_b_836764.html) (last visited Feb. 23, 2013).

23. *Id.*

that even certain kinds of armed clashes (“frontier incidents”) did not qualify either.<sup>24</sup>

In addition, the ICJ made it clear that *necessity* and *proportionality* were essential elements to the exercise of lawful self-defense. Notwithstanding Professor Dershowitz’s claims to the contrary, there is utterly no authority or precedent for the notion that resurrecting a more than twenty-year-old incident involving an embassy attack would sustain a finding of the requisite “necessity” to support a self-defense strike on major nuclear facilities.

Dershowitz offers another rationale. He argues that Iran has “publicly declared war on Israel by calling for it ‘to be wiped off the map.’”<sup>25</sup> Among the problems with this argument is the simple fact that not even the most bellicose of officials in both Israel and Iran are contending that a state of war exists between the nations, notwithstanding the hostility of the rhetoric. Thus, neither the self-defense nor the state of war theory espoused by Professor Dershowitz is sufficiently supported by the facts.

Another legal academic, Anthony D’Amato of Northwestern University, takes a somewhat different tack in arguing the legality of a military operation against Iran.<sup>26</sup> He says that if Iran is constructing nuclear weapons, it is “enough” for him that “Iran says it wants to push the Israelis into the sea.”<sup>27</sup> Under those circumstances, he contends, “it can hardly be said” that Israel and the U.S. would be violating international law if they took the “initiative to block” Iran’s acquisition of a nuclear device. According to D’Amato:

[Action against Iran] can only be preserving international law for future generations . . . . In order to preserve international law we have to defend it once in a while. I think we have to defend it against rogue states or states that have expressed hostile intentions, like Iran and like North Korea. The only reasonable

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24. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 94, (June 27, 2012), available at <http://www.icj-cij.org/docket/index.php?sum=367&code=nus&p1=3&p2=3&case=70&k=66&p3=5> (Last visited Feb. 23 2013).

25. *Experts Mull Legality of Strike on Iran*, WORLD NEWS, (Feb. 23, 2013) available at [http://www.upi.com/Top\\_News/World-News/2012/04/12/Experts-mull-legality-of-strike-on-Iran/UPI-79071334277960/](http://www.upi.com/Top_News/World-News/2012/04/12/Experts-mull-legality-of-strike-on-Iran/UPI-79071334277960/) (Last visited Feb. 23 2013).

26. *Id.*

27. *Id.*

thing to do is to take those weapons out. Remove that threat and the world is going to be safer.<sup>28</sup>

Little in Professor D'Amato's approach aligns with existing understandings of use of force law in the post-UN Charter era. Instead, he appears to embrace the concept of "illegal but justified" to legitimize an attack on Iran. Generally speaking, the "illegal but justified" concept has been raised in the past, especially in the context of humanitarian interventions. However, Professor Anthea Roberts of the London School of Economics points out that even in the often sympathetic setting of a humanitarian crisis, the concept "is ultimately not a sustainable position in international law [because] it will come to be recognized as an exception to the prohibition on the use of force."<sup>29</sup> Such concerns are warranted, as she explains:

The "illegal but justified" approach also shifts the focus away from questions of legality and towards questions of legitimacy. Attempting to completely divorce legality and legitimacy can ossify the law and undermine its relevance, which increases the risk of self-serving exceptionalism. Relying on legitimacy as an independent justification for action is also problematic because legitimacy is underdefined and open to manipulation by powerful actors.<sup>30</sup>

Consequently, advocates of the use of force against Iran must assess the appropriateness of such a course of action not based on the "illegal but justified" theory, but rather within the context of the anticipatory self-defense doctrine.

## II. ANTICIPATORY SELF-DEFENSE

What exactly is meant by anticipatory self-defense? In answering that vital question, it may be helpful to understand what the term does *not* mean. Professor Sean Murphy reminds us that *anticipatory* self-defense is not the

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28. *Id.*

29. Anthea Roberts, *Legality vs Legitimacy: Can Uses of Force be Illegal but Justified?*, in HUMAN RIGHT, INTERVENTION, AND THE USE OF FORCE 212 (P. Alston, E. Macdonald, eds., Oxford University Press, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1518290](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1518290) (last visited Feb. 23, 2013).

30. *Id.*

same as *preemptive* self-defense.<sup>31</sup> He points out that anticipatory self-defense “refers to the use of armed coercion by a state to halt an imminent act of armed coercion by another state (or non-state actor operating from that other state).”<sup>32</sup> Preemptive self-defense, he tells us, is different:

Preemptive self-defense is used to refer to the use of armed coercion by a state to prevent another state (or non-state actor) from pursuing a particular course of action which is not yet directly threatening, but which, if permitted to continue, could result at some future point in an act of armed coercion against the first state.<sup>33</sup>

Action constituting *preemptive* self-defense so defined requires a Security Council resolution. The *anticipatory* self-defense doctrine can, however, justify unilateral action. Authority for anticipatory self-defense is not literally set forth in the text of the U.N. Charter. Indeed, because of the absence of an explicit textual endorsement of anticipatory self-defense, many experts do not accept its legitimacy.<sup>34</sup>

However, as noted above, Article 51 does provide in relevant part that “[n]othing in the present Charter shall impair *the inherent right* of individual or collective self-defence . . . .”<sup>35</sup> Among those that do believe in the legality of anticipatory self-defense, they usually argue it is derived from Article 51’s reference to the “inherent” right of self-defense.

Where is this “inherent” right sourced? Most scholars point to the 1837 *Caroline* incident as the most important event admitting the doctrine.<sup>36</sup> The *Caroline* was a boat used to transport supplies to Canadian rebels. Despite her being moored in U.S. territory, British forces entered the U.S., boarded the vessel, killed an American crewman, set the ship on fire, and sent it over Niagara Falls. In the ensuing diplomatic uproar, the British claimed their action was justified in self-defense. Daniel Webster, then Secretary of State, addressed this claim in a response to the British Ambassador.

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31. Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 703–04 (2005), <http://lsgs.georgetown.edu/programs/nlp/preventivewar/Villanova%20Preemption%20Article%20Final.pdf> (last visited Feb. 23, 2013) (emphasis added).

32. *Id.* at 703.

33. *Id.* at 704.

34. See, e.g., SHIRLEY V. SCOTT, ANTHONY JOHN BILLINGSLEY, & CHRISTOPHER MICHAELSEN, *INTERNATIONAL LAW AND THE USE OF FORCE* 136 (2010) (referencing the “doubtful status of the legality of anticipatory self-defense”).

35. U.N. Charter, at art. 51 (emphasis added)

36. KINGA TIBORI-SZABO, *ANTICIPATORY ACTION IN SELF-DEFENCE* 72–75 (2011).

Webster conceded that a “just right of self-defense attaches always to nations as well as to individuals, and is equally necessary for the preservation of both.” When “clear and absolute necessity” warrants it a state, Webster contends, can use force in self-defense. Moreover, Webster’s further articulation that the necessity for self-defense must be “instant, overwhelming, leaving no choice of means, and no moment for deliberation” has come to define the prerequisites for anticipatory self-defense.<sup>37</sup>

Although some authorities nevertheless continue to claim that “the dominant view amongst states and international lawyers is that anticipatory self-defense is not permissible under international law,”<sup>38</sup> it is difficult to find any state that unequivocally and publicly asserts that it knowingly will forego the opportunity to use force to avert the blow of an armed attack it knows it will imminently and inevitably receive. It may be such blunt reality that prompted the Secretary General of the United Nations to declare in a 2005 report:

Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened.<sup>39</sup>

For its part, the U.S. State Department cited this statement and said “the United States welcomed the report’s . . . recognition of a right of anticipatory self-defense in appropriate circumstances.”<sup>40</sup> As a result, whatever theories or objections academics and others may have, it appears now that most states (albeit not without dispute) accept the legitimacy of anticipatory self-defense.

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37. *Id.* at 75 (sourcing Daniel Webster quotes).

38. See, e.g., James Mulcahy and Charles O. Mahony, *Anticipatory Self-Defense: A Discussion of the International Law*, 2 HANSE L. REV. 231, 233 (2006), available at <http://www.hanselawreview.org/pdf4/Vol2No2Art06.pdf> (last visited Feb. 23, 2013).

39. U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights For All*, ¶ 124, U.N. Doc. A/59/2005 (Mar. 21, 2005).

40. U.S. DEP’T OF STATE, REPORT BY THE SECRETARY OF STATE TO THE CONGRESS FOR THE YEAR 2006, PARTICIPATION IN THE UNITED NATIONS, Part 5, at 138 (2006).

### III. THE QUESTION OF IMMINENCE

The difficulty in applying anticipatory self-defense is determining exactly what “imminent” means, and whether reasonably reliable facts exist in a particular situation to support an imminence finding. The U.S. has long taken a somewhat aggressive interpretation as to this prerequisite of a fully justified act of anticipatory self-defense. In the 2005 version of the U.S.’s official Standing Rules of Engagement (SROE),<sup>41</sup> for example, U.S. forces are permitted to take action in self-defense not only when victimized by a hostile act, but also when faced with “hostile intent.”<sup>42</sup> Hostile intent is defined as:

The threat of imminent use of force against the United States, U.S. forces or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital USG property.<sup>43</sup>

In turn, “imminent use of force” is defined rather expansively. Specifically, the SROE states:

g. Imminent Use of Force. The determination of whether the use of force against U.S. forces is imminent will be based on an assessment of all facts and circumstances known to U.S. forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous.<sup>44</sup>

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41. U.S. ARMY, OPERATIONAL LAW HANDBOOK ch. 5, app. A (2012) [hereinafter OPERATIONAL LAW HANDBOOK] (republished from Chairman of the Joint Chiefs of Staff, Chairman of the Joint Chiefs of Staff Instruction, No. CJCSI 3121.01B, Standing Rules of Engagement(SORE)/Standing Rules for the Use of Force for US Forces (2005)).

42. *Id.* at ¶ 6b(1). The SROE states:  
Self-Defense. Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit. Both unit and individual self-defense includes defense of other U.S. Military forces in the vicinity.

43. *Id.* at ¶ 3f.

44. *Id.* at ¶ 3g.

Nevertheless, although arguably the U.S. is already more flexible on the temporal requirement of the anticipatory self-defense doctrine than other nations, it is possible that it is evolving towards an even more expansive reading. In a 2011 speech, John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, discussed the greater flexibility with respect to the imminence requirement in the context of terrorist threats:

We are finding increasing recognition in the international community that a more flexible understanding of “imminence” may be appropriate when dealing with terrorist groups . . . . Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an “imminent” attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.<sup>45</sup>

Mr. Brennan’s reference to “modern-day capabilities, techniques, and technological innovations” is significant in the context of the terrible potential of nuclear weapons. It is certainly true that these weapons have enjoyed something of a special status in international law. William Boothby points out in his treatise *Weapons and the Law of Armed Conflict* that their use is not governed by the Protocols to the Geneva Conventions<sup>46</sup> that otherwise comprehensively regulate the means and methods of war.<sup>47</sup> Indeed, Boothby notes that other than the Treaty on the Nonproliferation of Nuclear Weapons, no treaty “either prohibits or restricts the development, stockpiling, transfer, possession, or use of such weapons, or threats to use them.”<sup>48</sup>

In its 1996 case about nuclear weapons, the ICJ also seemed to accord them special status. In a lengthy opinion the ICJ generally lambasts the weapons, and concludes that “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable to armed

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45. John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Remarks at the Harvard Law School Program on Law and Security: Strengthening Our Security by Adhering to Our Values and Laws (Sep. 16, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (last visited Feb. 23, 2013).

46. PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF AUG. 12, 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I), art. 57, ¶ 2(b), Dec. 12, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978). Although the U.S. is not a party to Protocol I, parts of it are considered customary international law.

47. WILLIAM H. BOOTHBY, *WEAPONS AND THE LAW OF ARMED CONFLICT*, 215–20 (2009).

48. *Id.* at 220.

conflict, and in particular the principles and rules of humanitarian law.”<sup>49</sup> Yet, the ICJ concedes that the “Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a state would be at stake.”<sup>50</sup>

All of this seems to suggest that the world community recognizes that these weapons are distinctive, and that special considerations apply to them. This might suggest that given their unique potential to put the “very survival of the state” at risk, more flexibility as to the meaning of “imminence” might be applicable where they constitute an existential threat to the target state. As the experience of the U.S. and the Soviet Union militaries during the Cold War amply demonstrates, these weapons can be mated to delivery platforms such as missile systems that are capable of being launched on very short notice. Once launched, it can be extremely difficult or impossible to defend against them.<sup>51</sup>

At the same time it must be recalled that there is “no rule in general international law which prohibits a State from developing and/or possessing nuclear weapons, *per se*.”<sup>52</sup> Moreover, as a matter of international law, it appears that a nuclear weapons program at its very nascent stage does not qualify as an “imminent” threat, even when it may be plain that the developing state may very well intend to use the weapons against another state.<sup>53</sup> This is one reason why Israel’s 1981 attack against Iraq’s Osirak reactor as it was nearing operational status earned universal condemnation—to include that of the United States—in U.N. Security Council Resolution 487<sup>54</sup> despite assertions of self-defense by Israel.<sup>55</sup>

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49. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996, I.C.J. 226 (July 8, 1996).

50. *Id.*; see also BOOTHBY, *supra* note 477, at 221.

51. However, the U.S. and Israel conduct an annual exercise aimed at countering the threat of ballistic missiles. See Jim Garamone, *U.S. Partners with Israel for Exercise Austere Challenge*, AMERICAN FORCES PRESS SERVICE (Oct. 17, 2012), <http://www.defense.gov/news/newsarticle.aspx?id=118239> (last visited Feb. 23, 2013).

52. TOM RUYTS, “ARMED ATTACK” AND ARTICLE 51 OF THE UN CHARTER 359 (2010).

53. Some take a different perspective. One author points out that in a 1981 Congressional hearing concerning the Osirak raid Professor John Norton Moore “noted that the effort to strike the reactor before it went critical must also be taken into consideration and, even if were two to five years before the Iraqis could product a bomb: ‘Then I think that the action might well be legal.’” Lt. Col. Uri Shoham, *The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self-Defense*, 109 MIL. L. REV. 191, 222 (1985) (emphasis in original; citations omitted).

54. S.C. Res. 487, ¶ 36 U.N. SCOR, 36th Sess., 2288th mtg, UN Doc. S/RES/487 (1981).

55. See Shoham, *supra* note 53.

In any event, the best publicly available estimates seem to suggest that Iran would have enough enriched uranium to produce enough “fissile material for 2 nuclear weapons by late 2013 or early 2014.”<sup>56</sup> Of course, merely possessing a nuclear weapon is only part of the process, as there must be a delivery platform. In that regard, Iran’s ballistic missile program may be able to produce a medium-range missile capable of striking Israel, although an intercontinental ballistic missile capable of striking the U.S. seems to be some years distant.<sup>57</sup>

Importantly, however, the mere possession of nuclear weapons and the means of delivering them is not, in any event, alone sufficient to justify an act of anticipatory self-defense, even taking into account the gravity of the nuclear threat. While the facts need not necessarily show that an attack is actually under way as some have argued,<sup>58</sup> and the threat need not be “immediate or instantaneous,” the evidence still must show something more than capability and deep animosity before an attack based on anticipatory self-defense could be legally justified. One need only reference the Cold War between the U.S. and the Soviet Union to appreciate that such conduct can exist for literally decades without an attack occurring.

Discerning the Iranian calculus about the actual use of a nuclear device, especially in the face of official denials of any intent to acquire the weapons, is difficult. Still, there is no reason to assume Iran will fail to take into account Israel’s military capabilities in the decision-making process. This is especially so when experts estimate that with “80 or 90” nuclear weapons—along with the missiles, planes, and submarines to deliver them—Israel has an overwhelming advantage in terms of its nuclear capability.<sup>59</sup> Quite obviously, for the foreseeable future Israel would be able to deliver a crushing retaliatory blow in the event the Iranians chose to use the one or two weapons it is believed they might be able to acquire by 2014. Even rogue regimes that possess nuclear weapons recognize the risk to their existence posed by powers with a vastly superior arsenal, and exercise restraint accordingly.<sup>60</sup> In short, the required element of

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56. Maseh Zarif, *The Iranian Nuclear Program: Timelines, Data, and Estimates V5.0*, AEI IranTracker, Nov. 23, 2012, available at <http://www.irantracker.org/nuclear-program/zarif-timelines-data-estimates-november-23-2012>.

57. See generally, STEVEN A. HILDRETH, CONG. RESEARCH SERV., R42849, *IRAN’S BALLISTIC MISSILE AND SPACE LAUNCH PROGRAMS* (2012).

58. See, e.g., YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE 190–92* (4th ed. 2005) (discussing “interceptive self-defense”).

59. Eric Niiler, *What’s Up With Israel’s Nukes Nuclear Program*, DISCOVERY NEWS, Oct 4, 2012, <http://news.discovery.com/tech/israel-iran-nuclear-weapons-121004.html> (last visited Feb. 23, 2013).

60. North Korea would be an example of this phenomenon.

imminence to support the necessity for an anticipatory self-defense attack does not appear to currently exist.

#### IV. ANTICIPATORY COLLECTIVE SELF-DEFENSE

Even if one is among those who accept the legitimacy of anticipatory self-defense, and also further believes that sufficient facts exist to support an imminent threat to Israel, there is nevertheless the additional question as to whether anticipatory *collective* self-defense is extant in international law. In other words, to what extent can America “stand with Israel” where the threat of Iranian attack does not directly imperil the U.S.? Again, the text of Article 51 of the U.N. Charter provides no specific authority. Rather, it confines collective self-defense to circumstances where an armed attack has already occurred. Accordingly, if anticipatory *collective* self-defense exists at all, it must—like anticipatory self-defense itself—be contained within the “inherent” concept of self-defense.

Professor George Walker argues forcefully that it does.<sup>61</sup> In his seminal 1998 article, Walker asserts that the “concept of anticipatory collective self-defense has existed for nearly two centuries, including the fifty years during which the Charter has been in force, and this form of joint response by states appears to have attained the status of a customary norm.”<sup>62</sup> Indeed, Walker contends that the self-defense right the U.N. Charter negotiators intended as “inherent” in Article 51 “included a right to anticipatory collective self-defense.”<sup>63</sup>

Most scholars who accept the legitimacy of anticipatory self-defense seem to agree. For example, the *Tallinn Manual on the International Law of Cyber Warfare*,<sup>64</sup> a document produced by an international group of experts, explicitly provides for both anticipatory self-defense<sup>65</sup> and collective self-defense.<sup>66</sup> Regarding collective anticipatory self-defense, the commentary to Rule 16 provides: “Both the victim-State *and the State providing assistance* must be satisfied that there is an *imminent* (Rule 15) or on-going armed attack.”<sup>67</sup> In short, a non-victim state may provide

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61. See generally George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INT’L L.J. 321 (1998).

62. *Id.* at 324–25.

63. *Id.* at 351–52.

64. NATO COOPERATIVE CYBER DEFENCE CENTRE OF EXCELLENCE, THE TALLINN MANUAL ON THE INTERNATIONAL LAW OF CYBER WARFARE, (Michael N. Schmitt ed., 2012), available at <http://www.ccdcoe.org/249.html> (last visited Feb. 23, 2013).

65. *Id.* at Rule 15.

66. *Id.* at Rule 16.

67. *Id.* (emphasis added).

assistance to a victim as long as an attack is *imminent*—a clear endorsement, it seems, of collective anticipatory self-defense.

More broadly, Dr. Kinga Tibori-Szabo, author of the recent treatise *Anticipatory Action in Self-Defense*, opines:

[T]here is no (modern-time) instance of state practice for collective anticipatory self-defense, so we cannot talk about an *explicit* "customary right" to collective anticipatory self-defense. That does not mean, however, that there could not be a lawful exercise of such a right. Customary law acknowledges collective self-defense as well as anticipatory self-defense . . . . The collective nature of the anticipatory action should not bear on its legality.<sup>68</sup>

Additionally, Mr. Hays Parks, one of the world's leading law of armed conflict experts, likewise concludes that a right of collective anticipatory self-defense exists in international law, and points to the U.S. Standing Rules of Engagement as an expression of that view.<sup>69</sup> Those rules provide:

Collective Self-Defense. Defense of designated non-U.S. military forces and/or designated foreign nationals and their property from a hostile act *or demonstrated hostile intent*. Only the President or SecDef may authorize collective self-defense.<sup>70</sup>

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68. E-mail from Dr. Kinga Tibori-Szabo to Charles J. Dunlap, Jr., Professor of Law Duke University School of Law (Sept. 26, 2012, 3:36 PM EST) (on file with author). Dr. Tibori-Szabo's full commentary is as follows:

[T]here is no (modern-time) instance of state practice for collective anticipatory self-defense, so we cannot talk about an *explicit* "customary right" to collective anticipatory self-defense. That does not mean, however, that there could not be a lawful exercise of such a right. Customary law acknowledges collective self-defense as well as anticipatory self-defense.

According to the majority opinion, collective self-defense, as such, only requires an armed attack against one state. If other states wish to aid the attacked state in exercising self-defense, they can do so, as long as the attacked state agrees.

The same reasoning should apply in case of anticipatory self-defense. If a state considers, on the basis of the available information (interpreted in good faith) that it is the object of an imminent attack, it could use its window of opportunity to request help from its allies.

The legality of such an endeavour would thus depend on meeting the requirements of anticipatory self-defense by the state that feels in danger. The collective nature of the anticipatory action should not bear on its legality.

69. OPERATIONAL LAW HANDBOOK, *supra* note 41, at ch. 5 app. A.

70. *Id.* ¶ 3c (emphasis added).

Thus, from the American perspective, U.S. forces can act in collective anticipatory self-defense if the designated foreign entity faces *demonstrated hostile intent*, and the President or the Secretary of Defense authorizes it.

Still, some scholars disagree, and not just those who believe that anticipatory self-defense does not exist at all in the post-Charter era. Professor Scott Silliman of Duke Law School, maintains that while an inherent right to anticipatory self-defense can be fairly read into Article 51, *collective* anticipatory self-defense cannot.<sup>71</sup> Because the *Caroline* case, the formative event of the concept of anticipatory self-defense, did not have a collective element, it cannot be said, he maintains, that there is any *inherent* right to collective anticipatory self-defense.<sup>72</sup>

#### V. CONCLUDING OBSERVATIONS

As this brief examination illustrates, there do not yet appear to be adequate facts to support the legality of a strike on Iran, either from constructs that allege that an armed attack against Israel has already occurred, or from the perspective of anticipatory self-defense. An even more puzzling question is what legal authority President Obama would rely upon to authorize a strike against Iranian facilities in the event Iran acquired a nuclear weapon (or was about to do so), yet did not act in a manner that demonstrated intent to actually launch an attack. Again, the mere possession of a weapon is not, *ipso facto*, violative of international law in a way that would authorize the use of force.

Additionally, though beyond the scope of this essay, it is relevant to note that many—if not most—authorities question whether a use of force that complies with the dictates of anticipatory self-defense law—that is, it is proportionate and discriminate—would have anything more than a “limited chance of operational success.”<sup>73</sup> Yet it is also true that airstrikes, for example, do appear to have something of a record of success. In his book about the Iraq War, Thomas Ricks reports that experts believe that the U.S.’s 1998 airstrikes against Iraq’s weapon’s development facilities effectively ended their ambition to acquire nuclear arms.<sup>74</sup>

Regardless, if force is eventually used, it will be vitally important for the U.S. and Israel to have not only firm legal grounds conceptually, but also a clear, *publicly disclosable* set of supporting facts. Given the terrifying potential of nuclear weapons, Israel’s tragic history of the

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71. E-mail from Professor Scott Silliman to Charles J. Dunlap, Jr., Professor of Law Duke University School of Law (Sept. 24, 2012, 6:41 PM EST) (on file with author).

72. *Id.*

73. Ruys, *supra* note 52, at 363.

74. THOMAS RICKS, *FIASCO*, 20–22 (2006) (citing David Kay).

Holocaust, as well as Iran's inflammatory—and profoundly unwise—pronouncements challenging Israel's right to exist, the world may be ready to accept an aggressive interpretation of what constitutes an imminent threat of an actual attack, but the absence of *any* such evidence would likely be found unacceptable.

In a world in which the spread of technology permits a growing number of nations to wreak terrible destruction on an opponent, it is more important than ever to insist upon observance of the law, especially when doing so is the best hope of preventing the unnecessary use of force and all the unintended consequences it can entail.<sup>75</sup> It is not in either Israel's or the United States' interest to take any actions that would undermine the rule of law. To date, the legal case justifying a strike has yet to be made.

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75. See, e.g., Zbigniew Brzezinski, *Iran Should Be Key Topic at Hearings*, WASH. POST, Jan. 3, 2013, [http://www.washingtonpost.com/opinions/zbigniew-brzezinski-iran-should-be-key-topic-at-senate-hearings/2013/01/03/5dbc3324-5519-11e2-8b9e-dd8773594efc\\_story.html](http://www.washingtonpost.com/opinions/zbigniew-brzezinski-iran-should-be-key-topic-at-senate-hearings/2013/01/03/5dbc3324-5519-11e2-8b9e-dd8773594efc_story.html). Brzezinski writes that “five potential implications for the United States of an additional and self-generated war deserve close scrutiny”:

How effective are U.S. military strikes against Iranian nuclear facilities likely to be, with consequences of what endurance and at what human cost to the Iranian people?

What might be Iran's retaliatory responses against U.S. interests, and with what consequences for regional stability? How damaging could resulting instability be to European and Asian economies?

Could a U.S. attack be justified as in keeping with international standards, and would the U.N. Security Council—particularly China and Russia, given their veto power—be likely to endorse it?

Since Israel is considered to have more than 100 nuclear weapons, how credible is the argument that Iran might attack Israel without first itself acquiring a significant nuclear arsenal, including a survivable second-strike capability, a prospect that is at least some years away?

Could some alternative U.S. strategic commitment provide a more enduring and less reckless arrangement for neutralizing the potential Iranian nuclear threat than a unilateral initiation of war in a combustible regional setting?

# THE POWERS OF CONGRESS AND THE PRESIDENT ON MATTERS THAT AFFECT U.S. FOREIGN AFFAIRS

*Malvina Halberstam\**

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## I. INTRODUCTION

The subject of this Panel<sup>1</sup> is the authority of Congress and the President on matters that affect foreign affairs, when they disagree. The question arose in a case argued in the Supreme Court last term, *Zivotofsky v. Clinton*.<sup>2</sup> Under U.S. law, Consulates in foreign countries are required to issue a U.S. passport and Consular Report of Birth Abroad (CRBA) for children born abroad to parents who are U.S. citizens.<sup>3</sup>

Generally, those documents list the country of birth. However, for children born in Jerusalem, the State Department manual instructs

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1. A version of this paper was presented on October 26, 2012, at a Panel on Legislative and Executive Authority when Congress & the President Disagree on Matters that May Affect Foreign Affairs: *Clinton v. Zivotofsky*, at International Law Weekend, held in New York City, October 25–27, 2012. The four members of the Panel were Bill Dodge, who served as Counselor on International Law while the case was in the Supreme Court, and is a professor at the University of California, Hastings College of Law; Paul Stephan, who served as Counselor during 2006–07 and is a professor at the University of Virginia Law School, Nathan Lewin, who has represented the petitioners in this case pro bono since the inception of the case, in September of 2003, and continues to do so, and the author.

2. *Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012).

3. 22 C.F.R. § 50.2.

Consulates to enter “Jerusalem,” rather than Israel, as the place of birth.<sup>4</sup> In 2002, Congress adopted a law requiring the Consulate to enter “Israel” for children born in Jerusalem, if the parents so request.<sup>5</sup>

The *Zivotofsky* case involves an action by U.S. parents of a child born in Jerusalem whose request that the passport and Consular Report of Birth Abroad list Israel as the place of birth was refused by the U.S. Consul.<sup>6</sup> The Court of Appeals for the D.C. Circuit ordered the action dismissed.<sup>7</sup> Two judges did so on the ground that it raised a political question.<sup>8</sup> One judge did not agree that it was a political question, but concurred on the ground that the legislation unconstitutionally infringed on the President’s power to recognize foreign sovereigns.<sup>9</sup>

The Supreme Court granted *certiorari*.<sup>10</sup> Moreover, even though the petition for *certiorari* raised only the political question issue, the Court directed the parties to also address whether the statute “impermissibly infringes the President’s power to recognize foreign sovereigns.”<sup>11</sup>

The case was argued in the Supreme Court on November 7, 2011.<sup>12</sup> Most of the questions by the Justices focused on the constitutional authority of Congress to adopt the legislation. The Court did not decide that question, however. It held eight to one that it was not a political question,<sup>13</sup> but remanded the case to the lower court for a decision on the question it had asked the parties to address, stating:

Because the District Court and the D.C. Circuit believed that review was barred by the political question doctrine, we are

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4. Dept. of State, 7 Foreign Affairs Manual § 1360, Exh. 1383.1, App. 127; *see also id.*, §§ 1360.1, 1360.5-4, .5-5, .5-6, App. 106, 108-10.

5. Foreign Relations Authorization Act, Fiscal Year 2003, § 214, 107 Pub. L. No. 228, 116 Stat. 1350 (2002).

6. *Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1425-26 (2012).

7. *Zivotofsky v. Secretary of State*, 571 F.3d 1227 (2009). The case was initially brought in the D.C. District Court, which dismissed the complaint on the grounds that *Zivotofsky* lacked standing and that his complaint presented a nonjusticiable political question. *See Zivotofsky v. Secretary of State*, 2004 U.S. Dist. LEXIS 31172 at 9-10 (2004). The Court of Appeals for the D. C. Circuit reversed, concluding that *Zivotofsky* did have standing and remanded the case to the District Court. *See Zivotofsky v. Secretary of State*, 444 F.3d 614, 619 (2006). The District Court dismissed the complaint again on the ground that it presented a political question. *See Zivotofsky v. Clinton*, 511 F. Supp. 2d 97, 103 (2007). The D. C. Circuit affirmed. *See Zivotofsky*, 571 F.3d at 1232-33.

8. Judges Griffith and Williams. *See Zivotofsky*, 571 F.3d at 1233.

9. Judge Edwards. *See Zivotofsky*, 571 F.3d at 1240, 1245.

10. *Zivotofsky v. Clinton*, 131 S.Ct. 2897 (2011), *cert. granted*, 79 U.S.L.W. 3344, (U.S. May 2, 2011) (No. 10-699).

11. *Id.*

12. Official Transcript of Oral Argument, *Zivotofsky*, 132 S.Ct. at 1421.

13. *Id.*

without the benefit of thorough lower court opinions to guide our analysis of the merits.<sup>14</sup>

The case is now again before the Court of Appeals for the D.C. Circuit.<sup>15</sup>

## II. THE CONSTITUTION DOES NOT GIVE THE PRESIDENT THE POWER TO CONDUCT FOREIGN AFFAIRS

The proposition that under the U.S. Constitution the President has the sole power to conduct foreign affairs has become almost axiomatic. When I ask students in my Constitution and Foreign Affairs class “in whom does the Constitution vest the power to conduct foreign affairs,” they invariably respond, year after year, “the President.” When I ask them which clause in the Constitution so provides, they are amazed to discover that there is no such clause. The press routinely refers to the position of the President on foreign affairs matters as the position of United States government, even when Congress has enacted legislation taking a contrary position,<sup>16</sup> as does

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14. *Id.* at 1430.

15. *Zivotofsky*, 132 S.Ct. at 1421, *on remand* No. 07-5347, (D.C. Cir. 2012). It was argued on March 19, 2013, before a panel of the D.C. Court of Appeals.

16. *See, e.g.*, Section 3 of the Jerusalem Embassy Act of 1995, 104 Pub. L. No. 45, 109 Stat. 398 (1995), adopted by a vote of 93 to 5 in the Senate, 141 CONG. REC. D 1242-02 (daily ed. Oct. 24, 1995), and 374 to 37 in the House of Representatives, 141 CONG. REC. H 10680 (daily ed. Oct. 24, 1995), stating:

(a) Statement of the Policy of the United States.

(1) Jerusalem should remain an undivided city in which the rights of every ethnic and religious group are protected;

(2) Jerusalem should be recognized as the capital of the State of Israel; and

(3) the United States Embassy in Israel should be established in Jerusalem no later than May 31, 1999.

(The Act includes a waiver provision permitting the President to postpone moving the embassy if he believes it would threaten U.S. National Security to do so). Section 214 of the Foreign Relations Authorization Act of 2002, 107 Pub. L. No. 228, 116 Stat. 1350 (2002), entitled *United States Policy with respect to Jerusalem as the Capital of Israel*, provides in subsection (c): “none of the funds authorized to be appropriated by this Act may be available for the publication of any official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel.” Yet, newspapers continue to refer to the President’s position that the status of Jerusalem should be determined by negotiations as “U.S. policy” or as the “U.S. Government position.” *See Supreme Court: Judges Can Rule on Passport Law*, CHIC. TRIB., March 27, 2012 (The U.S. has long taken the position that sovereignty over Jerusalem . . . must be resolved by negotiations . . .); *Justices Find Pile of Issues in Passport Case*, WASH. POST, Nov. 8, 2011 (the official U.S. policy of neutrality over sovereignty of the holy city). *Party to Vote on Sharon’s Proposal to Leave Gaza: Plan Would Withdraw Settlers and Troops*, WASH. POST, April 12, 2004 (past and current U.S. policy . . . holds that . . . the status of Jerusalem . . . should be resolved only in direct negotiations between the Israelis and the Palestinians); *Arabs Rip New U.S. Law on Jerusalem*, N.Y. POST, Oct. 2, 2002 (“official

the President,<sup>17</sup> and as do the Department of Justice briefs in this case.<sup>18</sup> What is the scope of the President's power in foreign affairs when he and Congress disagree? Is the position of the President the "official position" of the United States, even when it's contrary to a statute?

Although it has been stated by commentators, the Restatement of U.S. Foreign Relations Law<sup>19</sup> and judicial decisions, including decisions of the Supreme Court, that the President has the exclusive power of recognition, and, even more broadly, the sole power to represent the U.S. in relations with foreign countries, the Constitution does not explicitly vest those powers in the President. Indeed, there is no mention in the Constitution of recognition or of foreign affairs.

### III. THE CONSTITUTION GIVES CONGRESS MOST OF THE POWERS THAT AFFECT FOREIGN AFFAIRS

The Constitution does provide for the exercise of a number of powers that may affect the conduct of foreign affairs. Some of these powers are vested in Congress, others in the President acting with the advice and consent of the Senate. None are vested in the President alone. Congress has the power to declare war,<sup>20</sup> to regulate foreign commerce,<sup>21</sup> to oversee immigration and naturalization,<sup>22</sup> and to define and punish piracy and other

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U.S. policy is that the status of Jerusalem should be worked out in negotiations between Israelis and Palestinians").

17. After signing the Foreign Relations Authorization Act of 2002, *supra* note 5, which includes a provision titled "United States Policy with Respect to Jerusalem as the Capital of Israel," and states in section 214(c), "[n]one of the funds authorized to be appropriated by this Act may be available for the publication of any official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel" (emphasis added), the President reportedly said, "U.S. policy on Jerusalem 'has not changed.' That means the U.S. still officially sees Jerusalem as a 'permanent-status issue' to be negotiated between the Israelis and the Palestinians in a final peace accord." See also *Although Bush Says He Doesn't Recognize the Provision, the New US Law Is Sure to Upset Arabs*, CHRIST. SCI. MONIT., Oct 2, 2002.

18. See Brief for the Respondent at 2, *Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012) (No. 10-699) ("for the last 60 years, the United States consistent policy has been to recognize no State as having sovereignty over Jerusalem"); see Brief for the Appellee at 3, 50, *Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012) *on remand* No. 07-5347 (D.C. Cir., Oct. 10, 2012) ("for the last 60 years, the United States policy has been to take no official act recognizing Israel's . . . claim to sovereignty over Jerusalem"). It is apparently the position of the Justice Department that laws enacted by Congress are not official acts of the United States.

19. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 204 (1987).

20. U.S. CONST. art. I, § 8.

21. U.S. CONST. art. I, § 8.

22. U.S. CONST. art. I, § 8.

offences against the law of nations.<sup>23</sup> The President has the power to make treaties and to appoint ambassadors, but both require the advice and consent of the Senate.<sup>24</sup> As Harold Koh, former Dean of Yale Law School and presently the Legal Advisor to the State Department, wrote, “Article I gives Congress almost all the enumerated powers over foreign affairs and Article II gives the President almost none . . . .”<sup>25</sup>

Nowhere does the Constitution vest any power involving foreign affairs exclusively in the Executive. The only function of the President touching on relations with other States referred to in the Constitution that does not require Senate advice and consent is receiving ambassadors. This was clearly not intended as a grant of power. As Professor Henkin noted, receiving ambassadors is not in section two of Article II, which states “[h]e shall have the *power* to . . . ,” but in section three, which states, “[h]e shall receive ambassadors and other public ministers . . . ,”<sup>26</sup> with no mention of “power.”<sup>27</sup> Had the provision on receiving ambassadors been intended as a grant of power, it would have been logical to include it in section two.<sup>28</sup> The drafters of the Constitution did not do so.

Receiving ambassadors was not viewed as an exercise of power by the framers; it was considered a ministerial function.<sup>29</sup> Hamilton, Madison, and Jefferson all interpreted the receiving ambassadors clause not as a source of power but as a ministerial and ceremonial function.<sup>30</sup>

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23. U.S. CONST. art. I, § 8.

24. U.S. CONST. art. II, § 2 (The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, . . . and by and with the Advice and Consent of the Senate, shall appoint Ambassadors.).

25. Harold Hongju Koh, *Why the President Almost Always Wins in Foreign Affairs*, THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 158, 159 (David Gray Adler & Larry N. George eds., 1996).

26. U.S. CONST. art. II, § 3.

27. See LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 37–38 (2d ed. 1996) (emphasis added).

28. That is, section two would have provided: “He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . ; and he shall receive Ambassadors.”

29. See Robert Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 47 UNIV. RICH. L. REV. 801 (2010); David Gray Adler, *The President’s Recognition Power*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 133–57 (David Gray Adler and Larry N. George eds., 1996); David Gray Adler, *The President’s Recognition Power: Ministerial or Discretionary?* Presidential Studies Quarterly, 267, 268 (1995) (“the reception of ambassadors was understood as a routine, mechanical function, an almost dutiful act devoid of discretion . . .”).

30. *Id.*

Thus, Hamilton wrote, “[i]t is a circumstance that will be *without consequence* in the administration of the government.”<sup>31</sup> Madison wrote:

[L]ittle if anything more was intended by the clause, than to provide for a particular mode of communication, almost grown into a right among modern nations; by pointing out the department of the government most proper for the ceremony of admitting public ministers, of examining their credentials, and of authenticating their title to privileges annexed to their character by the law of nations . . . . That being the apparent design of the Constitution, it would be highly improper to magnify the function into an important prerogative, even where no rights of other departments could be affected by it.<sup>32</sup>

Although a recent Supreme Court decision refers to the President’s “exclusive” power of recognition,<sup>33</sup> earlier decisions of the Court, including one by Chief Justice Marshall, viewed it as a power shared by Congress and the President.<sup>34</sup> For example, in *Jones v. United States*, the Court said:

Who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political, question, the determination of which by the *legislative* and *executive* departments of any government conclusively binds the judges . . . .<sup>35</sup>

In the view of such prominent commentators as Story and Rawle, Congress not only has power of recognition but its power supersedes that of the President. In his *Commentaries on the Constitution of the United States*, Story wrote:

If such [executive] recognition is made, it is conclusive upon the nation, unless indeed it can be reversed by an act of Congress repudiating it. If, on the other hand, such recognition has been refused by the executive, it is said, that Congress may,

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31. The Federalist No. 69 (Alexander Hamilton) (the real character of the executive) (emphasis added). In the debates over the Neutrality act, Hamilton took a contrary position. See Alexander Hamilton, Pacificus No. 1 (June 29, 1793), reprinted in *The Papers of Alexander Hamilton* 33, 41 (Harold C. Syrett et al. eds., 1969).

32. Adler, *supra* note 29 (quoting James Madison, Helvidius III., available at [http://forquignon.com/history/american/constitution/helvidius\\_iii.htm](http://forquignon.com/history/american/constitution/helvidius_iii.htm)) (last visited July 31, 2013).

33. See *Sabatino* *infra* notes 48–49; see also *infra* text accompanying note 50.

34. See *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818) (issues affecting recognition are “rather political than legal in their character” and “belong more properly to those who declare what the law shall be” 16 U.S. (3 Wheat.) at 34).

35. *Jones v. United States*, 137 U.S. 202, 212 (1890) (emphasis added).

notwithstanding, solemnly acknowledge the sovereignty of the nation . . . .<sup>36</sup>

William Rawle took the same position. He wrote:

The legislature indeed possesses a superior power, and may declare its dissent from the executive recognition or refusal, but until that sense is declared, the act of the executive is binding.<sup>37</sup>

#### IV. THE SUPREME COURT DECISIONS CITED IN SUPPORT OF THE PRESIDENT'S BROAD, EVEN EXCLUSIVE, POWER IN FOREIGN AFFAIRS DID NOT INVOLVE A CONFLICT BETWEEN CONGRESS AND THE PRESIDENT

Several Supreme Court decisions speak of the President's "power"—sometimes "exclusive power"—to conduct foreign affairs. However, none of these cases involved a conflict between Congress and the President. The broadest assertion of executive power over foreign affairs is in *Curtiss-Wright*.<sup>38</sup> Justice Sutherland, writing for the Court, stated:

[T]he President alone has the power to speak or listen as a representative of the nation . . . . The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.<sup>39</sup>

However, in that case, there was no conflict between the power of Congress and that of the President. On the contrary, Congress delegated power to the President and the question before the Court was whether that delegation was constitutional. Under Justice Jackson's analysis in *Youngstown*,<sup>40</sup> this is the strongest case for the exercise of executive power because the President is acting with Congress. As Justice Jackson stated:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate . . . . If his act is held unconstitutional

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36. Joseph Story, *Commentaries on the Constitution of the United States*, § 1560 (Boston 1833).

37. William Rawle, *A View of the Constitution of the United States of America* (AVC United States, at 96 (Phillip H. Nicklein 2d ed. 1829)).

38. *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936).

39. *Id.* at 319.

40. *See Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

under these circumstances, it usually means that the Federal Government as an undivided whole lacks power . . . .<sup>41</sup>

Moreover, even the broad language in *Curtiss-Wright* did not state that the President has exclusive power over matters that affect foreign affairs, only that “the President alone has the power to speak or listen as a representative of the nation.”<sup>42</sup> As Justice Scalia emphasized in questioning the Solicitor General during oral argument in this case:

[T]o be the sole instrument and to determine the foreign policy are two quiet different things. He’s the instrument, but there is certainly room in those many cases for saying that Congress can say . . . what the country’s instrument is supposed to do.<sup>43</sup>

In *United States v. Belmont*<sup>44</sup> and *United States v. Pink*,<sup>45</sup> the Court sustained the President’s power to settle claims in conjunction with United States recognition of the Soviet Union. Here, again, there was no conflict with Congress. Congress has long delegated to the President, either explicitly or implicitly, the power to settle claims against foreign states.<sup>46</sup> The conflict was with a state law. The Court stated in *Belmont*:

[The] complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.<sup>47</sup>

The opinions in *Curtiss-Wright* and *Belmont* were written more than a half century ago by the same Justice (Sutherland).

In dicta in *Sabbatino*,<sup>48</sup> Justice Harlan stated that “political recognition is exclusively a function of the Executive.”<sup>49</sup> That case also did not involve

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41. *Id.* at 635–36.

42. *Curtiss-Wright*, 299 U.S. at 319.

43. Official Transcript of Oral Argument at 39, *Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012) (No. 10-699).

44. *United States v. Belmont*, 301 U.S. 324 (1937).

45. *United States v. Pink*, 315 U.S. 203 (1942).

46. See *Medellin v. Texas*, 552 U.S. 491, 531 (2008) (“making executive agreements to settle claims of American nationals against foreign governments is a particularly long-standing practice”) (quoting *Am. Ins. Ass. v. Garamendi*, 539 U.S. 396, 415 (2003)); *Dames and Moore v. Regan*, 453 U.S. 654 (1981).

47. *Belmont*, 301 U.S. at 331 (citations omitted).

48. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

49. *Id.* at 410.

any conflict between Congress and the Executive. Rather, it involved application of the “Act of State” doctrine to enforce a Cuban law even though it violated international law. The Court reasoned that failure to apply the Cuban law might embarrass the Executive in the conduct of foreign affairs. However, when, following that decision, Congress adopted legislation (the Hickenlooper Amendment)<sup>50</sup> providing that the Act of State Doctrine should not be applied if the foreign act violates international law, the Court of Appeals applied the statute in that very case.<sup>51</sup> No one suggested that the legislation unconstitutionally infringed on the President’s power of recognition or the power to conduct foreign affairs.<sup>52</sup>

Notwithstanding dicta in decisions of the Supreme Court referring to the President’s broad power over foreign affairs and to his power of recognition as “exclusive,” the Court has never held that the President’s power cannot be limited by Congress exercising its constitutional powers. When executive action conflicts with congressional action, the power of the President is at its lowest. In the words of Justice Jackson:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can only rely upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.<sup>53</sup>

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50. 22 U.S.C. § 2370(e)(2).

51. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967).

52. Perhaps the strongest recent statement of broad executive power in foreign affairs, specifically referring to the President’s power to recognize foreign governments, is in Justice Thomas’ dissenting opinion in *Hamdan v. Rumsfeld*, 548 U.S. 557, 679 (2006). It is clear, however, that in his view this broad executive power exists only when Congress fails to act. He said:

Congress, to be sure, has a substantial and essential role in both foreign affairs and national security . . . [but] Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act, . . . [s]uch failure of Congress . . . does not, especially . . . in the areas of foreign policy and national security, imply congressional disapproval of action taken by the Executive.

*Id.* (internal quotations omitted).

53. *Youngstown Sheet and Tube Co.*, 343 U.S. at 637.

V. JUSTICE JACKSON'S ANALYSIS IN *YOUNGSTOWN STEEL* SHOULD  
APPLY TO FOREIGN AFFAIRS

The Supreme Court has never decided which branch has power over matters that affect foreign affairs when Congress and the President disagree. It is suggested that Jackson's famous analysis in *Youngstown* should apply. That is, when Congress and the President agree, as in *Curtis-Wright*,<sup>54</sup> the question of which branch has the power does not arise. When Congress is silent, the President may act by default, as in *Belmont*<sup>55</sup> and *Pink*.<sup>56</sup> But, when Congress legislates on a subject over which the Constitution vests power in Congress, such legislation does not become unconstitutional because it affects foreign affairs.

In an article entitled *Why the President Almost Always Wins in Foreign Affairs*,<sup>57</sup> Koh says,

First, and most obviously, the president has won because the executive branch has taken the initiative in foreign affairs and has done so by construing laws designed to constrain his actions as authorizing them. Second, the president has won because, for all its institutional activity, Congress has usually complied with or acquiesced in what he has done, because of legislative myopia, inadequate drafting, ineffective legislative tools, or sheer lack of political will. Third, the president has won because the federal courts have usually tolerated his acts, either by refusing to hear challenges to those acts or by hearing the challenges and then affirming his authority on its merits.<sup>58</sup>

In this case, Congress has not "acquiesced in what the President has done."<sup>59</sup> Congress has adopted legislation requiring the State Department to change its rules with respect to passports for children born to U.S. citizens in Jerusalem. However, in an action to implement that legislation, the District Court<sup>60</sup> and two Court of Appeals judges "refus[ed] to hear challenges"<sup>61</sup> to the President's acts and one "affirm[ed] presidential authority on its merits,"<sup>62</sup> the judicial approach described and criticized by Koh as the third reason why the President almost always wins in foreign

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54. *Curtiss-Wright Export Co.*, 299 U.S. at 304.

55. *Belmont*, 301 U.S. at 324.

56. *Pink*, 315 U.S. at 203.

57. Koh, *supra* note 25.

58. *Id.*

59. *See id.*

60. *See* sources cited in note 7, *supra*.

61. *See id.*

62. *See id.*

affairs. Ironically, as Legal Advisor, Koh urged the Supreme Court to do exactly that in this case.<sup>63</sup>

#### VI. CONCLUSION

The Supreme Court reversed eight to one the lower court's refusal to hear the case. But, even though the Court had requested the parties to address the merits, and much of the oral argument focused on that, the Court declined to decide it, saying it did not have "the benefit of . . . lower Court opinions" to guide its analysis on the merits.<sup>64</sup>

I think it is regrettable that the Court failed to address the question of legislative and executive authority on matters that affect foreign affairs. It is a question of utmost importance today, and one on which commentators and courts look for guidance to dicta in Supreme Court decisions written some seventy years ago.

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63. Brief for the Respondent, *Zivotofsky*, 132 S.Ct. at 1421.

64. *Zivotofsky*, 132 S.Ct. at 1430.



# LIBERTY AND JUSTICE FOR ALL: THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

*Esmé Grant and Rhonda Neuhaus\**

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## I. INTRODUCTION

At the heart of every just society are mechanisms that ensure full inclusivity of citizenry, equal rights to both representation and reparation, and impartial judgment. These components are all parts of access to justice. For people with disabilities, access to justice is broad, complex, and overwhelmingly important to ensure equality within society.

This paper will briefly explore emerging international law around the development of legislation and policy regarding access to justice for people with disabilities. Specifically, this paper will analyze the International Disability Treaty, the Convention on the Rights of Persons with Disabilities (CRPD), and the impact this Treaty has had on emerging disability rights law. The CRPD specifically addresses Access to Justice in its Article 13 and sets a framework for “States Parties” to the Treaty to follow in order to afford equal rights to its citizens with disabilities.<sup>1</sup> The first section of this paper will provide a brief background on what the CRPD is and how access to justice affects people with disabilities. Then it will explore how countries that have ratified the CRPD are fairing in ensuring access to justice by examining the CRPD Committee’s concluding observations. Finally, this article will discuss model legislation and policies that have emerged in the wake of the CRPD that will play an essential role in the implementation of this important treaty.

A. *Background on the CRPD*

The CRPD is the first treaty to impact disability rights exclusively and globally.<sup>2</sup> Previous to the CRPD, which was officially adopted by the United Nations (U.N.) in 2006, the U.N. had taken major actions to signal that its members viewed disability rights as a critical part of a just society.<sup>3</sup> In 1976, the U.N. declared 1981 as the International Year of Disabled

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2. *The Inter-American Convention for the Elimination of all forms of Discrimination against Persons with Disabilities (CIADDIS)*, OAS.ORG, Feb. 7, 2013, available at [http://www.oas.org/en/sedi/ddse/pages/index-4\\_convention.asp](http://www.oas.org/en/sedi/ddse/pages/index-4_convention.asp) (last visited Feb. 7, 2013).

3. Press Release, U.N.: Rights of Persons with Disabilities in Force; U.N. Press Release (May 5, 2008), available at <http://www.scoop.co.nz/stories/WO0805/S00048.htm> (last visited Feb. 23, 2013).

Persons.<sup>4</sup> This year challenged member nations to determine ways to improve the rights of persons with disabilities around the world. An outcome of the International Year of Disabled Persons was the World Programme of Action (WPA) Concerning Disabled Persons, which was adopted by the General Assembly in 1982.<sup>5</sup> The WPA presented a plan for how member nations could achieve the full integration and equality of its citizens with disabilities.<sup>6</sup> It also laid a blueprint for the CRPD and what was to trigger one of the fastest ratification rates of any human rights treaty in the world.<sup>7</sup> Before emerging into a binding treaty, the WPA inspired the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (a summary of the WPA's goals).<sup>8</sup> The Standard Rules were adopted by the General Assembly in 1993, and although not legally binding, the Rules set the expectation that member nations would incorporate the Standard Rules' human rights approach when handling issues pertaining to people with disabilities.<sup>9</sup>

Around the same time that the Standard Rules were being introduced at the U.N., the United States and other countries were beginning to adjust to new and innovative national legislation and policies that protected the rights of people with disabilities.<sup>10</sup> The United States led this movement with the Americans with Disabilities Act, which linked a human and civil rights approach with the technical guidance required to enforce these rights.<sup>11</sup> The world community took notice of the excitement around disability rights and the need for greater change, and in 2001, the Mexican

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4. *The International Year of Disabled Persons*, UN.ORG, General Assembly Resolution 2003–2004, available at <http://www.un.org/esa/socdev/enable/disiydp.htm> (last visited Feb. 7, 2013).

5. World Programme of Action Concerning Disabled Persons, (1981) <http://www.un.org/esa/socdev/enable/disiydp.htm> (last visited Feb. 7, 2013).

6. *Human Rights of Persons with Disabilities*, HREA.ORG, available at [http://www.hrea.org/index.php?doc\\_id=416#top](http://www.hrea.org/index.php?doc_id=416#top) (last visited Feb. 23, 2013).

7. *Keeping Up with the CRPD?*, ATPROGRAMNEWS.COM, June 12, 2012, available at <http://www.atprogramnews.com/2012/06/keeping-up-with-the-crpd.html> (last visited Feb. 23, 2013).

8. The Standard Rules on the Equalization of Opportunities for Persons with Disabilities, (Dec. 20, 1993) <http://www.un.org/esa/socdev/enable/dissre00.htm> (last visited Feb. 7, 2013).

9. *Id.*

10. John R. Vaughn, *Finding the Gaps: A Comparative Analysis of Disability Laws in the U.S. to the U.N. Convention on the Rights of Persons with Disabilities*, NCD.GOV, May 12, 2008, available at <http://www.ncd.gov/publications/2008/May122008> (last visited Feb. 23, 2013).

11. Arlene Mayerson, *The History of the ADA: A Movement Perspective*, DREDF.ORG, 1992, available at [http://dredf.org/publications/ada\\_history.shtml](http://dredf.org/publications/ada_history.shtml) (last visited Feb. 23, 2013).

delegation to the U.N. requested that member states begin drafting a treaty that dealt exclusively with the rights of persons with disabilities.<sup>12</sup>

The U.N. drafting process began in 2001 and the Treaty was adopted in 2006.<sup>13</sup> Unique to the drafting process of the CRPD was significant participation by civil society, particularly groups focused on issues of disability or Disabled Peoples Organizations (DPOs) themselves.<sup>14</sup> This was new for the development of any U.N. treaty, and what makes this Treaty so reflective of the needs and desires of people with disabilities around the world allowing them to live full participatory lives in society. Following eight *ad hoc* sessions of negotiations, the Treaty was adopted and then opened for signature in March 2007, ultimately coming into force in May 2008.<sup>15</sup> As of April 2013, the Treaty has been ratified by 129 nations and the European Union, and has been signed by 154 nations.<sup>16</sup>

The CRPD represents a paradigm shift from a medical and charitable model to a social model, meaning it embraces the right of people with disabilities to be included in the community, and to be independent and productive citizens.<sup>17</sup> The fifty articles of the Treaty cover issues from education to employment and respect for the home and family, all with the general focus of non-discrimination and equality of treatment.<sup>18</sup> Each

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12. Other human rights treaties developed by the United Nations including the International Covenant on Civil and Political Rights is applicable to disability rights in a broader context but did not exclusively focus on disability rights issues or mention the term “disability.” See *The International Covenant on Civil and Political Rights (ICCPR)*, OHCHR.ORG, Mar. 23, 1976, available at <http://www2.ohchr.org/english/law/ccpr.htm> (last visited Feb. 7, 2013).

13. *The U.S. Ratification of the Convention on the Rights of Persons with Disabilities Fact Sheet*, BRCCENTER.ORG, available at [http://brccenter.org/lib/lib\\_pdf/CRPDToolkit.pdf](http://brccenter.org/lib/lib_pdf/CRPDToolkit.pdf) (last visited Feb. 23, 2013).

14. Katherine Guernsey, Marco Nicoli, and Alberto Ninio, *Convention on the Rights of Persons with Disabilities: Its implementation and relevance for the World Bank*, WORLD BANK.ORG, (2007), available at <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Disability-DP/0712.pdf> (last visited Feb. 23, 2013).

15. *The U.S. Ratification of the Convention on the Rights of Persons with Disabilities Fact Sheet*, *supra* note 12, at 2.

16. Scott Rains, *US Access Board Issues Supplemental Rule to Address Access to Shared Use Paths*, ROLLINGGRAINS.COM, Jan. 23, 2013, available at <http://www.rollinggrains.com/leadership/> (last visited Feb. 23, 2013).

17. Francisco J. Bariffi, *Implementing the UN Convention on Disability in the European Union and Member States: A Review of Substantive Obligations and Examples of Good Practices*, ERA-COMM.EDU, available at [http://www.era-comm.eu/dalaw/kiosk/documentation/UNCRPD/2011\\_05%20Bariffi%20presentation%20paper.pdf](http://www.era-comm.eu/dalaw/kiosk/documentation/UNCRPD/2011_05%20Bariffi%20presentation%20paper.pdf) (last visited Feb. 23, 2013).

18. See *Convention on the Rights of Persons with Disabilities (CRPD)*, Dec. 6, 2006, available at <http://www.un.org/disabilities/convention/conventionfull.shtml> (last visited Feb. 23, 2013).

article lays out broad recommendations and technical guidance and requirements for how a ratifying party can achieve each specific right that has historically been challenging for the disability community.<sup>19</sup>

Key to the success of the CRPD has been its implementation by its ratifying parties. On the one hand, nations have been eager for a global treaty on disability rights.<sup>20</sup> On the other hand, the Chief of the Secretariat for the CRPD has suggested that many nations lack the technical expertise to even begin developing an implementation strategy.<sup>21</sup>

Therefore, the Committee on the Rights of Persons with Disabilities (CRPD Committee or Committee), established by Article 34 of the Treaty, plays an essential role in identifying where state parties should focus their attention and what they can seek to achieve as their ratification of the Treaty matures.

The CRPD Committee, composed of disability experts from ratifying countries, is meant to provide an international forum for the sharing of ideas. Although treaty-imposed limitations ensure that the body is merely advisory, the expertise on the Committee is of great value to other countries seeking professional guidance on approaches to implementation. As this paper will continue to explore, the Committee plays a particularly important role in identifying barriers to access to justice and counsel as to how to overcome them.

### B. *What is Access to Justice?*

The U.N. has historically held that access to justice is a human right.<sup>22</sup> In the Universal Declaration of Human Rights (UDHR), Articles 6 through 11 cover the issue of access to justice such as equality before the law and the right to be presumed innocent.<sup>23</sup> Similarly, human rights treaties emerging out of the UDHR carry the same theme. For instance, the International Covenant on Civil and Political Rights echoed many of the

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19. *Id.*

20. *Keeping Up with the CRPD?*, *supra* note 7.

21. Following the 5th Session of the Committee on the Rights of Persons with Disabilities this April, Akiko Ito, Chief of the Secretariat for the CRPD within DESA, noted that “while there is an increase in number of ratifications . . . the lack of expertise in how to plan and execute government policies and strategies remains a major challenge.” See *Advancing the Rights of Persons with Disabilities*, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS: UN.ORG, Apr. 18, 2011, available at <http://www.un.org/en/development/desa/news/social/disability-rights.html> (last visited Feb. 23, 2013).

22. *International Day for the Eradication of Poverty*, OHCHR.ORG, October 17 2012, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12670&LangID=E> (last visited Feb. 23, 2013).

23. See Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

statements from the UDHR and also specifically addressed issues of right to representation and *ex post facto*.<sup>24</sup>

As declared by the World Health Organization in July of 2011, there are one billion people with disabilities around the world.<sup>25</sup> As the world's largest minority, people with disabilities are categorically susceptible to barriers to justice.<sup>26</sup> In addition, people with disabilities have a higher degree of vulnerability to victimization.<sup>27</sup> The Bureau of Justice Statistics has cited that the violent crime rate in the United States was double that for people with disabilities than people without disabilities.<sup>28</sup> Considering that eighty percent of the world's people with disabilities live in developing countries,<sup>29</sup> the global rate of victimization is potentially even greater.

Access to justice for people with disabilities includes being treated equally and having access to general court services.<sup>30</sup> It also means having full access to the environment of a court, which may include providing physical access or interpretation services. What is strikingly different about disability rights as compared to the human rights of other populations is that inclusive policies and actions are typically not the final step in achieving equality. People with disabilities have a range of accommodation requirements that make ensuring their access to justice all the more complex. The CRPD embraces this complexity and introduces a cross-disability approach to Article 13, providing a broad overview of what parties that have ratified the Act should achieve.<sup>31</sup>

Article 13—Access to Justice:

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24. See *International Covenant on Civil and Political Rights*, Article 14–16, OHCHR.ORG, Mar. 23, 1976, available at <http://www2.ohchr.org/english/law/ccpr.htm> (last visited Feb. 7, 2013).

25. See *Media Centre: Disability and Health*, WORLD HEALTH ORGANIZATION INTERNATIONAL, Nov. 2012, available at <http://www.who.int/mediacentre/factsheets/fs352/en/index.html> (last visited Feb. 7, 2013).

26. *Disability Stats and Facts*, DISABILITYFUNDERS.ORG, available at <http://www.disabilityfunders.org/disability-stats-and-facts> (last visited Feb. 23, 2013).

27. Erika Harrell & Michael Rand, *Crime Against People with Disabilities*, 2008, BUREAU OF JUSTICE, Dec. 9, 2010, available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2019> (last visited Feb. 7, 2013).

28. *Id.*

29. See *Factsheet on Persons with Disabilities*, UN.ORG, available at <http://www.un.org/disabilities/default.asp?id=18> (last visited Feb. 7, 2013).

30. Stephanie Ortoleva, *Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System*, 17 ILSA J. INT'L & COMP. L. 281, 285–86 (2011).

31. *The UN Convention on the Rights of Persons with Disabilities*, INCLUSIONEUROPE.COM, available at <http://inclusion-europe.org/en/rights/crpd-general> (last visited Feb. 23, 2013).

- 1) States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
- 2) In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.<sup>32</sup>

Although brief in content, Article 13 effectively communicates the keys to effective access to justice practices for people with disabilities.<sup>33</sup> First, it states that accommodations can facilitate equal access.<sup>34</sup> Article 13 also confirms that establishing a policy is simply not enough, but that trainings are a key component to accomplishing access to justice.<sup>35</sup> As this paper will demonstrate, other articles outside of Article 13 also touch upon the development of human rights practices that impact the rights of people with disabilities. Overall, the values of access to justice throughout the Treaty will play an important role in molding the just environment for people with disabilities in a ratified nation.

Importantly, this human rights treaty was negotiated by a significant amount of input by the disability community itself. Although not stated directly in Article 13, paramount to the success of the Treaty is the inclusion of people with disabilities at all levels. As this paper will explore, not incorporating the perspective of people with disabilities may result in barriers to justice and failing mechanisms to achieve a justice system that is fair and accessible to all.

### C. *Background in the Drafting of Article 13*

The preparatory papers to the CRPD include limited guidance on the evolution of Article 13. The access to justice movement began in the United States in the 1960s.<sup>36</sup> The concept arose in the era of the welfare state and growing rights consciousness, usually identified with committing

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32. *Convention on the Rights of Persons with Disabilities (CRPD)*: Article 13, UN.ORG, available at <http://www.un.org/disabilities/convention/conventionfull.shtml> (last visited Feb. 7, 2013) [hereinafter *CRPD: Article 13*].

33. *Id.*

34. *Id.*

35. *Id.*

36. M.A. NOONE S. TOMSEN, *LAWYERS IN CONFLICT* 38–39 (1995).

a state to increased social services. In the drafting, participants incorporated a varied and broad definition of access to justice.

By January and February of 2005, many states had voiced support for access to justice and the court system as well as the right to an effective remedy against discrimination for people with disabilities.<sup>37</sup> During the discussion of what was then Draft Article 9 in early 2005, it was evident that “considerable support was expressed for the inclusion in the convention of language that would guarantee persons with disabilities access to justice.”<sup>38</sup> In these beginning stages, the article was entitled “equal recognition as a person before the law.”<sup>39</sup> Access to justice was regarded as so important that, although there were differing views on what kind of framework should be adopted, “[m]ost delegations supported the inclusion of the language in a separate article.”<sup>40</sup>

Article 13 was developed towards the end of the drafting negotiations, somewhat as a necessary add-on to the other components of the Treaty, as it did not appear in the original Working Group draft.<sup>41</sup> However, there was little to no objection or lobbying required for its inclusion. It was necessary for Article 13 to be included in the Treaty for a variety of reasons. Access to justice as a concept impacts many discrete areas. Since there are a variety of administrative and judicial procedures that affect access to justice, as this paper will highlight in Section II, full implementation of this issue will take quite a long time. For example, physical access to courthouses, courtrooms, and witness stands have just been initiated in many ratified nations. This is the start for the justice system to become fully available to, and inclusive of, people with a wide range of disabilities.

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37. U.N. Chairperson, Update on the Fifth Session UN Convention on the Rights of People with Disabilities (Mar. 17, 2005), <http://www.ncd.gov/publications/2005/09262005> (last visited Aug. 3, 2013).

38. *Remarks on Promoting The Rights of Persons With Disabilities: Full Participation and Equality In Social Life and Development*, (Feb. 4, 2005), [www.un.org/esa/socdev/enable/rights](http://www.un.org/esa/socdev/enable/rights) (last visited Aug. 3, 2013).

39. U.N. General Assembly, Report of the Ad Hoc Committee on A Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on Its Fifth Session, [https://docs.google.com/viewer?a=v&q=cache:Txam6dWkmtYJ:www.un.org/esa/socdev/enable/rights/ahc5docs/ahc5reporte.doc+&hl=en&gl=us&pid=bl&srcid=ADGEEsJRxuaebHvQWPE1MD8r9\\_7bATnFtDxIyoSVr8ClyEq-fN47UzDG\\_SnhrWBFkAc3hZBy7bc5oENT19a\\_ahNh0Qr-xEQbuIxpOFKHUVAPdYkrBwnHxWGEMwRJFF7JQ\\_awn89d7QT&sig=AHIEtbQp4twDHtUYaa8sSZwxvK17kIDICg](https://docs.google.com/viewer?a=v&q=cache:Txam6dWkmtYJ:www.un.org/esa/socdev/enable/rights/ahc5docs/ahc5reporte.doc+&hl=en&gl=us&pid=bl&srcid=ADGEEsJRxuaebHvQWPE1MD8r9_7bATnFtDxIyoSVr8ClyEq-fN47UzDG_SnhrWBFkAc3hZBy7bc5oENT19a_ahNh0Qr-xEQbuIxpOFKHUVAPdYkrBwnHxWGEMwRJFF7JQ_awn89d7QT&sig=AHIEtbQp4twDHtUYaa8sSZwxvK17kIDICg) (last visited Aug. 3, 2013).

40. *Id.*

41. Convention on the Rights of Persons with Disabilities (CRPD): Article 13, *supra* note 32; *see also* Draft Article 13: Freedom of Expression and Opinion, and Access to Information, UN.ORG, *available at* <http://www.un.org/disabilities/convention/conventionfull.shtml> (last visited Feb. 7, 2013).

Projects exist around the world broadly on access to Justice for marginalized populations, but they are often not well defined for people with disabilities, leaving them as an area in greater need for examination.

*D. How Does Access to Justice Impact People with Disabilities?*

For an equal, just and non-discriminatory system to exist, justice systems must be accessible to all marginalized groups, including people with disabilities. For countries to implement the CRPD, legal systems must continue to develop. Agencies must work together with judicial systems and legal assistance programs to improve justice delivery systems for all.

When we speak of access to justice for people with disabilities, one can refer to a wide range of services and activities that go beyond the expected. It includes effective access to the systems, procedures, information, and locations used in the administration of justice. In addition to being frequently denied access to fair and equal treatment before courts, tribunals, law enforcement officials, and prison systems, people with disabilities are often unable to rise in the legal profession, judiciary, and other positions within the judicial system.<sup>42</sup> People with disabilities are often unable to serve as witnesses or jurors, thus barring them from contributing to the functioning under the system in which they live. This bilateral impediment and discrimination not only inhibits persons with disabilities from utilizing the systems of justice, but also contributes to the lack of administration of justice and to the community at large.<sup>43</sup> Seeing the person with a disability as an active participant in society is a manifestation of the social model of disability that underlies the CRPD, specifically Article 13.

Access to justice in disability inclusion widely includes the following: physical inaccessibility, communication barriers (i.e., American Sign Language, availability of materials in alternative formats like Braille, large print, etc.), blocks to the legal and judiciary as a profession, improving access to dispute resolution mechanisms (i.e., mediation, arbitration, negotiation options), inaccessible police stations, awareness of attorneys and other professionals in the judicial system.<sup>44</sup> There is also quite often limited education and outreach to the disability community on their rights in this area (i.e., how to file a complaint and that they have the ability to take action/participate to begin with).

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42. Ortoleva, *supra* note 30, at 285–86.

43. *Id.*

44. *Id.*

The concept of access to justice is not a simple one in application. It is an over-arching human right and incorporates many of the rights enumerated in the CRPD. These rights include the right to education, employment, and several others.<sup>45</sup> These rights must also be kept in mind as we analyze and think through implementation of Article 13. For example, if a person is denied the right to education,<sup>46</sup> they may wish to seek a remedy through the judicial system. This may also apply with a person denied the right to work.<sup>47</sup> Similarly, a person who is a victim of a crime may wish to report that crime to the police.<sup>48</sup> A person with a disability may not be able to access the transportation necessary to independently travel to a police station, courthouse, or other locality where justice is administered. In the larger picture, an educated person is more likely to better understand how to utilize the justice system itself. Without such an education, people with disabilities are unable to run for office, vote, run accessible electoral processes, or participate in political advocacy activities; this would be their right under the CRPD<sup>49</sup> as it is available to all citizens. However, if the person is denied physical access, communication barriers exist, or information is not understandable, then that person cannot exercise their rights.<sup>50</sup>

People with disabilities also have a need like all citizens to be able to access lawyers, courts, and dispute resolution venues. If unable to pay, attorneys need to be provided through legal aid mechanisms. Court and dispute resolution services should incorporate accessible and appropriate technology (i.e., materials in alternate formats including large print, Braille, hearing amplification devices, etc.) when necessary for the equal participation and treatment in the process.<sup>51</sup>

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45. Convention on the Rights of Persons with Disabilities (CRPD), *supra* note 18.

46. *Convention on the Rights of Persons with Disabilities (CRPD): Article 24*, OHCHR.ORG, available at <http://www2.ohchr.org/english/law/disabilities-convention.htm> (last visited Feb. 7, 2013).

47. *Convention on the Rights of Persons with Disabilities (CRPD): Article 27*, OHCHR.ORG, available at <http://www2.ohchr.org/english/law/disabilities-convention.htm> (last visited Feb. 7, 2013).

48. *Convention on the Rights of Persons with Disabilities (CRPD): Articles 15–16*, OHCHR.ORG, available at <http://www2.ohchr.org/english/law/disabilities-convention.htm> (last visited Feb. 7, 2013).

49. *Convention on the Rights of Persons with Disabilities (CRPD): Article 29*, OHCHR.ORG, available at <http://www2.ohchr.org/english/law/disabilities-convention.htm> (last visited Feb. 7, 2013).

50. Ortoleva, *supra* note 30, at 286.

51. See Frances Gibson, *Article 13 of the Convention on the Rights of Persons with Disabilities—A Right to Legal Aid?*, 15 AUSTL. J. OF HUM. RTS. 123 (2010) available at [http://www.academia.edu/207906/Article\\_13\\_of\\_the\\_Convention\\_on\\_Rights\\_of\\_Persons\\_with\\_Disabilities\\_-\\_A\\_Right\\_to\\_Legal\\_Aid](http://www.academia.edu/207906/Article_13_of_the_Convention_on_Rights_of_Persons_with_Disabilities_-_A_Right_to_Legal_Aid) (last visited Feb. 11, 2013).

Training and education must occur for all involved. Lawyers, law schools, police officers, and court officers must be educated as to the CRPD and domestic disability legislation, where existing. They must also be educated on a wide range of issues related to the inclusion and accommodation of people with disabilities in the carrying out of justice. Legal capacity<sup>52</sup> may be questioned for those with intellectual, developmental, or psychiatric disabilities. CRPD's Article 8 raises awareness and states that a precondition to legal empowerment is the battle of the stigma that seeds discrimination.<sup>53</sup> Under Article 8, awareness must be brought to all personnel, policies, practices and procedures, as well as inaccessible public information about courts and court services.<sup>54</sup>

A final overlapping concern addresses the need for election access. Accessible polling locales are limited for persons with physical disabilities. Materials are rarely provided in alternate formats and the same concerns raised above regarding legal capacity are of serious concern. Finally, electoral complaint systems also need to have a spotlight provided on disability access to electoral rights.

Each of these barriers to justice are in and of themselves complex to address. However, they must be examined holistically in order for us to create a world where all individuals, including people with all disabilities, have access to create the society in which we live. Access to justice and the impediments to its participation are critical in enforcing all of the other rights that people with disabilities fight for daily but which most people in society take for granted. These connections are what we hope readers will begin to think about when Article 13 or access to justice issues for people with disabilities are raised.

## II. COMMITTEE REVIEW OF ARTICLE 13 AND ACCESS TO JUSTICE

The CRPD Committee is composed of eighteen independent disability rights experts who oversee implementation of the CRPD.<sup>55</sup> They are elected every four years by the States Parties to the Treaty.<sup>56</sup> States Parties

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52. Legal capacity is addressed in CRPD Article 12, Equal Recognition Before the Law; *See Convention on the Rights of Persons with Disabilities (CRPD): Article 27*, OHCHR.ORG, available at <http://www2.ohchr.org/english/law/disabilities-convention.htm> (last visited Feb. 7, 2013).

53. Janet E. Lord, Deepti Samant Raja, & Peter Blank, *Beyond the Orthodoxy Rule of Law and Justice Sector Reform*, in 4 THE WORLD BANK LEGAL REVIEW 45, 50 (Matthew Moorhead, Ed., 2013); available at <http://issuu.com/world.bank.publications/docs/9780821395066/9> (last visited Feb. 7, 2013).

54. *Id.* at 100.

55. *Questions and Answers*, OHCHR.ORG, available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/QuestionsAnswers.aspx> (last visited Feb. 23, 2013).

56. *Id.*

are required to submit their initial report on how they are implementing the Treaty within two years of ratification, and every four years thereafter.<sup>57</sup> The Committee reviews the reports and then issues its concluding observations, which include suggestions and recommendations for how the State Party can continue to implement the Treaty to its fullest potential.<sup>58</sup>

The Committee, which meets biannually, issued its first concluding observations for Tunisia in April 2011.<sup>59</sup> As of November 2012, the Committee has issued concluding observations for Argentina, Spain, Hungary, Peru, and China as well.<sup>60</sup> Before issuing its concluding observations, the Committee may pose specific questions to a State Party about the implementation and then review the State Party's responses.<sup>61</sup> For purposes of this research, the focus will be on the ultimate concluding observation reports, which set the expectations for the State Party's compliance in its next reporting stage.

#### A. *Committee Report on China and Article 13*

Initial Committee reports demonstrate that the intention of the CRPD is to make genuine changes in the rights of people with disabilities around the world. China's report, which is the only report to reference Article 13 directly, sets the tone for how the Committee interprets success in implementing the Treaty's understanding of the right of Access to Justice.<sup>62</sup>

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57. *Id.*

58. *Id.*

59. United Nations Convention on the Rights of Persons with Disabilities, Comm. on the Rights of Persons with Disabilities, 5th Sess., Apr. 11-Apr. 15, 2011, U.N. Doc. /C/TUN/CO/1, available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session5.aspx> (last visited Aug. 3, 2013) [hereinafter CRPD Tunisia].

60. United Nations Convention on the Rights of Persons with Disabilities, Comm. on the Rights of Persons with Disabilities, 8th Sess., Sept. 17-Sept. 28, 2012, U.N. Doc. /C/CHN/CO/1, available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session8.aspx> (last visited Aug. 3, 2013) [hereinafter CRPD China]. United Nations Convention on the Rights of Persons with Disabilities, Comm. on the Rights of Persons with Disabilities, 6th Sess., Sept. 19-Sept. 23, 2011, U.N. Doc. /C/ESP/CO/1, available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session6.aspx> (last visited Aug. 3, 2013) [hereinafter CRPD Spain]. United Nations Convention on the Rights of Persons with Disabilities, Comm. on the Rights of Persons with Disabilities, 7th Sess., Apr. 16-Apr. 20, 2012, U.N. Doc. /C/PER/CO/1, available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session7.aspx> (last visited Aug. 3, 2013) [hereinafter CRPD Peru]. United Nations Convention on the Rights of Persons with Disabilities, Comm. on the Rights of Persons with Disabilities, 8th Sess., Sept. 17-Sept. 28, 2012, U.N. Doc. /C/ARG/CO/1, available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session8.aspx> (last visited Aug. 3, 2013) [hereinafter CRPD Argentina].

61. Office of the United Nations High Commissioner for Human Rights, Human Rights Treaty Bodies, <http://www2.ohchr.org/english/bodies/treaty/glossary.htm>.

62. CRPD China, *supra* note 60.

The Committee's critique of China's implementation of Article 13 illustrates that pathways to implementation must be meaningful and effective, and that the pure existence of a policy or program is not enough to meet compliance. Real, meaningful change must be effected. Further, since China is the first country to be guided on implementation of Article 13, the Committee provides an important understanding that it is not only developing countries that struggle with creating access to justice. In fact, the criticism of China's lack of access to justice includes an observation that the country is withholding existing resources. Therefore, a more developed country is just as susceptible to the deprivation of justice if it is not allocating resources properly to ensure its programs are being administered effectively. This concept of sufficient resource dedication, when extrapolated across all articles of the CRPD, could have a significant implication on the enforcement of rights and move the implementation forward with greater effectiveness.

The China report suggests that although legal centers for people with disabilities exist, they do not follow the human rights framework that the CRPD holds as pertinent to achieving permanent change. The Committee states:

While appreciating the establishment of legal aid service centres for persons with disabilities, the Committee notes that these service centres often lack the necessary resources and do not operate on an independent basis. The Committee is concerned that neither the criminal nor the civil procedure laws in China are accessible for the use of persons with disabilities on an equal basis with others, and, instead, patronizing measures are put into place, such as the designation of public defenders that treat the person concerned as if they lacked legal capacity.<sup>63</sup>

Key to the Committee's recommendations to China is the provision of trainings. Later in this paper is a discussion of model legislation and policies that directly insert a training model into countries seeking to implement this Treaty. Specifically, the Committee recommends the following:

[That] the State Party allocate the necessary human and financial resources to the legal aid service centres. It asks the State party to ensure that these centres safeguard the access to justice of persons with disabilities independently and in practice, including below the county level. The Committee suggests that the State party reviews its procedural civil and criminal laws in order to

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63. *Id.*

make mandatory the necessity to establish procedural accommodation for those persons with disabilities who intervene in the judicial system can do it as subject of rights and not as objects of protection.<sup>64</sup>

The Committee notably references to a review of civil and criminal laws that do not currently provide full access to the judicial system by people with disabilities in China. This is also raised under Article 5 (Equality and non-discrimination) where the Committee expresses concern about “contradictions between many local law regulations and the national law with regard to prohibition of discrimination.”<sup>65</sup> This review should include, as the Committee points out, a definition of reasonable accommodation that is similar to the understanding of this definition in the CRPD.

Although the Committee commends China for other areas where it has accomplished achievements in advancing disability rights, its serious criticism of China’s implementation of Article 13 sets an important precedent that laws and policies related to access to justice will not be taken lightly.<sup>66</sup> It is clear that the CRPD’s Committee of experts will not support antiquated methods or non-inclusive strategies that create additional barriers to access in the judicial system for people with disabilities.<sup>67</sup>

#### B. *Other Articles that Crossover (Articles 12/24)*

Although the only direct reference to Article 13 in the Committee’s concluding observations is in the most recent report of China, references to Access to Justice do arise in other ways throughout the other five concluding observation reports of Tunisia, Hungary, Peru, Spain, and Argentina that directly correlate to access to justice.<sup>68</sup> There are two separate ways that these references are relevant to access to justice. Either the Committee made recommendations under another Article on a topic that impacts access to justice (like Article 9 on Accessibility) or the Committee highlighted situations of hardships that people with disabilities face.

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64. *Id.*

65. *Id.*

66. CRPD China, *supra* note 60.

67. *Id.*

68. *Id.*; *see generally*, CRPD Spain, *supra* note 60; *see generally*, CRPD Peru, *supra* note 60; *see generally*, CRPD Argentina, *supra* note 60; CRPD Tunisia, *supra* note 59; Committee on the Rights of Persons with Disabilities, 8th Session (17–28 September 2012), Hungary concluding observations, available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session8.aspx> (last visited Aug. 3, 2013) [hereinafter CRPD Hungary].

### 1. Committee Reports on Articles Related to Access to Justice

Due to the crossover of issues of access to justice into other Articles of the CRPD previously mentioned, the Committee may reference access to the judicial system in its concluding observations without referencing Article 13. For each of the five reports where this is the case, common themes emerge including the lack of policies and legislation that allow for people with disabilities to access remedies in a court of law. Further, there are more specific themes such as the deprivation of identity cards for institutionalized citizens.

In Spain, the first state party to submit its initial report, the Committee focuses on the need for greater awareness in accessing the judicial system.<sup>69</sup> For instance, under the CRPD's Article 5 (Equality and non-discrimination), the Committee recommends that Spain create greater awareness and training to ensure a better understanding of the concept of reasonable accommodations.<sup>70</sup> Developing a concept of reasonable accommodations is essential to achieving access to justice in order to provide a remedy for people with disabilities to use the court systems when they have been discriminated against or face inequality. It also creates the basis for which people with disabilities may access the judicial system. The "provision of procedural and age-appropriate accommodation"<sup>71</sup> is vital to the effectiveness of Article 13. Without a clear definition of reasonable accommodations, people with disabilities have no expectation of access to the judicial process, and are at risk at being completely barred.

The concluding observations for Spain also urge the State Party, under Article 8 (Awareness-raising), to create better awareness of the CRPD and its Optional Protocol—particularly among the judiciary and legal profession.<sup>72</sup> While ratification of the Treaty is the final formal step in acceding to a treaty, implementation of the Treaty and its human rights framework is highly dependent on awareness-raising. Article 13 cannot be fully implemented without mindfulness of the Treaty, particularly by the members of the legal profession who manage and monitor the administration of justice.

Similar to Spain, Tunisia's concluding observations suggest greater awareness-raising of the concept of reasonable accommodations particularly by the judiciary under Article 5 (Equality and non-

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69. CRPD Spain, *supra* note 60.

70. *Id.*

71. CRPD Article 13, *supra* note 32.

72. CRPD Spain, *supra* note 60

discrimination).<sup>73</sup> The review of Tunisia by the Committee came immediately in the aftermath of Tunisia's overthrow of their government. For this reason, the Committee understood the importance of the country to "act with urgency" and "make greater efforts to raise awareness on non-discrimination among members of the legal profession" to ensure that the new government immediately embraced an accessible judicial system.<sup>74</sup>

Hungary's concluding observations highlight an important aspect of access to justice: accessibility. Under Article 9 (Accessibility), the Committee urges Hungary to meet its own deadlines for barrier removal.<sup>75</sup> The physical component of access to justice is unique to people with disabilities. For a person who uses a wheelchair or has another physical impairment, a physical barrier like stairs can completely bar them from judicial services.<sup>76</sup> Accessibility should exist for the client, the juror, the judge, and the attorney. The serious ramifications of physical barriers create an urgency, which the Committee has called upon Hungary to respond to.<sup>77</sup> The Committee also expresses concern about withdrawing consent from people with disabilities under Article 12 (Equal Recognition Before the Law) and encourages Hungary to and also provide training for judges on legal capacity and create legislation that allows people with disabilities to give informed consent for access for justice purposes.<sup>78</sup>

The Committee's concluding observations for Peru, under Articles 1–4, again point to similar themes of requesting clearer definitions of reasonable accommodations and discrimination based on disability, as well as encouraging greater accessibility under Article 9.<sup>79</sup> However, the report of Peru introduces another obstacle that people with disabilities face in terms of access to justice. Under Article 12 (Equal Recognition Before the Law), the Committee notes that many people with disabilities either in rural or institutional settings do not have identity cards, and, in some cases, do not have a name.<sup>80</sup> This unique circumstance creates an incredible barrier, not only procedurally, but risks creating an understanding by these undocumented individuals that the protection and services of the judicial system do not apply to them because they are not officially recognized by the State.

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73. CRPD Tunisia, *supra* note 59.

74. *Id.*

75. CRPD Hungary, *supra* note 68.

76. *See generally, id.* art. 23.

77. *Id.* art. 9.

78. *Id.* art. 12.

79. CRPD Peru, *supra* note 60.

80. *Id.*

Under Article 5 (Equality and Non-Discrimination), the Committee notes in Argentina's concluding observations a concern for the lack of judicial remedies for persons with disabilities and recommends creating measures that recognize discrimination.<sup>81</sup> Related to this, under Article 12 (Equal Recognition Before the Law), the Committee recommends greater training for judges, particularly on the human rights model of disability.<sup>82</sup> The Committee also recommends that judicial trainings incorporate the participation of organizations of people with disabilities.<sup>83</sup> As aforementioned, key to the CRPD is the involvement of people with disabilities at all levels.<sup>84</sup> The theme and rallying cry of the disability movement—"nothing about us without us"—should be incorporated into the trainings that can effectively translate how a person with a disability interacts with the judicial system. Argentina's concluding observations also take note of due process concerns under Article 12 (Equal Recognition before the Law), as well as concerns about restrictions of legal capacity to authorize medical procedures under Article 25 (Right to Health).<sup>85</sup>

The Committee's issued reports reveal that although the concluding observations of a State Party may not directly reference Article 13, they will likely draw on issues that impact access to justice.<sup>86</sup> The analysis of access to justice in the Committee reports illustrates how State Parties share similar issues in the full implementation of the Treaty such as awareness-raising with judicial administrators and establishment of anti-discrimination laws that create pathways to remedies. It also demonstrates how State Parties have their own unique barriers to implementation such as accessibility or granting of identity cards. What is most apparent from the reports, however, is that improvements to access to justice are suggested within each of the six country reports regardless of whether Article 13 was directly referenced.<sup>87</sup>

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81. CRPD Argentina, *supra* note 60.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. See generally CRPD Spain, *supra* note 60; see generally CRPD Peru, *supra* note 60; see generally CRPD Argentina, *supra* note 60; see generally CRPD Tunisia, *supra* note 59; see generally CRPD Hungary, *supra* note 68; see generally CRPD China, *supra* note 60.

87. See generally CRPD Spain, *supra* note 60; see generally, CRPD Peru, *supra* note 60; see generally CRPD Argentina, *supra* note 60; see generally CRPD Tunisia, *supra* note 59; see generally, CRPD Hungary, *supra* note 68.

## 2. References to the Importance of an Accessible Judicial System

Another interesting aspect of the concluding observations in terms of access to justice is that, in addition to identifying concerns and creating suggestions to issues that impact access to justice, the Committee acknowledges areas of concern that inherently emphasize the importance of having a strong judicial system in place.<sup>88</sup>

For example, referring back to Spain's concluding observations, the Committee acknowledges its concern under Article 7 (Children with Disabilities) at the "reportedly higher rates of abuse of children with disabilities in comparison with other children."<sup>89</sup> Tunisia's concluding observations under Article 16 (Freedom from Exploitation, Violence and Abuse) also mentions concern "at the situation of violence that women and children with disabilities might face."<sup>90</sup> Hungary's concluding observations under Article 16 note that "women, men, girls and boys with disabilities continue to face violence, abuse and exploitation," regardless of some policies in place to prevent this abuse.<sup>91</sup> That people with disabilities face higher rates of violence emphasizes need for a strong judicial system that provides accommodations and access that this population requires in order to discourage growing violence and to remedy existing abuse.

The Committee highlights another area of concern in its concluding observations for Peru.<sup>92</sup> Under Article 5 (Equality and Non-Discrimination), the Committee urges Peru to develop policies and programs for indigenous and minority persons with disabilities, and in particular, women and children who live in rural areas and persons of African descent.<sup>93</sup> The Committee recognizes that people with disabilities can face multiple forms of discrimination. These features can make it more difficult for these individuals to participate on an equal basis in society, including within the judicial system.

The concluding observations for Argentina touch back on previously mentioned issues of violence; under Article 6 (Women with Disabilities), however, the Committee confronts the larger issue of mainstreaming

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88. See generally CRPD Spain, *supra* note 60; see generally CRPD Peru, *supra* note 60; see generally CRPD Argentina, *supra* note 60; see generally CRPD Tunisia, *supra* note 59; see generally CRPD Hungary, *supra* note 68; see generally CRPD China, *supra* note 60.

89. CRPD Spain, *supra* note 60.

90. CRPD Tunisia, *supra* note 59.

91. CRPD Hungary, *supra* note 68.

92. See generally CRPD Peru, *supra* note 59.

93. *Id.*

disability and gender in legislation and programs.<sup>94</sup> The Committee specifically references access to justice under Article 6 as being an issue if the consideration of women with disabilities is not fully addressed.<sup>95</sup>

References throughout the concluding observations of all of the reports demonstrate that there is a strong understanding that crimes against people with disabilities exist at higher rates than for people without disabilities.<sup>96</sup> In addition, characteristics like race and gender can contribute to further discrimination against persons with disabilities. The undertone in the Committee's reports of the greater susceptibility of people with disabilities to being violated reaffirms the need for a stronger and more just system of law to be in place for this community.

### III. LEGISLATIVE AND GOVERNMENTAL ACTION ON ACCESS TO JUSTICE

As of April 2013, 154 countries have signed and 129 have ratified the CRPD.<sup>97</sup> As an aspirational document, Article 4 of the CRPD sets forth the need for the CRPD to be carried out through national law, policy, and programming in consultation with persons with disabilities.<sup>98</sup> Stakeholders in the disability community must be involved in this process, mirroring the CRPD development process itself, "nothing about us without us." However, many countries are finding the reality of implementation to be challenging because of the disempowering social contexts and underdeveloped legal systems.<sup>99</sup> There are also issues raised regarding implementation based on a country's developed or developing status and capacity.<sup>100</sup>

Although enabling legislation and policies themselves do not assure full CRPD implementation, they are necessary to facilitate change and to comply with their obligations under Article 4 of the CRPD. Laws developed or expanded should "aim at eliminating barriers to access that constitute both formal and substantive discrimination, attribute obligations

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94. CRPD Argentina, *supra* note 60.

95. *Id.*

96. *See generally* CRPD Spain, *supra* note 60; *see generally* CRPD Peru, *supra* note 60; *see generally* CRPD Argentina, *supra* note 60; *see generally* CRPD Tunisia, *supra* note 59; *see generally* CRPD Hungary, *supra* note 68; *see generally* CRPD China, *supra* note 60.

97. Convention on the Rights of Persons with Disabilities, U.N. Doc. A/RES/61/106 (Dec. 13, 2006), [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-15&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-15&chapter=4&lang=en) (last visited Aug. 3, 2013).

98. Convention on the Rights of Persons with Disabilities (Dec. 13, 2006) <http://www.un.org/disabilities/convention/conventionfull.shtml> (last visited Aug. 3, 2013).

99. Lord, *supra* note 53, at 90.

100. *Id.*

to public and private actors, and introduce measures to bring about equitable access to all rights.”<sup>101</sup> The CRPD has already sparked the creation of significant laws and policy shifts since its entry into force. This includes constitutional development and reform, national-level law reform and development, and targeted law reforms in specific thematic areas.<sup>102</sup> Many other countries are creating disability action plans where none had existed previously. In the area of access to justice, some countries have taken specific steps towards legislative change—notably Israel, India, Brazil, Cambodia, and Australia.<sup>103</sup>

#### A. *Israel*

Disability advocacy in a rights-based context is new in Israel. Similar to prevailing global attitudes prior to the existence of the CRPD, attitudes in Israel towards persons with disabilities were guided by a medical approach and were highly paternalistic.<sup>104</sup> The human rights discourse of the 1990s along with a more active disability movement sparked the shift in approach from welfare to rights.<sup>105</sup> In addition to the legislation described in this section, Israel has also seen the emergence of acknowledgment of victims’ rights since the 1990s (led by women and children’s movements), and has

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101. *Id.*

102. *Id.*

103. See generally Neta Ziv, *Witnesses with Mental Disabilities: Accommodations and the Search for Truth—The Israeli Case*, 27 *DISABILITY STUDIES QUARTERLY*, 4 (2007), available at <http://dsq-sds.org/article/view/51/51> (last visited Aug. 3, 2013); see generally Dina Feldman, *Human Rights of Children with Disabilities in Israel: The Vision and the Reality*, 29 *DISABILITY STUDIES QUARTERLY*, No. 1 (2009) available at <http://dsq-sds.org/article/view/172/172>; see generally, The Draft Rights of Persons with Disabilities Bill, Dep’t of Disability Affairs Art. 20 § 1 (2012) available at <http://socialjustice.nic.in/pdf/draftpwd12.pdf> (last visited Aug. 3, 2013); see generally *Government of Brazil—Rights of Persons with Disabilities—Response to Questionnaire by the OHCHR*, available at [www2.ohchr.org/english/issues/disability/docs/study/Brazil.doc](http://www2.ohchr.org/english/issues/disability/docs/study/Brazil.doc) (last visited Aug. 3, 2013); see generally, International Labor Organization *Cambodian Law on the Protection and the Promotion of the Rights of Persons with Disabilities*, (2009), available at <http://apskills.ilo.org/resources/cambodian-law-on-the-protection-and-the-promotion-of-the-rights-of-persons-with-disabilities> (last visited Feb. 7, 2013); see generally, Australia Human Rights Comm’n, *Welcome to the Disability Rights Home Page*, available at [http://humanrights.gov.au/disability\\_rights/](http://humanrights.gov.au/disability_rights/) (last visited Feb. 7, 2013); see generally Disability Rights Now, *Civil Society Report on the Convention on the Rights of Persons with Disabilities*, Aug. 2012, available at [http://doc.afdo.org.au/CRPD\\_Civil\\_Society\\_Report\\_PDF](http://doc.afdo.org.au/CRPD_Civil_Society_Report_PDF) (last visited Feb. 7, 2013); see generally, Disability Rights Now, *Civil Society Report on the Convention on the Rights of Persons with Disabilities*, Aug. 2012, available at [http://doc.afdo.org.au/CRPD\\_Civil\\_Society\\_Report\\_PDF](http://doc.afdo.org.au/CRPD_Civil_Society_Report_PDF) (last visited Feb. 7, 2013).

104. Ziv, *supra* note 103.

105. *Id.* at 8.

seen an increase in advocacy and legal services for victims of crimes with disabilities.<sup>106</sup>

In 2006, the year the CRPD was adopted, Israel enacted a comprehensive law specifically making changes to legal policy in the area of access to justice in the Investigation and Testimony Procedural Act (Accommodations for Persons with Mental or Cognitive Disabilities) of 2005.<sup>107</sup> This law applies to police investigations and court testimony of persons with mental and cognitive disabilities, if accused or suspected of committing a crime, witnessing a crime, or as victims of a crime.<sup>108</sup> This law came about as statistics demonstrated that people with mental disabilities were more likely to become victims of crime and assault.<sup>109</sup> Subsequent statements on this bill indicate that the Israeli parliament is charged with enforcing this law, as well as Article 13 of the CRPD. The Ministry of Welfare is responsible for the implementation of these laws.<sup>110</sup>

An article published in the Fall 2007 Disability Studies Quarterly examined this bill for nuances on its impact on the judicial system and people with mental and psychosocial disabilities.<sup>111</sup> The bill outlines each element in detail, including what information might be introduced in a legal proceeding according to the bill's admissibility standards.<sup>112</sup> The bill also explores witnesses with disabilities, both as perpetrator and victim. Normatively, the person with a disability was often viewed as the perpetrator; this standard has shifted to acknowledging the testimony of people with disabilities as crime victims as well.<sup>113</sup> Questions of witness reliability emerge and the article outlines specific ways to take evidence from a witness with a mental disability (i.e., speak slowly, use simple words, avoid yes/no answers, do not keep repeating questions, only move to new topics once an explanation is given, etc.).<sup>114</sup> Finally, the law addresses police investigations, the cross examination of witnesses, accommodations affecting the credibility and meaning of testimony.

Since the development of the law, Israel has continued to show its commitment to the CRPD and disability integration through legislation,

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106. *Id.* at 10.

107. Ziv, *supra* note 103, at 1.

108. *Id.*

109. *Id.*

110. Feldman, *supra* note 103.

111. Ziv, *supra* note 103, at 3.

112. *Id.*

113. *See id.*

114. *Id.* at 7.

budget, and services.<sup>115</sup> That said, similar to other countries, Israel still faces the challenges of shifting to a human rights and social model of disability in all spheres.<sup>116</sup>

### B. *India*

At the time of this writing, a draft of India's Rights of Persons with Disabilities Bill (Bill) was being considered. The Bill seeks to replace the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act of 1995, and to bring India in line with new notions of disability and the rights of persons with disabilities under the CRPD, which India has ratified.<sup>117</sup> Once implemented, the Bill will begin moving towards achievement of more inclusive schools,<sup>118</sup> lower unemployment rates, and more accessible infrastructure. The Ministry of Social Justice and Empowerment's Department of Disability Affairs have moved the Bill through the legislative process, which has been welcomed by the Indian disability community.

With regard to access to justice, Article 20 of India's proposed law covers the subject stating in paragraph one that people with disabilities and their representative organizations shall have the right to courts, tribunals, authorities, commissions, or any other judicial, quasi-judicial, or investigative powers.<sup>119</sup> The law enumerates five sections continuing to ensure that reasonable accommodations are provided to secure persons with disabilities access to "any scheme, programme, facility or service offered by them on an equal basis with others."<sup>120</sup> The law continues to expand Access to Law by enumerating that testimony, opinion, or argument given by a person with a disability should be evaluated on an equal basis with others.<sup>121</sup> Public documents, filing departments, registries, and other records, recordings, testimony, arguments, or opinion should also be

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115. See generally Ziv, *supra* note 103.

116. Feldman, *supra* note 103.

117. Rahul Cherian, *The Disabilities Bill is a Mixed Bag*, THE HINDU, <http://thehindu.com/news/national/the-disabilities-bill-is-a-mixed-bag/article3927212.ece> (last visited Jan. 25, 2013).

118. As the majority of schools are inaccessible (especially due to the privatization of education, yielding much inaccessible construction).

119. The Draft Rights of Persons with Disabilities Bill, Dep't of Disability Affairs Art. 20 § 1 (2012), available at <http://socialjustice.nic.in/pdf/draftpwd12.pdf> (last visited Aug. 3, 2013).

120. *Id.* § 4.

121. *Id.* § 3.

provided in accessible formats and/or in a person's preferred language and means of communication.<sup>122</sup>

The law's eighty-six pages are comprehensive and all-inclusive, including Articles in the area of Legal Capacity and Equal Recognition before the Law (Article 7); Duty to Provide Support in Exercise of Legal Capacity (Article 9); Right to Political Participation (Article 19), as well as all of the other areas covered under the CRPD.<sup>123</sup> At the time of this writing, the law is currently facing opposition from some disability organizations, which claim that the law does not address the core needs of the nation's 30 to 40 million people living with psychosocial disabilities.<sup>124</sup> These organizations express a desire for the law to eliminate the creation of institutions with minimal responsibility and oversight, and re-introduce safeguards for involuntary admission.<sup>125</sup>

### C. Brazil

The CRPD was incorporated into Brazilian law after the country's ratification in January 2008, and has since received constitutional status within Brazil.<sup>126</sup> The Brazilian government has since been working to transform the traditional model of disability into one that "also enables persons with disabilities to exercise a central role in their emancipation and citizenship, thus contributing to the development of the country."<sup>127</sup>

On January 29, 2009, a note verbale<sup>128</sup> was transmitted to the U.N. on behalf of the Portuguese-speaking countries who met to discuss the CRPD.<sup>129</sup> Their findings were presented to the U.N. by the Permanent Mission of Brazil.<sup>130</sup> In their Santos Charter, participants from Brazil and seven other Portuguese-speaking countries celebrated the CRPD's entry

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122. *Id.* § 5.

123. *See id.*

124. *Rights Groups Question New Disability Bill*, DECCAN HERALD, available at <http://www.deccanherald.com/content/284295/rights-groups-question-disability-bill.html> (last visited Jan. 25, 2013).

125. *Id.*

126. *Government of Brazil—Rights of Persons with Disabilities—Response to Questionnaire by the OHCHR*, available at [www2.ohchr.org/english/issues/disability/docs/study/Brazil.doc](http://www2.ohchr.org/english/issues/disability/docs/study/Brazil.doc) (last visited Aug. 3, 2013).

127. *Id.*

128. United Nations Convention on the Rights of Persons with Disabilities, Note verbale dated Jan. 29, 2009 from the Permanent Mission of Brazil to the United Nations addressed to the Secretary-General (Jan. 2009).

129. *Id.*

130. *Id.*

into force and outlined actions that will focus on its implementation.<sup>131</sup> They discussed the need for people with disabilities and their representative organizations to be included in all phases of the implementation. With regard to access to justice, the parties agreed to “the training of law professionals, within the Judicial System of each country, since their individual initial and continued education, for the mainstreaming of the inclusive approach on all areas of their work.”<sup>132</sup>

In addition, at the 2009 CRPD Conference of States Parties, Brazil’s representative highlighted this commitment by saying that his government was facilitating a greater role for people with disabilities in the judicial system—and shared one example that the nation’s first blind judge would soon assume office.<sup>133</sup>

#### D. Cambodia

The Law of the Protection and the Promotion of the Rights of Persons with Disabilities was adopted by the Cambodian National Assembly on May 29, 2009 and was officially signed by the King on July 3, 2009.<sup>134</sup> The goal was to protect and promote the rights of persons with disabilities in Cambodia.<sup>135</sup> As quoted the purposes of the law was to:

- 1) Protect the freedoms of persons with disabilities;
- 2) Protect the interests of persons with disabilities;
- 3) Prevent, reduce and eliminate discrimination against persons with disabilities; and
- 4) To rehabilitate physical, mentally and vocationally in order to assure that persons with disabilities are able to participate fully and equally in activities within society.<sup>136</sup>

In the same year, a National Plan of Action for Persons with Disabilities was adopted to address the needs and provide services for

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131. *Id.*

132. *Id.*

133. United Nations General Assembly, States Parties to Convention on Rights of Persons with Disabilities, 3rd meeting AM (Sept. 3, 2009), available at <http://www.un.org/News/Press/docs/2009/hr5000.doc.htm> (last visited Aug. 2013).

134. International Labor Organization, *Cambodian Law on the Protection and the Promotion of the Rights of Persons with Disabilities*, (2009), available at, <http://apskills.ilo.org/resources/cambodian-law-on-the-protection-and-the-promotion-of-the-rights-of-persons-with-disabilities> (last visited Feb. 7, 2013).

135. *Id.*

136. *Id.*

persons with disabilities; however, to date, there has been no real implementation of the law.<sup>137</sup> That said, people have made improvements in the NGO sector with disabilities forming their own organizations.<sup>138</sup>

Cambodia signed the CRPD in January 2007, but has yet to ratify it.<sup>139</sup> The emergence of their 2009 disability law following its CRPD signature, however, suggests Cambodia's eagerness to adopt the social model of disability legislation.<sup>140</sup> It is essential, though, that Cambodia ratify the CRPD to move disability into the mainstream agenda, working towards Article 13 implementation.<sup>141</sup> This is necessary in Cambodia, and in other countries of the world, as disability is often overlooked in mainstream development projects. For example, the U.N. Development Program (UNDP) began an access to justice project in Cambodia, which was active between April 2006 and March 2010.<sup>142</sup> The project worked to bridge the gap between formal and informal justice systems but focused solely on the poor, women, and indigenous people as the most marginalized groups.<sup>143</sup> The program focused on alternate dispute resolution as well as finding new mechanisms for accessing the formal justice system.<sup>144</sup> It included training of professionals and educated the communities involved.<sup>145</sup> None of these activities focused on people with disabilities in the community and, although an effective program, people with disabilities must nonetheless be recognized and take into account and be included within this population.

#### E. Australia

The Australian Human Rights Commission leads the implementation of the Disability Discrimination Act of 1992, which makes disability discrimination illegal and promotes rights, opportunity, and access for

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137. The International and Human Rights Network, *Cambodia: Disabled People Continue to Face Poverty and Discrimination*, Mar. 30, 2011, available at <http://www.daa.org.uk/index.php?mact=Blogs,cntnt01,showentry,0&cntnt01entryid=375&cntnt01returnid=98> (last visited Feb. 7, 2013).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. The International and Human Rights Network, *supra* note 137.

143. *Id.*

144. *Id.*

145. *Id.*

people with disabilities.<sup>146</sup> They also have a significant role regarding the implementation of the CRPD.<sup>147</sup>

The Australian Shadow Report on the implementation of the CRPD was released in June 2012 as a supplemental community perspective to the government of Australia's periodic report on how the Treaty was being implemented.<sup>148</sup> The Report's findings highlight many of the concerns the authors have raised in this article. People with disabilities are "over-represented in the justice system whether as complainants, litigants, defendants, victims or other witnesses."<sup>149</sup> They also encounter significant barriers in undertaking roles as officers of the courts, such as jurors, lawyers, administrators and adjudicators."<sup>150</sup> Concerns were raised about the hostility of the legal system towards persons with disabilities,<sup>151</sup> and legal services in the community need to be expanded.<sup>152</sup> This often creates gaps in service or inadequate resources to deal with disability issues.

The Shadow Report also highlights other barriers that impede participation of people with disabilities in programs.<sup>153</sup> For example, there is insufficient participation among the disabled in court diversion programs,<sup>154</sup> and insufficient police and prison staff trainings on how to deal with people with disabilities.<sup>155</sup> Experience and statistics also indicate that Australia has failed to train prison system personnel and police to facilitate access to justice.<sup>156</sup> Another concern is the credibility challenges faced by people with disabilities when interacting with the justice system,<sup>157</sup> and that people with disabilities are often ineligible for jury service on the

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146. Australia Human Rights Commission, *Welcome to the Disability Rights Home Page*, available at [http://humanrights.gov.au/disability\\_rights/](http://humanrights.gov.au/disability_rights/) (last visited Feb. 7, 2013).

147. *Id.*

148. Disability Rights Now, *Civil Society Report on the Convention on the Rights of Persons with Disabilities*, Aug. 2012, available at [http://doc.afdo.org.au/CRPD\\_Civil\\_Society\\_Report\\_PDF](http://doc.afdo.org.au/CRPD_Civil_Society_Report_PDF) (last visited Feb. 7, 2013).

149. *Id.*

150. *Id.*

151. *Id.*

152. National Association of Community Legal Centres *Community Legal Centres Across Australia: An Investment Worth Protecting*, 2007, available at [http://www.naclc.org.au/resources/NACLCL\\_fund08\\_CMYK.pdf](http://www.naclc.org.au/resources/NACLCL_fund08_CMYK.pdf) (last visited Feb. 7, 2013).

153. See Disability Rights Now, *supra* note 148.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

basis of their disability.<sup>158</sup> Finally, as stated above, people with disabilities often cannot access police or court localities and may face communication barriers when they do.<sup>159</sup>

The Department of Disability Inclusive Development with the Australian Agency for International Development (AusAid), has been supportive of CRPD implementation, funding the International Disability Alliance (IDA) in their CRPD implementation activities.<sup>160</sup> As part of the funded CRPD Implementation Guidelines process, IDA will launch a journal focused on the gathering of information related to the CRPD implementation covering good practices of action.<sup>161</sup> Two journals will be published annually.<sup>162</sup> [The first topic will be on Article 29 (the Right to Vote)] and the second topic will address Article 13 (access to justice).<sup>163</sup> The journals will provide guidance on the specific rights and how they are all overarching and linked.<sup>164</sup>

#### IV. ACCESS TO JUSTICE PROGRAMS LED BY PEOPLE WITH DISABILITIES AND DISABILITY ORGANIZATIONS IN IMPLEMENTATION OF THE CRPD ARTICLE 13

##### A. *Access to Free Legal Aid and the Uganda Case Study*

The Ugandan Disabled People's Organization, Legal Action for Persons with Disabilities (LAPD), is one of the only legal aid organizations in Africa managed by and for people with disabilities.<sup>165</sup> Their work has an impact on access to justice in the country. With support from the Disability Rights Fund,<sup>166</sup> LAPD trains local leaders, including leaders with disabilities, on how to use the CRPD to enforce the rights and protect

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158. Disability Rights Now, *supra* note 148.

159. *Id.*

160. International Disability Alliance, IDA, *Towards the Full Implementation of the CRPD: Activities Undertaken within and Connected to the Project Supported by the Australian Agency for International Development*, Final Rep., AUSAID Agreement 55854, Jan. 31, 2012, available at [http://www.internationaldisabilityalliance.org/sites/disalliance.e-presentaciones.net/files/public/files/Final%20Report\\_CRPD%20Implementation%20Guidelines%20Project\\_AusAID.pdf](http://www.internationaldisabilityalliance.org/sites/disalliance.e-presentaciones.net/files/public/files/Final%20Report_CRPD%20Implementation%20Guidelines%20Project_AusAID.pdf) (last visited Feb. 7, 2013).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. Disability Rights Fund, *Searching for Justice and Advancing Disability Rights*, available at [http://www.disabilityrightsfund.org/program\\_grantees/highlight/LAPD](http://www.disabilityrightsfund.org/program_grantees/highlight/LAPD) (last visited Feb. 7, 2013).

166. *Id.*

persons with disabilities from human rights violations.<sup>167</sup> They are also fighting against fear and prejudice by speaking out on radio and television talk shows.<sup>168</sup>

LAPD's work has increased the number of cases taken by courts of human rights violations against persons with disabilities.<sup>169</sup> According to LAPD's Executive Director, Laura Kanushu, "[n]ot only has this offered relief to our clients, but it has also raised awareness about disability and justice among local officials as well as among the perpetrators of human rights violations."<sup>170</sup>

LAPD's mission is to provide free legal aid to indigent persons with disabilities to create a Uganda where the rights of persons with disabilities are actualized.<sup>171</sup> Ms. Kanushu states that through their work, "[w]e seek inclusive laws and practices in all areas—education, health, employment, and government services. We hope to address the needs at the grassroots and even in the camps for internally displaced persons where our legal services are in demand."<sup>172</sup> The LAPD works especially close with women with disabilities who have been affected by conflict and are particularly vulnerable to violence.<sup>173</sup> According to a recent report released by Human Rights Watch:

Women with disabilities are vulnerable to such crimes because of their isolation, lack of support structures, mobility and communication barriers, and also because of myths that women with disabilities are weak, stupid, or asexual. For women and girls with disabilities, the process for reporting rape is not accessible due to such factors as long distances to travel from remote areas to police posts or lack of sign language interpreters.<sup>174</sup>

#### *B. Women with Disabilities in Bangladesh*

The National Council of Disabled Women (NCDW), a coalition of ninety-two disabled womens' organizations in Bangladesh, is working

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167. *Id.*

168. *Id.*

169. *Id.*

170. Disability Rights Fund, *supra* note 165.

171. *Id.*

172. *Id.*

173. *Id.*

174. Disability Rights Fund, *supra* note 165.

towards access to justice in their country.<sup>175</sup> They assert that female victims do not receive justice as they are not treated as complete human beings, and are thus not eligible to file a complaint, not considered eligible witnesses, and face significant social stigma.<sup>176</sup> Through funding from the Disability Rights Fund, NCDW advocates the need to protect and promote rights of women with disabilities, utilizing CRPD as the tool for their actions.<sup>177</sup> Their actions are varied:

- 1) At the national level, they have worked closely with the Ministry of Women and Children's Affairs and other disabled persons organizations and networks to harmonize the country's disability laws to align with the CRPD. Acknowledging that disability is a cross-cutting development issue, they also organized a national roundtable on discrimination in employment practices.
- 2) Operating in eight districts, one of NCDW's community activities in 2010 focused on establishing *Violence Prevention Committees* and providing training to fight violence against women with disabilities. By starting the committees, and in using the word "Violence," NCDW is sending a strong message that violence is a problem and that it is not acceptable and that women with disabilities must be included in all programs affecting women at large.
- 3) NCDW's work has started to change the public mindset about women with disabilities as silent victims or easy targets. On December 2, 2010, NCDW members joined a protest against sexual harassment in front of the parliament building. Through such highly public acts, the members are refusing to be invisible and are serving as role models for women who might be afraid to come forward. They are also showing womens' and human rights organizations that disability is a cross-cutting issue: issues that affect other women also affect women with disabilities, sometimes even more so.<sup>178</sup>

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175. Disability Rights Fund, *Promoting Rights and Dignity of Women with Disabilities*, available at [http://disabilityrightsfund.org/program\\_grantees/highlight/NCDW](http://disabilityrightsfund.org/program_grantees/highlight/NCDW) (last visited Feb. 7, 2013).

176. *Id.*

177. *Id.*

178. *Id.*

### C. *DPO in Bangladesh*

NOWZUWAN,<sup>179</sup> a Disabled People's Organization in Bangladesh, has made strides towards Article 13 implementation since the country ratified the CRPD on November 30, 2007. A few examples of their documented actions included the following:

- 1) A visually impaired attorney was successful at obtaining a verdict on a sexual harassment case.
- 2) NOWZUWAN's representatives facilitated the inheritance of a person with disability who was being denied his parent's assets. The person with a disability was able to obtain his fair share.
- 3) NOWZUWAN sits on the district/sub-districts jail committee to be the voice towards ensuring the rights of people with disabilities and women.<sup>180</sup>

In 2012, the government of Bangladesh took some strides towards this end by including people with disabilities. In their Police Reform Project, the government of Bangladesh included people with disabilities and women beginning in November 2012.<sup>181</sup> This Program promotes gender sensitivity in the police force.<sup>182</sup> Training on awareness-raising and recruitment efforts for new police officers will also work to include women with disabilities in these activities.<sup>183</sup>

### D. *Disability Rights Fund Projects Globally*

As with implementation of the CRPD, there are examples of disability organizations taking on both broad-based and article-specific implementation projects. The Disability Rights Fund (DRF)<sup>184</sup> is a collaboration between donor organizations and the disabled community to move the CRPD forward practically and actively. They have funded a variety of projects implementing Article 13, access to justice, including:

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179. *Disability Resource Centre*, NOWZUWAN.ORG, <http://nowzuwan.org/disability-resource-centre-2> (last visited Feb. 7, 2013).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. Disability Rights Fund, *Searching for Justice and Advancing Disability Rights*, available at [http://www.disabilityrightsfund.org/program\\_grantees/highlight/LAPD](http://www.disabilityrightsfund.org/program_grantees/highlight/LAPD) (last visited Feb. 7, 2013).

- 1) Strategic case taken in Peru against justice system that disallowed blind people to be appointed as judges. This was successful as Edwin Bejar Rojas was sworn in as a judge in Cuzco, Peru in July, 2012.<sup>185</sup>
- 2) Training of judges in Courts of Peace in rural areas of Peru about access to justice for people with disabilities.
- 3) Training of judges in the Supreme Court of Peru on the CRPD and the new Disability Act (the Act was developed and put before Congress via a citizen's initiative, funded by DRF).<sup>186</sup>
- 4) Sign language support to deaf women victims of violence to take cases Edwin Bejar Rojas before court in Bangladesh.<sup>187</sup>

## V. CONCLUSION

The very first words of the CRPD's preamble read:

The States Parties to the present Convention, recalling the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice, and peace in the world . . . .<sup>188</sup>

The concept of access to justice is inherent to a historical understanding of human rights. With the development of the CRPD, disability rights have now been introduced under the human rights framework and the concept of access to justice is more meaningful than ever. It is through accessing the judicial system that people are reassured that they are equal, that they are part of society, and that their contribution to the community is valued and important. The judicial system is the heart of a just society, and access to justice must exist in order to preserve this vital organ.

The Committee's six concluding observation reports reveal that the instrument of the CRPD is actively at work, identifying where disability

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185. Lucia Valdez Romero, *Abogado Invedente Edwin Bejar Rojas fue Nombardo Juez de Familia del Distrito Judicial de Cusco*, LA REPUBLICA, July 20, 2012, <http://www.larepublica.pe/11-07-2012/abogado-invidente-edwin-bejar-rojas-fue-nombrado-juez-de-familia-del-distrito-judicial-de-cusco> (last visited Aug. 3, 2013).

186. LA PRIMERA, [http://www.diariolaprimeraperu.com/online/actualidad/breves\\_72176.html](http://www.diariolaprimeraperu.com/online/actualidad/breves_72176.html) (last visited Feb. 7, 2013).

187. *Id.*

188. United Nations General Assembly, 61st Sess., Item 67(b), U.N. Doc A/61/611 (Dec. 6, 2006), available at <http://www.un.org/esa/socdev/enable/rights/convtexte.htm> (last visited Aug. 3, 2013).

rights are weak and providing recommendations and guidance for how they can be strengthened. The Committee's observations reveal the interconnectivity between different regions and cultures on disability issues, and the unique barriers that nations face in implementation. Although currently only one report explicitly mentions Article 13, this mention is in addition to related references throughout the other five concluding observation reports. This reveals that there are high expectations from Committee to ensure that access to justice is taken seriously, and that it includes people with disabilities at all levels, respecting the human rights principles on which the Treaty is based.

The authors, as members of the legal profession and the disability community, believe that the implementation of Article 13 and all of the rights associated with its complete implementation is essential towards the progression of the profession. Without access to lawyers, the rights of persons with disabilities to file a complaint, testify, become a lawyer or court officer themselves or participate in society as a protagonist in one's life will never be fully integrated into society. More exploration must be done by scholars, advocates, and countries around the world in order to combat the discrimination Article 13 was written to address. Without the ability to engage in the judicial system and all of its associated elements, our rights will never be fully recognized. We hope this article is a start to a larger conversation and longer-term awareness and action in this area.

**ADVISORY OPINION ON RESPONSIBILITY AND  
LIABILITY FOR INTERNATIONAL SEABED  
MINING (ITLOS CASE NO. 17) AND THE FUTURE  
OF NGO PARTICIPATION IN THE  
INTERNATIONAL LEGAL PROCESS**

*Anna Dolidze\**

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I. INTRODUCTION

On February 1, 2011, the Seabed Disputes Chamber of the International Tribunal on the Law of the Sea (ITLOS) issued an advisory opinion in Case No. 17, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Case No. 17).<sup>1</sup> The commentators have highlighted a number of important aspects in this opinion. First, from a substantive viewpoint, the Advisory

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1. Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Feb. 1, 2011, available at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/adv\\_op\\_010211.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf) (last visited Feb. 23, 2013) [hereinafter *Responsibilities and Obligations*].

Opinion was hailed as historic because it set the highest standards of due diligence, a legal obligation to apply precaution, best environmental practices, and Environmental Impact Assessment by the sponsoring States in relation to the activities of the sponsored organizations in the Area.<sup>2</sup> Second, for the first time, the advisory jurisdiction of ITLOS was invoked.<sup>3</sup> Third, Advisory Opinion in Case No. 17 was unanimous, an unprecedented occasion in the line of the Tribunal's earlier decisions marked by separate and dissenting views by judges.<sup>4</sup>

This article highlights another aspect of the case, hitherto unrecognized. Case No. 17 was the first instance in which non-governmental organizations (NGOs) took part in the Tribunal's proceedings in the capacity of *amici curiae*. First, the Tribunal requested the *amicus curiae* brief of the International Union for the Conservation of Nature (IUCN).<sup>5</sup> Under the United Nation's definition, IUCN is considered an NGO.<sup>6</sup> Second, on August 17, 2010, the ITLOS Registry received a request by Stichting Greenpeace Council (Greenpeace) and the World Wide Fund for Nature (WWF) to permit them to participate in the Advisory proceedings as *amici curiae*.<sup>7</sup> The President of the Court informed the organizations with individual letters on August 27 that their statement would not be included in the case file, for it was not submitted in accordance with the procedural rules.<sup>8</sup> However, it would be transmitted to the states, intergovernmental organizations, and the Seabed Authority.<sup>9</sup> On September 10, 2010, the Chamber decided not to grant the request for participation to the two organizations and informed them of this decision on the same day.<sup>10</sup> The Advisory Opinion was issued on February 1, 2011.<sup>11</sup>

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2. David Freestone, *Advisory Opinion of the Seabed Disputes Chamber of International Tribunal for the Law of the Sea on Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area*, Mar. 9, 2011, available at <http://www.asil.org/pdfs/insights/insight110309.pdf> (last visited Feb. 23, 2013) [hereinafter *Advisory Opinion of Seabed*].

3. *Responsibilities and Obligations*, *supra* note 1.

4. *Advisory Opinion of the Seabed*, *supra* note 2.

5. *Responsibilities and Obligations*, *supra* note 1.

6. International Union for Conservation of Nature (IUCN), *About IUCN*, available at <http://www.iucn.org/about/> (last visited Feb. 13, 2013).

7. *Responsibilities and Obligations*, *supra* note 1.

8. *Id.*

9. *Id.* at 14.

10. *Id.*

11. *Id.*

NGO participation in ITLOS Case No. 17 is an example of a larger trend in which entities not party to litigation take part in the proceedings before international tribunals as *amici curiae*. More often than not, litigation within the international tribunals involves a number of *amicus curiae* interventions by NGOs.<sup>12</sup>

Scholars have analyzed the international law-making activity by NGOs from a number of perspectives. Although international law-making has traditionally been reserved to States, some commentators point out that NGOs play an increasingly active role in the development of international law.<sup>13</sup> Although a number of scholars applaud this development as a possibility to democratize international law-making and welcome NGO involvement in the international environmental law-making, others criticize NGOs and their role.<sup>14</sup>

I analyze ITLOS's action with respect to the NGO *amicus curiae* petition on two levels. On an immediate level, the Tribunal's actions represent a cautious welcome to NGO participation in the Tribunal's proceedings. Tribunal's actions toward the *amici* petition point to its favorable disposition. This, in turn, widens the possibility of NGO participation and influence in the law-making process within the Tribunal. In this regard, I discern the Tribunal's positive approach in two specific actions: First, in its decision in Case No. 17, ITLOS clarified that it was open to considering *amicus* briefs by organizations other than those whose members were exclusively States.<sup>15</sup> By requesting *amicus curiae* views from a number of organizations, including the International Union for Conservation of Nature and Natural Resources (IUCN), ITLOS expressed its welcome to *amicus curiae* briefs by NGOs—at least as the term is understood by the United Nations. The Tribunal established a precedent by which NGOs that contain States and State agencies and their representatives as members that can be invited as *amici curiae* to submit their views.

Second, the Tribunal was neither required nor authorized to undertake the steps they did in relation to the submission by Greenpeace and WWF. However, the Tribunal used its discretion favorably towards the NGO petition and allowed it to attain the maximum effect, for even though the

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12. *Responsibilities and Obligations*, *supra* note 1.

13. Arnold Pronto, *Some Thoughts on the Making of International Law*, 19 EUR. J. INT'L L. 601, 603 (2008).

14. Rana Lehr-Lehnardt, *NGO Legitimacy: Reassessing Democracy, Accountability and Transparency*, Apr. 16, 2005, available at [http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1020&context=lps\\_clacp](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1020&context=lps_clacp) (last visited Feb. 13, 2013).

15. *Advisory Opinion of the Seabed*, *supra* note 2.

Tribunal officially declined to admit the *amici curiae* submission, in fact, the Tribunal fostered the dissemination of NGO arguments.<sup>16</sup>

From a more general perspective, the case has important implications for NGO participation as *amici* in the international legal process. Alongside the International Court of Justice (ICJ), up until this case, the ITLOS has remained as one of the last bastions untouched by NGO attempts to participate as *amici* and to put forth their views. Many other international tribunals have already been accustomed to handling NGO petitions for intervention as *amici*.<sup>17</sup> Moreover, international tribunals often draw on research and expertise provided in NGO *amicus* briefs.<sup>18</sup> By its most recent actions in Case No. 17, the Tribunal went down the path that many other international courts have traveled earlier.

This paper proceeds as follows: Part II stresses that NGO participation as *amici curiae* in international dispute resolution is one form of NGOs activity in international lawmaking. It maps the theoretical discussions regarding the role of NGOs in international law-making, and specifically, in international environmental lawmaking. Part III sketches out the domestic legal origins of the procedural institution of *amicus curiae* intervention. Part IV highlights how *amicus curiae* participation procedure was adopted by international tribunals. It shows the active role that NGOs play as *amici curiae* before five major international tribunals. Part V presents the jurisdiction of ITLOS and outlines the contours of the legal framework regulating non-state actor access to the Tribunal. Part VI provides the factual background to the advisory opinion in Case No. 17 and *amicus curiae* petitions in the case. Part VII analyzes the Tribunal's approach and explores the implications of the Tribunal's approach from the perspective of NGO participation as *amici* within ITLOS. Finally, Part VIII highlights the importance of the Tribunal's approach to NGOs in Case No. 17 from a general perspective of NGO participation in the international legal process.

## II. NGOS IN INTERNATIONAL LAW-MAKING

International public interest organizations and their domestic counterparts often contribute to the shaping of international law through legal means; they may take part in proceedings in different capacities: Initiating a case, acting as a court-appointed expert, appearing as a witness,

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16. *Id.*

17. Emanuele Rebasti, *A Legal Status for NGOs in Contemporary International Law?*, available at <http://www.esil-sedi.eu/sites/default/files/VierucciRebasti.PDF>. (last visited Feb. 23, 2013).

18. *Id.*

and submitting *amicus curiae* briefs.<sup>19</sup> NGO participation as *amici curiae* before international tribunals<sup>20</sup> is one form of NGOs participation in international law-making. Through *amici* briefs, NGOs express their advocacy and put forth arguments with which international tribunals engage in a number of ways.<sup>21</sup>

Non-state actors' activity in international lawmaking has posed a challenge for scholars who need to reassess their views on the making of international law.<sup>22</sup> A number of commentators have responded to the challenge, conceptualizing the involvement and initiatives of NGOs in creating specific international law instruments.

New Haven School of International Process provides one of the most convincing explanations of NGO participation in international law-making.<sup>23</sup> The New Haven School arose out of dissatisfaction with conventional explanations of the emergence of international law and aimed at offering new ways to conceptualize the process of making international law.<sup>24</sup> The New Haven School was launched as a response to Cold War realism, which, according to one of the proponents of the School, "underestimates the role of rules, and of the legal processes in general, and

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19. Dinah Shelton, *The Participation of Non-Governmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 612 (1994).

20. See, e.g., Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT'L L. 267 (2001); see also David Davenport, *The Proliferation of International Courts and Tribunals: What Does It Mean?*, 9 NAT'L LEGAL CENTER PUB. INT. 5 (2005); see also Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U.J. INT'L L. & POL. 679, 680 (1999); Cesare PR Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U.J. INT'L L. & POL. 709, 709 (1999); Chester Brown, *The Proliferation of International Courts and Tribunals: Finding Your Way Through the Maze*, 3 MELB. J. INT'L L. 453, 454 (2002).

21. See Anna Dolidze, *Making International Property Law: Amici Curiae in International Judicial Decision-Making*, 43 SYRACUSE J. INT'L L. & COM. (forthcoming 2013).

22. ANTHONY C. AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* 8–9 (1995).

23. See generally MYRES MCDUGAL, *INTERNATIONAL LAW, POWER, AND POLICY: A CONTEMPORARY CONCEPTION* 136–57 (1953); see also Myres McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967); see also Myres McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law is Made*, 6 YALE STUDIES IN WORLD PUB. ORDER 249 (1980); W. Michael Reisman, *The Democratization of International Law Law-making Processes and the Differentiation of Their Application*, in *DEVELOPMENT OF INTERNATIONAL LAW IN TREATY MAKING* 16, 26 (Rüdiger Wolfrum & Volker Röben eds., 2005).

24. See Myres McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law is Made*, 6 YALE STUDIES IN WORLD PUB. ORDER 249, 249 (1980).

over-emphasize[s] the importance of naked power.”<sup>25</sup> However, the school also does not understand international law as static, created, and implemented through states.<sup>26</sup>

A number of commentators have built on the New Haven School and have explained NGOs transnational law-making activity as their participation in the international legal process.<sup>27</sup> As one commentator points out, “[p]rivate parties, non-governmental organizations (NGOs), and/or mid-level technocrats coalesce around shared, on the ground experiences and perceived ‘self-interests,’ ‘codifying’ norms that at ones reflect and condition group practices.”<sup>28</sup> Over time, these informal rules embed, often unintentionally, in a more formal legal system and thereof become “law.”<sup>29</sup> Building on the New Haven School’s insights, Harold Koh has looked at the role of NGOs as “norm entrepreneurs” in facilitating the process of internalization of international law domestically by States.<sup>30</sup>

Scholars working on the international legal process tradition have emphasized their normative approach to the trend of increased NGO participation in international lawmaking.<sup>31</sup> For instance, Janet Levit remarked, “in an era of globalization, the international lawmaking universe is disaggregating into multiple—sometimes overlapping lawmaking communities, and neither the President, political elites, nor any of the other protagonists that star in the neo-conservative account are at the center of many of these communities.”<sup>32</sup> Some may recoil at this reality; I, on the other hand, celebrate this moment as one of possibility and promise, as an opportunity “to invite new worlds.”<sup>33</sup> Other commentators as well regard participation of NGOs at various levels of international governance as

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25. MYRES MCDUGAL, *INTERNATIONAL LAW, POWER, AND POLICY: A CONTEMPORARY CONCEPTION* 136–57 (1953).

26. Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 *YALE J. INT’L L.* 393, 394 (2007).

27. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599 (1997).

28. Levit, *supra* note 26, at 395.

29. *Id.*

30. *Id.*

31. Boutros Boutros-Ghali, *Democracy: A Newly Recognized Imperative*, 1 *GLOBAL GOVERNANCE* 3, 10 (1995).

32. U.N. Dev. Programme (UNDP), *Human Development Report* (1999) [hereinafter UNDP 1999].

33. See also David Kennedy, *The International Human Rights Movement: Part of the Problem?* 12 *HARV. HUM. RTS. J.* 101 (2002) (summarizing main criticisms advanced against the global human rights movement, primarily driven by human rights NGOs).

“mechanisms for democracy.”<sup>34</sup> For instance, a 1999 United Nations (U.N.) Human Development Report stated that “[o]ne big development in opening opportunities for people to participate in global governance has been the growing strength and influence of NGOs—in both the North and the South.”<sup>35</sup>

However, NGOs’ intensified international law-making activity has been subject to critique as well.<sup>36</sup> Uneasiness about the new role that NGOs play in international law-making processes is well expressed in the opinion of the President of the ICJ in the case of *The Legality of the Threat or Use of Nuclear Weapons*.<sup>37</sup> He expressed his discontent about the fact that the International Association of Lawyers against Nuclear Arms (IALANA) and other groups brought strong pressure on the UN General Assembly and the World Health Organization in order to convince them to bring a request for an advisory opinion to the International Court of Justice.<sup>38</sup> He expressed his hope that “[G]overnments and inter-governmental institutions [would] still retain sufficient independence of decision[s] to resist the powerful pressure groups which besiege them today with the support of mass communication media.”<sup>39</sup>

For instance, Makau Mutua criticizes the “façade of neutrality” maintained by international non-governmental organizations while they actually engage in political projects.<sup>40</sup> Obiora Okafor emphasizes the crises of legitimacy that human rights NGOs active in Nigeria face.<sup>41</sup> In addition, the actions of individual NGOs have often come under fire for lack of objectivity and bias.<sup>42</sup>

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34. Boutros-Ghali, *supra* note 31, at 10.

35. UNDP, *supra* note 32, at 35.

36. See Kennedy, *supra* note 33.

37. *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 67 (July 8) (dissenting opinion of Judge Guillaume); see also *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 216 (July 8) (as Judge Weeramantry indicated in his dissenting opinion, the Court had received more than 3,000,000 signatures from NGOs and individuals in relation to this case).

38. *Id.*

39. *Id.*

40. MAKAU W. MUTUA, *Human Rights International NGOs: A Critical Evaluation*, in *NGOS AND HUMAN RIGHTS: PROMISE AND PERFORMANCE* 151 (Claude W. Welch Jr. ed. 2001).

41. JOEL M. NGUGI & OBIORA CHINEDU OKAFOR, *LEGITIMIZING HUMAN RIGHTS NGOS: LESSONS FROM NIGERIA* (2007).

42. See, e.g., Robert Neiman, *Latin America Scholars Urge Human Rights Watch to Speak up on Honduras Coupe*, THE HUFFINGTON POST, Aug. 21, 2009, available at [http://www.huffingtonpost.com/robert-naiman/latin-america-scholars-ur\\_b\\_265282.html](http://www.huffingtonpost.com/robert-naiman/latin-america-scholars-ur_b_265282.html), (last visited Dec. 12, 2010) (arguing that Human Rights Watch’s “reporting on Latin America is often heavily

Moreover, scholars have expressed specific calls for NGO participation in the process of international environmental lawmaking.<sup>43</sup> Barbara Gemmill and Abimbola Bamidele-Izu have indicated, for instance, the need to create structures for NGO participation in advocacy for environmental justice.<sup>44</sup> They state that the creation of opportunities for NGO participation as *amicus curiae* should be welcome: “[T]he submission of ‘friends of the court’ opinions would be well-suited to the skills and interests of NGOs.”<sup>45</sup>

Writing about *amicus curiae* submissions by NGOs in the WTO and drawing on Jurgen Habermas’ work, Robin Eckersley argues that NGO participation as *amicus curie* has the potential of creating transnational space for dialogue on environmental matters or a transnational “green public sphere.”<sup>46</sup> “Cosmopolitan public spheres are conceptualized as specialized, intermediary structures, with multiple strategic and communicative functions, that mediate between supra-national governance structures and regional and domestic civil societies.”<sup>47</sup> According to Eckersley, transnational public spheres can partly remedy concerns for the lack of external accountability of international courts.<sup>48</sup>

However, writing about the legitimacy deficit of international environmental law, Daniel Bodansky cautions against confusion between NGO involvement and public participation.<sup>49</sup> As Bodansky emphasizes:

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influenced by the agendas of official Washington”); Robert Bernstein, *Rights Watchdog, Lost in the Mideast*, NEW YORK TIMES, Oct. 19, 2009, available at <http://www.nytimes.com/2009/10/20/opinion/20bernstein.html>, (last visited Jan. 11, 2011) (founder of the Human Rights Watch criticized the organization for allegedly biased reporting on human rights abuses in the Israeli-Arab Conflict); Scott Macleod, *Sneak Attack on Human Rights Watch*, L.A. TIMES, Oct. 30, 2009, available at <http://articles.latimes.com/2009/oct/30/opinion/oe-macleod30>, (last visited Dec. 12, 2010) (arguing that the attacks on Human Rights Watch for its Middle East policies are unfounded).

43. On public participation in international environmental lawmaking, see Neil A.F. Popovic, *The Right to Participate in Decisions that Affect the Environment*, 10 PACE ENVTL. L. REV., 683 (1993); see also Kal Raustiala, *The “Participatory Resolution” in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537 (1997).

44. Barbara Gemmill and Abimbola Bamidele-Izu, *The Role of NGOs and Civil Society in Global Environmental Governance*, in GLOBAL ENVIRONMENTAL GOVERNANCE: OPTIONS AND OPPORTUNITIES 20 (Daniel C. Esty & Maria H. Ivanova, eds. 2002).

45. *Id.* at 19.

46. Robyn Eckersley, *A Green Public Sphere in the WTO? The Amicus Curiae Interventions in the Transatlantic Biotech Dispute*, 13 EUR. JOURNAL INT’L RELATIONS 329 (2007).

47. *Id.*

48. *Id.*

49. Daniel M. Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AM. J. INT’L L. 596 (1999).

What is meant more precisely is participation by non-governmental groups, such as Greenpeace, the Sierra Club, and the Global Climate Change Coalition, which often have opposing positions and may or may not reflect ‘the public interest’—if such a thing exists at all. Indeed, even if international meetings were opened up and NGOs given unrestricted access, few members of the public would, as a practical matter, be able to participate.<sup>50</sup>

This article highlights that with ITLOS’ actions in Case No. 17, the opportunities for NGO participation in international environmental law-making have expanded. ITLOS’ cautious welcome to *amicus* participation by NGOs in this case might be a stepping stone towards NGOs more active involvement in the Tribunal’s work. Moreover, although this analysis could be in line with scholarship that aspires for more NGO involvement in international lawmaking, due to the constraints of space, this article is intentionally limited to the analytical side of the issue and remains agnostic to its normative aspects.

### III. DOMESTIC LEGAL ORIGINS OF *AMICUS CURIAE* PROCEDURE

Although currently *amici curiae* participation is a commonly accepted international procedural instrument, its origins are purely local. *Amicus curiae* petitions evolved as part of common law procedure. *Amici* have served a number of objectives, including remedying certain deficiencies of adversarial procedure and preventing judicial error.<sup>51</sup> Moreover, although *amici* have been traditionally recognized as participants in the judicial proceedings in common law countries, a number of civil law countries have recently adopted the procedure as well.<sup>52</sup> The section below outlines the historical origins, objectives, and evolution of *amicus curie* procedure.

Principles of Transnational Civil Law, a codification of internationally accepted “best practices” of civil procedure by the influential American Law Institute and International Institute for the Unification of Private Law (UNIDROIT), put forth the following description of the *amicus curiae* procedure:

Written submissions concerning important legal issues in the proceeding and matters of background information may be received from third persons with the consent of the court, upon

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50. *Id.* at 619.

51. PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE, UNIDROIT & THE AMERICAN LAW INSTITUTE 32 (2006).

52. *Id.*

consultation with the parties. The court may invite such a submission. The parties must have an opportunity to submit written comment addressed to the matters contained in such a submission before it is considered by the court.<sup>53</sup>

The commentary to the Principles indicates that, in general, civil law nations do not possess a practice of allowing *amicus curiae* submissions, though some countries from civil law tradition, such as France, have developed the practice in its case law.<sup>54</sup>

*Amicus curiae* intervention practice has been an integral part of English law and practice. Bouvier's Law dictionary<sup>55</sup> notes that the practice is "immemorial" in England and can be traced back to the Roman institution of "*amicus consiliari*," who assisted the advocate.<sup>56</sup> Some sources reveal that the practice of *amicus curiae* or "friend of the court" existed in England since at least Edward I.<sup>57</sup>

*Amici* did not have an entitlement to intervene.<sup>58</sup> However, the discretion was wide, for *amicus* interventions took place for different purposes, including relieving problems created by an adversarial system.<sup>59</sup> Moreover, *amicus* interveners were allowed to expand their role from neutral informers of the Court on matters which the Court would have otherwise overlooked to advocates of parties whose interests might have been prejudiced by the impending judgment.<sup>60</sup> Samuel Krislov cites a number of early English cases that refer to the participation of *amici curiae*.<sup>61</sup>

Indeed, *amicus curiae* submissions are customary in a number of countries that share the fundamental principles of common law, including the United States, Canada, the United Kingdom, and Australia.<sup>62</sup> As Professor Michael Reisman wrote in 1970:

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53. *Id.* at 32.

54. *Id.* at 33.

55. BOUVIER'S DICTIONARY (3d ed. 1914).

56. *Id.*

57. SIR FREDERICK POLLOCK, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, vol. 2, 248 (Liberty Fund Inc. 1898).

58. *Id.*

59. Samuel Krislov, *Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 696 (1963).

60. *Id.* at 697.

61. *Id.* at 695.

62. Roger S. Clark, *The International League for Human Rights and South West Africa*, 3 HUM. RTS. Q. 101, 112-13 (1981).

In common law countries, the *amicus curiae* brief has been an institution which has provided useful information to courts, permitted private parties who were not litigating to inform the court of their views and the probable effects the outcome might have on them and, overall, has served as means for integrating and buttressing the authority and conflict-resolving capacities of domestic tribunals.<sup>63</sup>

In the United States, the procedural institution of *amicus curiae* has a long, rich history. For instance, Rule 29 of the Federal Rules of Appellate Procedure establishes the process with which entities can file *amicus* briefs in the U.S. appellate courts.<sup>64</sup> Rule 37 of the Supreme Court Rules indicates the ways for filing *amicus* briefs before the U.S. Supreme Court.<sup>65</sup> Scholars have extensively written on the *amicus curiae* institution within the U.S.<sup>66</sup>

The Canadian Supreme Court has allowed *amicus curiae* interventions since the first rules of procedure were adopted in 1878.<sup>67</sup> Further, *amicus curiae* interventions also have a long history in Australia,<sup>68</sup> whose position has been described by the following decision of the Australian Supreme Court:

Brennan CJ in *Levy v. Victoria*:

The footing on which *amicus curiae* is heard is that that person is willing to offer the court a submission on law or relevant fact which will assist the court in a way in which the court would not otherwise have been assisted . . . . [A]n *amicus* will be heard when the Court is of the opinion that it will be significantly assisted thereby, provided that any cost to the parties or any delay

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63. *Id.*

64. FED. R. APP. P. 29.

65. SUP. CT. R. 37.

66. See, e.g., Karen O'Connor & Lee Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 JUST. SYS. J. 35 (1983).

67. Amanda Jane Burgess, *Intervenors Before the Supreme Court of Canada, 1997–1999: A Content Analysis (2000)*, COLLECTIONSCANADA.COM, available at <http://www.collectionscanada.gc.ca/obj/s4/f2/dsk2/ftp03/MQ62193.pdf> (last visited Feb. 14, 2013); CAN. SUP. CT. R. 18.

68. Jason Pierce, *The Road Less Traveled: Non-Party Intervention and Public Litigation Model in the High Court*, (2003), 28 ALT. L. J. 69; see also, Ronnit Redman, *Litigating for Gender Equality: The Amicus Curiae Role of the Sex Discrimination Commissioner*, 27 U.N.S.W.L.J. 849 (2004); for a discussion of the *amicus curiae* in Australia, see George Williams, *The Amicus Curiae and Intervener in the High Court*, 28 FED. L. REV. 1 (2000); see also Susan Kenny, *Intervenors and Amici Curiae in the High Court*, 20 ADEL. L. REV. 159, 159 (1998).

consequent on agreeing to hear the amicus is not disproportionate to the assistance that is expected.<sup>69</sup>

#### IV. NGOS AS *AMICI CURIAE* BEFORE INTERNATIONAL TRIBUNALS

The chronological overview of the legalization of NGO *amicus curiae* submissions by five important international tribunals shows that international tribunals have been moving recently to formalization of *amicus curiae* procedure for NGOs. All of these tribunals have legally formulated a procedure for accepting *amicus curiae* submissions by NGOs. Each of them has chosen an individual approach to *amicus curiae* petitions. The International Court of Justice, for instance, authorizes NGOs to submit *amicus curiae* briefs and provides a specific procedure for addressing them, while not making such submissions part of the official case file.<sup>70</sup> The Inter-American Court of Human Rights, on the other hand, accepts all *amicus* briefs indiscriminately without specifying if and based on what criteria they may be rejected.<sup>71</sup> Nevertheless, it is indisputable that over the last 30 years, all of the major international courts, whether transnational or interstate,<sup>72</sup> have chosen to regulate *amicus* participation for NGOs.

The first international court to legalize the procedure formally for *amicus* submission by non-state actors was the European Court of Human Rights (ECHR), which was established in 1959.<sup>73</sup> The Court was based on the European Convention for the Protection of Human Rights and Fundamental Freedoms after eight State parties delivered their instruments recognizing the compulsory jurisdiction of the Court.<sup>74</sup> The Court's initial structure allowed neither for the right of individuals to address the Court nor for the right of third parties to request the Court to hear their views.<sup>75</sup> However, the European Convention recognized the procedure in 1998, when in addition to other reforms in the Convention structure, the newly adopted Article 36(2) granted the States, individuals, and organizations that

69. *Levy v. Victoria*, (1997) 189 CLR 579, 604–05, (Austl.).

70. Robert O. Keohane, *Legalized Dispute Resolution: Interstate and Transnational*, available at <http://www.princeton.edu/~slaughtr/Articles/IOdispute.pdf> (last visited Apr. 5, 2013).

71. *See id.*

72. *See id.*

73. European Court of Human Rights, *The European Court of Human Rights Some Facts and Figures*, available at [http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFigures\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFigures_EN.pdf). (last visited Feb. 23, 2013).

74. Paul Mahoney, *Developments in the Procedure of the European Court of Human Rights: The Revised Rules of the Court*, 3 Y.B. EUR. L. 127, 127 (1983).

75. STEVEN GREER, *THE EUROPEAN CONVENTIONS ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS* 37–38 (Cambridge University Press 2006).

are not party to the proceedings to intervene.<sup>76</sup> Article 36(2) notes: “The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.”<sup>77</sup>

However, the procedure existed prior to the Convention amendments of 1998 and operated on the basis of a similar provision that was incorporated in the Rules of Procedure in 1982.<sup>78</sup> On November 24, 1982, the judges of the Court held a plenary session in which they adopted the revisions to the procedural rules<sup>79</sup> after a series of attempts by British civil society organizations and the United Kingdom to participate in the proceedings as *amici*.<sup>80</sup> The new Rule 37 in Chapter III established the possibility of third-party intervention.<sup>81</sup> Clause 2 stated the following:

The President may, in the interest of proper administration of justice, invite or grant leave to any Contracting State which is not a Party to the proceedings to submit written comments within a time-limit and on issues which he shall specify. He may also extend such an invitation or grant such a leave to any person concerned other than the applicant.<sup>82</sup>

Thus, the ECHR’s approach to NGO *amicus* briefs has been more expansive relative to the International Court of Justice’s as *amici*. Under the ECHR, NGOs have a right to submit unsolicited requests to the Court, though the requests may be rejected by the Court “in the interests of proper administration of justice.”<sup>83</sup>

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76. European Convention on Human Rights, art. 36(2), Dec. 10, 1948, available at [http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention\\_ENG.pdf](http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf) (entered into force on Oct. 1, 1994) (last visited Aug. 3, 2013).

77. *Id.*

78. European Court of Human Rights, *Rules of Court*, Sept. 1, 2012, available at [http://www.echr.coe.int/NR/ronlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT\\_EN\\_2012.pdf](http://www.echr.coe.int/NR/ronlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT_EN_2012.pdf). (last visited Feb. 23, 2013).

79. *Id.*

80. See Anna Dolidze, *Anglo-Saxonizing Rights: The European Court of Human Rights and British Civil Society*, 104 ASIL PROC. 47, 47–50 (2012).

81. *Rules of Court*, *supra* note 83.

82. *Id.*

83. European Convention on Human Rights, art. 36(2), Dec. 10, 1948, available at [http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention\\_ENG.pdf](http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf) (entered into force on Oct. 1, 1994) (last visited Aug. 3, 2013).

Currently, NGOs are very active in participating as *amici* in litigation in the European Court of Human Rights.<sup>84</sup> For instance, on March 18, 2011, the European Court of Human Rights handed down the judgment in *Lautsi v. Italy* concerning the display of religious symbols in classrooms in Italy.<sup>85</sup> This case is noteworthy for a record number of *amicus curiae* interveners.<sup>86</sup> The Court's final judgment mentions *amicus* submissions from the governments of Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta, the Republic of San Marino, and the principalities of Monaco and Romania.<sup>87</sup> Submissions from NGOs included the Greek Helsinki Monitor, *Associazione nazionale del libero Pensiero*, the European Center for Law and Justice, *Eurojuris*, International Commission of Jurists and Human Rights Watch, *Zentralkomitee der deutschen katholiken*, *Semaines sociales de France*, *Associazioni cristiane lavoratori italiani*, and thirty-three members of the European Parliament.<sup>88</sup>

Moreover, the Court sometimes rejects NGO submissions. For instance, the U.S. based organization Rights International was denied the possibility of submitting an *amicus* intervention in the case of *Ahmed Sadik v. Greece*.<sup>89</sup> In the case of *McGinley and Egan v. UK*, the President of the Court granted the right to submit *amicus* briefs to two non-governmental organizations, Liberty and Campaign for Freedom of Information, while it declined this possibility without further justification for another organization, the New Zealand Nuclear Test Veterans' Association.<sup>90</sup>

The International Court of Justice, the principal judicial organ of the United Nations, is an adherent of a more restrictive model of accepting NGO *amicus* interventions.<sup>91</sup> Article 34 of the Statute of the ICJ allows "public international organizations" to submit their views about a case before the Court *proprio motu* as well as to authorize the Court to inform the named organization if the construction of the constituent instrument of the organization or international convention has been invoked in the case.<sup>92</sup>

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84. See Anna Dolidze, *Making International Property Law: Amici Curiae in International Judicial Decision-Making*, 43 SYR. J. INT. L. & COM. (forthcoming).

85. Appl. No. 30814/06, *Lautsi and Others v. Italy*, 2011, ECHR 8, available at [http://www.echr.coe.int/echr/resources/hudoc/lautsi\\_and\\_others\\_v\\_italy.pdf](http://www.echr.coe.int/echr/resources/hudoc/lautsi_and_others_v_italy.pdf). (last visited Feb. 23, 2013).

86. *Id.*

87. *Id.*

88. *Id.* at 47–56.

89. Appl. No. 46/1995/552/638, *Ahmet Sadik v. Greece*, 1996, ECHR 4.

90. Appl. No. 10/1997/794/995-996, *McGinley and Egan v. the UK*, 1998, ECHR 5.

91. *Id.*

92. Competence of the Court, Statute ICJ, art. 34.

NGOs have petitioned the Court to accept their briefs as *amici curiae* in contentious proceedings.<sup>93</sup> However, the Court has never formally accepted an *amicus* brief from an NGO in such proceedings.<sup>94</sup>

Nonetheless, the Court has been more welcoming of *amicus* submissions by NGOs in its advisory proceedings than in the contentious ones. Article 66 of the International Court of Justice's Statute refers to two types of entities that can voice its opinion as *amici curiae* in advisory proceedings: "States" and "international organizations."<sup>95</sup> The practice under the Article has been varied, for the Court has requested an *amicus curiae* brief from Palestine (neither a State nor an International organization at the time). It has also consented to receiving an *amicus curiae* brief from the International League for the Rights of Man in 1950 in the *International Status of South-West Africa* case.<sup>96</sup> Furthermore, in 2004, the Court adopted Practice Direction XII, an addition to earlier Practice Directions, for which it regulated *amicus curiae* submissions by international NGOs.<sup>97</sup> Practice Direction IX states, "[w]here an international non-governmental organization submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file."<sup>98</sup>

Such statements and/or documents shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain. Written statements and/or documents submitted by international non-governmental organizations will be placed in a designated location in the Peace Palace. All States as well as intergovernmental organizations presenting written or oral statements under Article 66 of the Statute will be informed as to the location where statements and/or documents submitted by international non-governmental organizations may be consulted.<sup>99</sup>

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93. See Lance Bartholomeusz, *The Amicus Curiae Before the International Courts and Tribunals*, 5 NON-ST. ACTORS & INT'L L. 216, 231 (2005).

94. *Id.* at 224.

95. *Id.* at 218.

96. *Id.*

97. Dinah Shelton, *The International Court of Justice and Nongovernmental Organizations*, 9 INT'L COMMUNITY L. REV. 139, 139 (2007).

98. *Practice Directions*, ICJ-CIJ.ORG, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0> (last visited Feb. 23, 2013).

99. International Court of Justice (ICJ), *Practice Directions*, Jan. 20, 2009, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0> (last visited Feb. 14, 2013).

Thus, although the Court does not officially recognize NGO *amicus curiae* submission, the practice direction does indicate that it has decided to take the issue of accessibility of NGO submissions seriously.<sup>100</sup>

Issues arose in 1998 whether or not WTO Dispute Panels should accept *amicus curiae* briefs in the *Shrimp/Turtle* case.<sup>101</sup> The two briefs were submitted by the Center for Marine Conservation (CMC) and the Center for International Environmental Law (CIEL) jointly, and by the WWF.<sup>102</sup> The Panel's decision to accept or reject the briefs rested on the interpretation of Article 13 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Article 13 states:

- 1) Each Panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member . . . .;
- 2) Panels may seek information from any relevant sources and may consult experts to obtain their opinion on certain aspects of the matter . . . .<sup>103</sup>

In relation to the Panel's right to receive unsolicited briefs, the appellate body in the *Shrimp/Turtle* case held on November 6, 1998 that "authority to seek information is not properly equated with prohibition on accepting information which has been submitted without having been requested by a panel. A panel has a discretionary authority whether to accept or to reject information and advice submitted to it, whether requested by a panel or not."<sup>104</sup>

In November of 2000, in relation to the case between Canada and France concerning France's ban on the import of asbestos, the Division of the Appellate Body tasked with considering the dispute issued "[t]he

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100. Bartholomeusz, *supra* note 93, at 105.

101. Case No. WT/DS58/AB/R, United States-Import Prohibition of Certain Shrimp and Shrimp Products 1998, App. Body Rep., available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/58abr.pdf](http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf) (last visited Mar. 12, 2013) [hereinafter *Import Prohibition of Certain Shrimp*].

102. See Laurence Boisson de Chazournes & Makane Moïse Mbengue, 2 *The Amici Curiae and the WTO Dispute Settlement System: The Doors are Open*, 2 *LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS* 205 (2003).

103. K. OELLERS-FRAHM & A. ZIMMERMAN, *DISPUTE SETTLEMENT IN PUBLIC INTERNATIONAL LAW* 650 (2d ed. 2001).

104. *Import Prohibition of Certain Shrimp*, *supra* note 101, at 108.

Additional Procedure for Purposes of Canada's Appeal Only."<sup>105</sup> The Procedure specified the process through which entities interested in submitting *amicus curiae* briefs could request participation.<sup>106</sup> The Procedure also established relatively stringent criteria that the petitions for *amicus curiae* intervention should have met, including the requirement to provide information about the petitioner's relationship to the case and to parties.<sup>107</sup>

ICC's procedural rules regarding *amicus curiae* interventions mirror the phrasing of a similar rule, Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (ICTR).<sup>108</sup>

The Rules of Procedure of the International Criminal Court allow for *amicus curiae* interventions by entities other than states. Rule 103 indicates that the power of the Chamber to invite a State, organization, or a person to submit written or oral observations.<sup>109</sup> Rule 149 extends the same authority to the Appeals Chamber.<sup>110</sup> NGOs have used the possibility of *amicus curiae* intervention a number of times. For instance, on May 12, 2012, the ICC Pre-Trial Chamber I agreed to hear the views of two organizations, Lawyers for Justice in Libya and the Redress Trust, in relation to *The Prosecutor v. Saifal-Islam Gaddafi and Abdullah Al-Senussi* case.<sup>111</sup>

Moreover, the ICC continues to provide an important and expansive interpretation of the *amicus curiae* procedure. On June 8, 2012, the ICC put forth an important interpretation of Rule 103.<sup>112</sup> The Office of Public Counsel for Victims filed a motion requesting leave to reply to the *amicus*' submission, even though the entity's right to reply to *amicus*' briefs is not mentioned explicitly in the rules.<sup>113</sup> The Chamber granted the request, finding that the Chamber also has discretion to grant participants leave to

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105. Ulrich Beyerlin, *The Role of NGOs in International Environmental Litigation*, 61 ZAÖRV 357, 366 (2001).

106. *Id.*

107. Communication from the Appellate Body, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/9 (Nov. 8, 2000).

108. See Sarah Williams & Hannah Woolaver, *The Role of Amicus Curiae before International Criminal Tribunals*, 6 INT'L CRIMINAL L. REV. 151 (2006).

109. INT'L CRIM. CT. R. OF P. 103.

110. ICC R. OF P. 149.

111. *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Request (June 8, 2012).

112. *Id.*

113. *Id.*

reply to such filings.<sup>114</sup> The Chamber “reviewed the [r]equest, and considering the issues for which leave to submit *amicus curiae* observations has been granted, the Chamber is of the view that it is appropriate in the present circumstances to accord the OPCV the opportunity to submit a response to the *amicus curiae* observations.”<sup>115</sup>

The Inter-American Court of Human Rights formalized the *amicus* procedure for NGOs in 2009, although in practice it has admitted *amicus* interventions by NGOs.<sup>116</sup> The Inter-American Court of Human Rights was created in 1979 as an autonomous judicial organ of the Organization of American States (OAS).<sup>117</sup> Its creation came about through the entry into force of the Inter-American Convention on Human Rights on July 18, 1978.<sup>118</sup> The Inter-American Convention created the Court for the purpose of applying and interpreting the Convention and formalized the relationship between the Commission and the Court.<sup>119</sup> The Court’s jurisdiction extends only to the twenty-five states that have ratified the Convention, whereas the Commission has a more general competence under the OAS Charter.<sup>120</sup>

The Court adopted its rules of procedure during its third ordinary session held from June 30, 1980 to August 9, 1980.<sup>121</sup> The rules have been subsequently amended several times; the most recent amendments were adopted in 2009. In the amendments, the Court formalized the procedure for submitting *amicus curiae* interventions, which should be emphasized.<sup>122</sup> Although recent cases at the Inter-American Court have witnessed burgeoning *amici* interventions from domestic and international non-governmental organizations.<sup>123</sup> This activity has so far remained unregulated.

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114. *Id.*

115. Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Decision (June 4, 2012).

116. *Id.*

117. *Id.*

118. American Convention on Human Rights “Pact of San Jose, Costa Rica” art. 8, Sep. 22, 1969, O.A.S.T.S. 36.

119. *Rules of Procedure of the Inter-American Court of Human Rights*, Nov. 16, 2008, available at [http://www.corteidh.or.cr/reglamento/regla\\_ing.pdf](http://www.corteidh.or.cr/reglamento/regla_ing.pdf) (last visited Mar. 12, 2013).

120. *Id.*

121. *Rules of Procedure of the Inter-American Court of Human Rights*, *supra* note 119.

122. *Id.*

123. Open Society Foundations, *Justice Initiative and Four Other Groups Join Landmark Access to Information Case*, Mar. 30, 2006, available at <http://www.opensocietyfoundations.org/press-releases/justice-initiative-and-four-other-groups-join-landmark-access-information-case> (last visited Apr. 5, 2013) (“Consider, for example, the case of Marcel Claude Reyes and Others v. Chile (Case no. 12.108) where five civil society organizations submitted a joint *amicus* brief: Open Society Justice

Henceforth, *amicus curiae* interventions will be sent to the Court and be admissible within fifteen days following a hearing.<sup>124</sup> If no hearing had been appointed, *amici* brief should be submitted following the Order that set the deadlines for submission of final arguments and documentary evidence.<sup>125</sup> In its unconditional acceptance of *amicus* briefs, the Inter-American Court is even more welcoming to civil society's participation than its European counterpart.<sup>126</sup>

#### V. NGO ACCESS IN THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

ITLOS was founded as a dispute resolution mechanism under the United Nations Convention on the Law of the Sea (UNCLOS).<sup>127</sup> Although there has been extensive academic discussion on whether the Tribunal allows access to NGOs as applicants and as *amicus curiae*, prior to the Case No. 17 the issue had not been tested in practice. Moreover, when referring to *amicus curiae* interventions, the Tribunal's Statute and Rules of Procedure mention "intergovernmental organizations."<sup>128</sup> The commentators have been discussing whether the term includes "NGOs."<sup>129</sup> Furthermore, *amicus curie* can only participate in the Tribunal's proceedings if requested by the Chamber.<sup>130</sup> The section below outlines ITLOS' basic structure and delineates the main procedural aspects related to the applicant and *amicus curiae* access.

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Initiative, Article 19, Libertad de Informacion Mexico, Instituto Presa y Sociedad, Access Info Europe.").

124. *Rules of Procedure of the Inter-American Court of Human Rights*, *supra* note 119

125. Inter-Am. Ct. H.R. Art. 56, *available at* <http://www.cidh.org/basicos/english/basic20.RulesCourt.pdf> (last visited Feb. 10, 2013); *see also* Inter-Am. Ct. H.R. Art. 61 *available at* <http://www.cidh.org/basicos/english/RulesIACourtNov2009.pdf> (last visited Feb. 10, 2013).

126. Anna Dolidze, *Inter-American Court of Human Rights, Reports on International Organizations*, REPORTS ON INTERNATIONAL ORGANIZATIONS (Oct. 2010), [http://www.asil.org/rio/iccourt\\_hr\\_oct2010.html](http://www.asil.org/rio/iccourt_hr_oct2010.html) (last Feb. 10, 2013).

127. Cathrin Zengerling, *NGOs versus European Pirates: Fisheries Agreements, IUU Fishing and ITLOS in West African Cases* in INTERNATIONAL ENVIRONMENTAL LAW MAKING AND DIPLOMACY REVIEW 107, 121 (Ed Couzens & Tuula Honkonen eds. 2008).

128. INT'L TRIBUNAL LAW OF THE SEA, Rules of the Tribunal, Annex 6, art. 16.

129. Zengerling, *supra* note 127.

130. *Id.*

### A. *Background*

ITLOS is a judicial body entrusted with the adjudication of disputes that arise out of application and interpretation of the UNCLOS.<sup>131</sup> The UNCLOS resulted from one of the most complex and protracted diplomatic negotiations in the twentieth century, and was hailed as a success.<sup>132</sup> The Tribunal was set up pursuant to Annex VI of UNCLOS.<sup>133</sup> Annex VI contains the Statute of the International Tribunal for the Law of the Sea.<sup>134</sup> The Tribunal had its first session in October of 1996,<sup>135</sup> in which its judges adopted the Rules of Procedure in accordance with Article 16 of Annex VI on October 28, 1997.<sup>136</sup>

The Tribunal, which is composed of twenty-one members, has its seat in Hamburg, Germany.<sup>137</sup> The first case of ITLOS, *M/V Saiga (St. Vincent and the Grenadines v. Guinea)* was submitted to the Court on November 13, 1997.<sup>138</sup> ITLOS is split into four chambers:

- 1) The Chambers for Summary Procedure,
- 2) Fisheries Disputes,
- 3) Marine Environments Disputes, and
- 4) Seabed Disputes.<sup>139</sup>

The Seabed Disputes Chamber that issued the Advisory Opinion in Case No. 17 consisted of eleven members.<sup>140</sup>

The Tribunal has jurisdiction in two kinds of proceedings: Contentious and advisory.<sup>141</sup> In terms of access, the Tribunal is a hybrid

131. *Id.*

132. RAH & WALLRABENSTEIN, SUSTAINABILITY NEEDS JUDICIAL SUPPORT: WHAT DOES THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (ITLOS) OFFER IN THIS RESPECT? (2006).

133. Statute of the International Tribunal for the Law of the Sea, Annex VI, Dec. 10, 1982, 1983 U.N.L.O.S 397.

134. *Id.*

135. Zengerling, *supra* note 127.

136. INT'L TRIBUNAL LAW OF THE SEA, Rules of the Tribunal, Annex 6, art. 16.

137. Statute of the International Tribunal for the Law of the Sea, Annex VI, Dec. 10, 1982, 1983 U.N.L.O.S 397.

138. International Tribunal for the Law of the Sea (ITLOS), *Cases*, ITLOS.ORG, available at <http://www.itlos.org/index.php?id=10&L=0%20%5C%20Opens%20internal%20link%20in%20current%20window> (last visited Feb. 17, 2013).

139. ITLOS, *Seabed Disputes Chamber and Ad Hoc Chambers of the Seabed Disputes Chamber*, available at <http://www.itlos.org/index.php?id=19> (last visited Feb. 23, 2013).

140. Randa Salama, *Fragmentation of International Law: Procedural Issues Arising in Law of the Sea Disputes*, 19 AUSTRALIAN AND N. Z. MAR. L. J. 24, 27 (2005).

mechanism. The issues related to access to the tribunal should be considered in two separate areas: 1) access in the contentious proceedings with special considerations given to the issues of access to the Seabed Disputes Chamber and 2) access to advisory proceedings.<sup>142</sup>

### B. Access as Applicants

Article 20 of Annex VI of UNCLOS stipulates provisions regarding access to the Tribunal.<sup>143</sup> First, the Tribunal is open to state parties of UNCLOS.<sup>144</sup> However, access is not foreclosed to them. Article 20(2) states the following: “The Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.”<sup>145</sup>

First, we have to inquire what is meant by a “state party” in 20(1). Article 1(2.1) defines State parties as States that have consented to be bound by the Convention and for which the UNCLOS is in force.<sup>146</sup> Moreover, the meaning of “state parties” is extended to entities other than States by virtue of Article 305, which stipulates that UNCLOS will accept signatures by entities other than states, including by self-governing associated states and international organizations.<sup>147</sup> Article 305 of Annex IX (Participation by International Organizations) establishes the following:

For the purposes of Article 305 and of this Annex, “international organization” means an intergovernmental organization constituted by States to which its member States have transferred competence over matters governed by this Convention, including

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141. *Jurisdictions*, ITLOS.ORG, <http://www.itlos.org/index.php?id=11> (last visited Feb. 15, 2013).

142. *Advisory Proceedings*, ITLOS.ORG <http://www.itlos.org/index.php?id=44&L=1%252527%252560%252528%25255B%25257B%25255E%25257> (last visited Feb. 15, 2013); *see also Contentious Proceedings*, ITLOS.ORG <http://www.itlos.org/index.php?id=43&L=1%252527%252560%252528%25255B%25257B%25255E%25257> (last visited Feb. 15, 2013).

143. Statute of the International Tribunal for the Law of the Sea, Annex VI, Dec. 10, 1982, 1983 U.N.L.O.S 397.

144. *Id.*

145. *Id.*

146. U.N. Convention on the Law of the Sea, art. 1, Dec. 10, 1982, 1833 U.N.T.S. 397.

147. U.N. Convention on the Law of the Sea, art. 305, Dec. 10, 1982, 1833 U.N.T.S. 397.

the competence to enter into treaties in respect of those matters.<sup>148</sup>

Commentary to the UNCLOS has also suggested that the definition entails only those organizations to which States transfer competence.<sup>149</sup> Some commentators argue that this definition includes the European Community (EC) only.<sup>150</sup> Indeed, the EC ratified the UNCLOS in 1998.<sup>151</sup> Up until now, the EC is the only international organization and non-state member of the Convention.<sup>152</sup>

Second, Part XI referred to in Article 20 is the Part that regulates activities in the Area.<sup>153</sup> Article 187 of Part XI of UNCLOS provides that in the cases when disputes arise from the activities in the Area, the relevant Chamber of the Tribunal has jurisdiction over disputes between States as well as non-state parties, including State enterprises and natural or juridical persons.<sup>154</sup> The third prong, in “any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case” has been subject to much academic discussion.<sup>155</sup>

There are several opinions on how to interpret the word “agreement” in this part. Thomas Mensah, for instance, argues that the “agreement” can only be a public international agreement, as also stated in Article 288(2) that would mean that the general contentious jurisdiction is not open for private entities.<sup>156</sup> Others, such as Sicco Rah and Tilo Wallrabenstein,

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148. U.N. Convention on the Law of the Sea, annex. IV, art. 1, Dec. 10, 1982, 1833 U.N.T.S. 397.

149. MYRON NORDQUIST, SHABTAI ROSENNE, & SATYA NANDAN, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 193, 456 (vol. v. 1989).

150. INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 40 (Laurence Chazournes, Cesare Romano, & Ruth Mackenzie, eds., 2002).

151. *Id.*

152. Zengerling, *supra* note 127.

153. United Nations Convention on the Law of the Sea, *Agreement Relating to the Implementation of Part IX of the Convention*, art. 20, available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm) (last visited Aug. 3, 2013).

154. United Nations Convention on the Law of the Sea, *Agreement relating to the Implementation of Part XI of the Convention*, art. 187, Dec. 10, 1982, 1833 U.N.T.S. 397.

155. ITLOS, *Competence*, ITLOS.ORG, available at <http://www.itlos.org/index.php?id=41> (last visited Feb. 17, 2013).

156. Thomas A. Mensah, *The Place of the International Tribunal for the Law of the Sea in the International System for the Peaceful Settlement of Disputes*, in THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: LAW AND PRACTICE 30 (P. Chandrasekhara Rao and Rahmatullah Khan eds., 2001); BUDISLAV VUKAS, THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 6 (2004).

argue that the phrasing exhibits “theoretical openness” towards NGOs.<sup>157</sup> Philippe Gautier, the Registrar of the Tribunal,<sup>158</sup> considers that even if the “agreement” in Article 20(2) does imply the public international law agreement as in Article 288(2), access to ITLOS remains open to entities that have international legal personality.<sup>159</sup> However, the question as to which entities possess the international legal personality should be determined based on the “needs of the international community.”<sup>160</sup>

Moreover, even after meeting the conditions under these provisions, theoretically, a plaintiff before ITLOS needs to have legal standing according to the general rules of international public law.<sup>161</sup> Thus, NGOs would have either to claim infringement on their own rights or have the option of arguing altruistically in the common interest.<sup>162</sup> ITLOS could develop criteria for such standing.<sup>163</sup> In any event, so far the Tribunal’s practice has not provided definitive answers for solving these debates.

Section H of the Rules of Procedure concerns advisory proceedings<sup>164</sup> in which Article 133 of the Rules of Procedure spells out the system for advisory proceedings, which fall within the domain of the Seabed Disputes Chamber.<sup>165</sup> The request for an advisory opinion should rest on a legal question arising within the scope of the Assembly’s activities.<sup>166</sup> It should also contain a concise formulation of the question and be accompanied by the relevant documentation.<sup>167</sup>

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157. RAH & WALLRABENSTEIN, *supra* note 132, at 18.

158. PHILIPPE GAUTIER, THE REPARATION FOR INJURIES CASE REVISITED: THE PERSONALITY OF THE EUROPEAN UNION 331, 332, *available at* [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm). (J.A. Frowein and R. Wolfrum 2000).

159. *Id.*

160. Zengerling, *supra* note 127.

161. Harold M. White, *International Law and Relations*, *available at* <http://er.jsc.nasa.gov/seh/law.html> (last visited Mar. 12, 2013).

162. *Id.*

163. ITLOS, Rules of the Tribunal, sec. H, art. 130 (Mar. 17, 2009), *available at* [http://www.itlos.org/fileadmin/itlos/documents/basic\\_texts/Itlos\\_8\\_E\\_17\\_03\\_09.pdf](http://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf) (last visited Feb. 15, 2013).

164. *Id.*

165. *Id.*

166. *Id.*

167. Donald K. Anton, *Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17): International Environmental Law in the Seabed Disputes Chamber*, *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1793216](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793216) (last visited Feb. 23, 2013).

C. *Access as Amicus Curiae*

The possibility of *amicus* intervention is not mentioned in the ITLOS Statute. However, the Tribunal's Rules of Procedure allow *amici curiae* interventions both in contentious and advisory proceedings.<sup>168</sup> Rule 84 regulates the procedure of such interventions in contentious proceedings.<sup>169</sup> The Tribunal's procedure allows for *amici* interventions of two basic forms: 1) top down, i.e. when requested by the Tribunal and 2) unsolicited—when an intergovernmental organization seeks to furnish information relevant to the case.<sup>170</sup>

The top-down occasions may have three specific origins:

- 1) When requested by the state party,
- 2) When requested by the Tribunal *proprio motu*, or
- 3) In a special instance, when the case before the Tribunal is concerned with the interpretation of the constituent instrument of an international organization or a related international convention.<sup>171</sup>

At any time prior to the closure of the oral proceedings, the Tribunal might request the organization “to furnish information relevant to a case before it.”<sup>172</sup>

In advisory proceedings, the *amicus curiae* procedure is top-down only.<sup>173</sup> The Registrar communicates to all State parties that a request for advisory opinion was submitted.<sup>174</sup> Article 133(2) establishes, “[t]he Chamber, or its President if the Chamber is not sitting, shall identify the intergovernmental organizations which are likely to be able to furnish information on the question. The Registrar shall give notice of the request

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168. Rules of the Tribunal, *supra* note 163.

169. *Amicus curiae* should not be confused with third party intervention. Article 31 of Annex VI sets out the procedure for the third party intervention. Only state parties to the Convention can request an intervention when they have “an interest of a legal nature which may be affected by the decision in any dispute.” In the request is granted, the intervening party is bound by the ensuing decision as long as the decision relates to the issues in relation to which the state intervened. Article 31, Annex VI

170. Rules of the Tribunal, *supra* note 163.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 133.

to such organizations.”<sup>175</sup> Then the Chamber or its President, if the Chamber is not sitting, will identify an intergovernmental organization that can furnish information pertinent to the legal question raised.<sup>176</sup> The organizations and States are invited to submit their opinions within fixed time limits.<sup>177</sup> If the oral proceedings are held, then the States and organizations are invited to make oral submissions.<sup>178</sup>

However, scholars have debated the exact meaning of the word “intergovernmental” in Rule 133. As noted above, *amici* interventions under both Rules 84 and 133 are limited to “intergovernmental organizations.”<sup>179</sup> Because neither the Tribunal’s Statute nor Rules of Procedure define the characteristics of “intergovernmental organizations,” considerable scholarly discussion has been generated around the Rules’ use of this term. In particular, scholars have deliberated about the frequent and seemingly interchangeable uses of the phrases “intergovernmental organization” and “international organization” by the Rules of Procedure.

For instance, Rule 52 elaborates on the procedure for communication to the parties and mentions both types of organizations.<sup>180</sup> It indicates that “in the case of the International Seabed Authority or the Enterprise, any international organization and any other intergovernmental organization (*emphasis added*) the Tribunal shall direct all communications to the competent body or executive head of such organization at its headquarters location.”<sup>181</sup>

With regard to the possibility of *amicus* interventions by NGOs, it is important to inquire whether the “intergovernmental organization” mentioned in the Rules of Procedure provisions about *amicus* interventions are equivalent to the “International Organization” defined in UNCLOS. Could the Tribunal, hypothetically speaking, call on an internationally recognized NGO to submit its views under Rules 84 and 133? And if not, in what way are “intergovernmental organizations” different from “international organizations” for the purposes of submitting *amicus* briefs?

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175. ITLOS, Rules of the Tribunal, sec. H, art. 133(2) (Mar. 17, 2009), available at [http://www.itlos.org/fileadmin/itlos/documents/basic\\_texts/Itlos\\_8\\_E\\_17\\_03\\_09.pdf](http://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf) (last visited Feb. 15, 2013).

176. *Id.*

177. *Id.*

178. *Id.* art. 133(4).

179. *Id.*

180. Rules of the Tribunal, *supra* note 163.

Lance Bartholomeusz highlights the drafting history of the procedural rules of ITLOS.<sup>182</sup> He indicates that Article 133 of ITLOS Rules of Procedure was modeled on Article 66 of the ICJ statute and notes that the wording of the rules changed from “international” to “intergovernmental organization” only in later drafts.<sup>183</sup> According to Bartholomeusz, the reading precludes NGOs from participation as *amici*.<sup>184</sup> Beyerlin agrees with Bartholomeusz’s conclusion, yet does not elaborate in what sense an “intergovernmental organization” is different from an “international organization.”<sup>185</sup>

Philippe Gautier adds that “intergovernmental organization” is broader than “international organization” and includes all international organizations, except when they are parties or intervening parties in the case.<sup>186</sup> According to Gautier, it is difficult to see how the term “intergovernmental organization” could cover an NGO.<sup>187</sup>

#### D. *Amicus Curiae in Case No. 17*

Case No. 17 concerns an unprecedented instance when the International Seabed Authority faced a request by private entities to allow them exploration of the international seabed dubbed “a common heritage of mankind.”<sup>188</sup> However, one of the host States, Nauru requested the Seabed Authority to request an advisory opinion regarding the contours of State liability for damage in the Area incurred by private actors.<sup>189</sup> The Case is noteworthy for *amicus* participation in two respects: First, based on its procedural rules the Tribunal requested *amicus* briefs by a number of “intergovernmental” organizations that possess observer status at the Assembly of the International Seabed Authority.<sup>190</sup> One of the organizations that submitted a brief in response was the International Union

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182. Lance Bartholomeusz, *The Amicus Curiae Before the International Courts and Tribunals*, 5 NON-STATE ACTORS & INT’L LAW 216, 231 (2005).

183. *Id.*

184. *Id.*

185. Ulrich, *supra* note 105, at 364.

186. GAUTIER *supra* note 158, at 339.

187. *Id.*

188. Wikipedia, *United Nations Convention on the Law of the Sea*, available at [http://en.wikipedia.org/wiki/United\\_Nations\\_Convention\\_on\\_the\\_Law\\_of\\_the\\_Sea](http://en.wikipedia.org/wiki/United_Nations_Convention_on_the_Law_of_the_Sea) (last visited Feb. 23, 2013).

189. *Case No. 17*, ITLOS.ORG, available at <http://www.itlos.org/index.php?id=109> (last visited Feb. 15, 2013).

190. *Id.*

for the Conservation of Nature (IUCN).<sup>191</sup> At the same time, two groups, Greenpeace and the WWF petitioned the Tribunal to accept their *amicus curiae* brief.<sup>192</sup> This section outlines the relevant background to the Tribunal's opinion, as well as the founding history, organizational structure, and membership base of intervening and petitioning *amici*.

#### E. *Facts of the Case*

UNCLOS declares the seabed and its resources that lie beyond national jurisdiction (known as "The Area") to be "the common heritage of mankind."<sup>193</sup> The Doctrine of Common Heritage establishes norms preserving a large part of ocean space as a commons accessible and shared by all States.<sup>194</sup> The International Seabed Authority (ISA) supervises the exploration and exploitation of "The Area."<sup>195</sup> All prospective exploration and exploitation activities (either carried out by a State entity or a private entity) are required to be sponsored by a party to UNCLOS.<sup>196</sup> Sponsoring states must apply to the ISA for approval of a work plan for exploration and licenses for exploitation.<sup>197</sup>

In 2008, ISA received two applications for approval of work plans for exploration in a reserved area.<sup>198</sup> They were lodged by Nauru Ocean Resources, Inc. (a Nauruan corporation sponsored by Nauru) and Tonga Offshore Mining Ltd. (a Tongan corporation sponsored by Tonga).<sup>199</sup> In 2009, as sponsoring countries became anxious about the possible liability caused by exploration, they requested the ISA to postpone both applications.<sup>200</sup> Before proceeding, Nauru proposed that the ISA seek an

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191. *Id.*

192. *Id.*

193. *United Nations Convention on the Law of the Sea*, *supra* note 188.

194. International Seabed Authority, *Regulations on prospecting and exploration for polymetallic sulphides in the Area*, Preamble, available at <http://www.isa.org.jm/files/documents/EN/Regs/PolymetallicSulphides.pdf> (last visited Aug. 3, 2013).

195. *Id.*

196. *Id.*

197. *Id.*

198. Donald K. Anton, *Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17): International Environmental Law in the Seabed Disputes Chamber*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1793216](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793216) (last visited Feb. 23, 2013).

199. *Id.*

200. *Id.*

Advisory Opinion from the Chamber on several specific questions to clarify the liability of sponsoring States.<sup>201</sup>

The ISA Council requested an Advisory Opinion from the Chamber on three questions.<sup>202</sup> Based on Rule 82 of its Rules of Procedure, the Tribunal asked for an *amicus* opinion only of those intergovernmental organizations that serve as observers in the Assembly of the Authority.<sup>203</sup> A study of the entities that submitted written statements as requested by the Tribunal shows that eleven states, three organizations, and the International Seabed Authority furnished such statements.<sup>204</sup>

#### F. *Amicus Brief by IUCN*

Rule 82 of the Rules of Procedure of the Assembly specifies the types of entities that may be granted observer status.<sup>205</sup> This list includes states that are not members of the Authority and the U.N. along with its agencies and non-governmental organizations.<sup>206</sup> Rule 82.1(e) of the Rules of Procedure of the assembly defines two types of organizations that can receive an observer status in the assembly: 1) Non-governmental organizations with which the Secretary-General has entered into arrangements in accordance with Article 169, paragraph 1, of UNCLOS, and 2) other non-governmental organizations invited by the Assembly that have demonstrated their interest in matters under consideration by the Assembly.<sup>207</sup>

Therefore, from the wide range of entities that serve as Observers of the Assembly, the Chamber invited only several organizations.<sup>208</sup> The Interoceanmetal Joint Organization (IOM), the International Union for the Conservation of Nature (IUCN), and the United Nations Environment Programme (UNEP) submitted statements.<sup>209</sup> The Tribunal invited

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201. *Id.*

202. *Id.*

203. *Rules of Procedure of the Assembly of the International Seabed Authority*, available at [http://www.isa.org.jm/files/documents/EN/Regs/ROP\\_Assembly.pdf](http://www.isa.org.jm/files/documents/EN/Regs/ROP_Assembly.pdf) (last visited Feb.23, 2013).

204. *Case No. 17*, *supra* note 194.

205. *Rules of Procedure of the Assembly of the International Seabed Authority*, *supra* note 203.

206. *Id.*

207. *Case No. 17*, *supra* note 189.

208. *Rules of Procedure of the Assembly of the International Seabed Authority*, *supra* note 203.

209. *About the Interoceanmetal Joint Organization*, IOM.COM, available at <http://www.iom.gov.pl/welcome.htm> (last visited Feb. 15, 2013).

organizations that are either fully constituted by states, such as the UNEP and the IOM or those that have States as members (IUCN).<sup>210</sup>

IOM was founded in 1987 by an intergovernmental agreement.<sup>211</sup> The current IOM sponsoring states are Bulgaria, Cuba, the Czech Republic, Poland, Russia, and Slovakia.<sup>212</sup> The IOM is headquartered in Poland.<sup>213</sup> In fact, since 2001, the IOM has had an agreement with the International Seabed Authority for exploration activity in the area.<sup>214</sup> The UNEP is a United Nations arm regarding environmental issues around the world.<sup>215</sup> UNEP's mandate is based on the United Nations General Assembly Resolution 2997 (XXVII) of December 15, 1972 and subsequent amendments.<sup>216</sup>

IUCN is the most hybrid of all the participating organizations. In its submission, the organization defined itself as “an intergovernmental organization.”<sup>217</sup> However, in academic literature IUCN and its predecessor are referred to as NGOs.<sup>218</sup> Nevertheless, its membership base goes beyond governments alone. The statement notes, “IUCN is the world's oldest and largest global environmental network. It has a democratic membership union with more than 1,000 government and NGO member organizations, and almost 11,000 volunteer scientists and other experts in more than 160 countries.”<sup>219</sup> In it, the Statute of the IUCN indicates that it is registered under the “Article 60 of the Swiss Civil Code as an international association of governmental and non-governmental

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210. *Case No. 17, supra* note 189.

211. *About the Interoceanmetal Joint Organization (IOM), supra* note 214.

212. *Id.*

213. *Id.*

214. *Id.*

215. Adopted at UNCED in 1992, the Nairobi Declaration on the Role and Mandate of UNEP, adopted at the Nineteenth Session of the UNEP Governing Council, and the Malmö Ministerial Declaration of 31 May, 2000. See NATURAL ALLIES: UNEP AND CIVIL SOCIETY, U.N. ENV'T PROGRAMME (2004).

216. *Id.*

217. *Case No. 17: Responsibilities and obligations of states sponsoring person and entities with respect to activities in the international seabed area*, ITLOS.ORG, ¶ 3, available at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/StatementIUCN.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/StatementIUCN.pdf) (last visited Feb. 15, 2013) [hereinafter *Case No. 17 Responsibilities*].

[http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/StatementIUCN.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/StatementIUCN.pdf) Para 2.

218. See ANNA-KATHARINA WOBSE, *THE WORLD AFTER ALL WAS ONE: THE INTERNATIONAL ENVIRONMENTAL NETWORK OF UNESCO AND IUPN*, 20 CONTEMPORARY EUROPEAN HISTORY 331, 348 (Cambridge University Press 2011).

219. *Case No. 17 Responsibilities, supra* note 217, at ¶ 3.

members.”<sup>220</sup> In terms of its members, IUCN classifies membership as States and integration organizations. States are Category A, although non-governmental organizations registered within states and international NGOs affiliated with more than one state can become members of Category B.<sup>221</sup> The difference between categories is reflected in the rights of entities within these Categories, including voting rights. For instance, each member State has three votes, while each NGO has one vote.<sup>222</sup>

### G. *Amicus Curiae* Petition by WWF and Greenpeace

On August 17, 2010, the ITLOS Registry received a request by Greenpeace and WWF to permit them to participate in the Advisory proceedings as *amici curiae*.<sup>223</sup> The President of the Court informed the organizations with individual letters on August 27<sup>th</sup> that their statement would not be included in the case file, as it was not submitted in accordance with Rule 133 of the Court.<sup>224</sup> However, it would be transmitted to the States, intergovernmental organizations, and the Seabed Authority.<sup>225</sup> The recipients were also informed that the statement would not be a part of the official case file.<sup>226</sup>

The *amicus curiae* pleading was submitted by two organizations: Stichting Greenpeace (Greenpeace International) and the World Wide Fund for Nature.<sup>227</sup> The petitioners’ pleading was innovative relative to requests for intervention as *amici* in other international courts because it was composed of two related, yet separate documents: The Petition and Memorial.<sup>228</sup> The Petition put forth the organizations’ request to participate as *amici* in the proceedings as well as their justifications for intervention, while the Memorial presented the petitioners’ substantive arguments.<sup>229</sup>

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220. International Union for Conservation of Nature and Natural Resources, *Statutes and Regulations*, art. 1, Sept. 14, 2012, available at [http://cmsdata.iucn.org/downloads/statutes\\_en.pdf](http://cmsdata.iucn.org/downloads/statutes_en.pdf) (last visited Feb. 23, 2013).

221. *Id.* art. 4.

222. *Id.* art. 34.

223. *Case No. 17 Responsibilities*, *supra* note 217, at ¶ 13.

224. *Responsibilities and Obligations*, *supra* note 1.

225. *Id.*

226. *Id.*

227. See World Wide Fund for Nature, *Petition of Stichting Greenpeace Council and the World Wide Fund for Nature to be granted amicus curiae status*, Aug. 13, 2010, available at <http://www.greenpeace.org/international/Global/international/publications/oceans/2011/ITLOS%20Petition%20-%20final.pdf>. (last visited Feb. 23, 2013) [hereinafter *Petition of Stichting*].

228. *Id.*

229. *Id.*

In particular, in the petition, the organizations requested that 1) the petition and the memorial be considered as part of the pleadings in Case No. 17 and 2) the intervening organizations be permitted to make oral submissions during the hearings.<sup>230</sup>

The Petition touches upon three specific issues:

- 1) The authority of ITLOS to accept NGO *amicus curiae* submissions;
- 2) The desirability of admitting *amici* submissions; and
- 3) The interests of the intervening organizations in relation to the case.<sup>231</sup>

In the section addressing the Tribunal's authority, the petitioners' main claim rested on the argument that the Tribunal's statute and rules of procedure neither authorize nor bar *amici* participation.<sup>232</sup> The petitioners write, "[i]n summary, although there is no express legal basis for *amicus curiae* participation in ITLOS proceedings in general . . . neither is there a bar to it . . . ."<sup>233</sup> The argument in the petition regarding desirability of accepting *amici* submissions rests on a number of claims.

First, in what can be called a "lacuna" argument, the petitioners indicate that the proceedings before the international tribunals raise many issues that cannot be adequately expressed via the views of just governments and intergovernmental organizations.<sup>234</sup> Second, the petitions put forth the "diffusion argument," asserting that *amici* participation is becoming more accepted in international dispute resolution, marshaling evidence from the practice of other international courts including the European Court of Human Rights and the WTO.<sup>235</sup> Third, the petitioners highlight specific features of the deep seabed regime that warrant representation by entities other than governments.<sup>236</sup> Lastly, the petitions respond to an anticipated concern of the ITLOS judges in the so-called "floodgates" argument by arguing that the acceptance of *amicus* briefs will

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230. *Id.* at 2

231. *Id.*

232. *See Petition of Stitching, supra* note 227.

233. *Id.* at 5.

234. *Id.*

235. *Id.* at 7.

236. *Id.* at 11–12.

not result in an overwhelming submission of *amici* petitions.<sup>237</sup> The petitioners put forth research from ICJ and the ECHR in this regard.<sup>238</sup>

In a separate section, the petitioners outline their “interest” for participating in the case as *amici*.<sup>239</sup> Both organizations are “foremost environmental organizations globally, and both have campaigned for protection of the marine environment for decades.”<sup>240</sup> They petitioned the Court to highlight that the Law of the Sea Convention as well as the customary international law impose serious obligations on States sponsoring activities in the Seabed.<sup>241</sup>

The combined purpose of these obligations is to ensure that the risk of activities in the Area is properly internalized to discourage ill-advised projects and ensure that the risk of these activities is not simply transferred to third parties and the environment.<sup>242</sup> Lastly, the petitioners described their organizations, objectives, and involvement with the International Seabed Authority.<sup>243</sup>

WWF is a trailblazer in *amicus curiae* procedures and was one of the organizations in relation to which the WTO had to confront the issue of admitting *amicus curiae* submissions. The issue of whether WTO Dispute Panels should accept *amicus curiae* briefs arose in the *Shrimp/Turtle* case.<sup>244</sup> One of the two organizations that filed an unsolicited *amicus* submission in that case was the WWF.<sup>245</sup> The two briefs were submitted jointly by the CMC and the Center for International Environmental Law (CIEL), and by the WWF.<sup>246</sup> Interestingly, the ITLOS petition refers to the precedent within the WTO instance, yet does not highlight the fact that WWF was there as well as the first petitioner.<sup>247</sup>

Greenpeace International describes itself as “an independent global campaigning organisation that acts to change attitudes and behaviour, to

237. See *Petition of Stitching*, *supra* note 227.

238. *Id.* at 14–15.

239. *Id.*

240. *Id.* at 15.

241. *Id.*

242. See *Petition of Stitching*, *supra* note 227.

243. *Id.* at 16–17.

244. *United States—Imp. Prohibition of Certain Shrimp and Shrimp Products*, App. Body Rep. at 108.

245. Henry S. Gao, *Amicus Curiae in WTO Dispute Settlement: Theory and Practice*, Nov. 1, 2006, available at [http://hrichina.org/sites/default/files/oldsite/PDFs/CRF.1.2006/CRF-2006-1\\_Amicus.pdf](http://hrichina.org/sites/default/files/oldsite/PDFs/CRF.1.2006/CRF-2006-1_Amicus.pdf) (last visited Feb. 23, 2013).

246. *Id.*

247. *Id.*

protect and conserve the environment and to promote peace . . . .”<sup>248</sup> It is present in forty countries across the globe and does not accept funds from governments or corporations.<sup>249</sup> Greenpeace is an experienced *amicus curiae* submitter both internationally and before domestic courts. For instance, in 2004, Greenpeace submitted an *amicus curiae* brief before the WTO together with fourteen other non-governmental organizations in the so-called Biotech dispute.<sup>250</sup>

Nevertheless, Greenpeace has much more experience in *amicus curiae* participation domestically. Greenpeace USA has also been active filing *amicus* briefs in the courts at home.<sup>251</sup> The two organizations have a history of collaboration on the submission of *amicus* briefs. They submitted a joint brief along with other organizations in the case of *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* (EC–Asbestos).<sup>252</sup>

## VI. THE TRIBUNAL’S APPROACH

In Case No. 17 the Tribunal expressed its cautious, yet favorable approach to NGO participation through two distinct means. First, by admitting an *amicus* brief by IUCN under Rule 133, the Tribunal conceded that “intergovernmental organizations” as understood under its Rules could include NGOs within the UN definition of this term.<sup>253</sup> Second, although the Tribunal dismissed the brief by WWF and Greenpeace, indicating that it

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248. Greenpeace International, *About Greenpeace*, available at <http://www.greenpeace.org/international/en/about/> (last visited Feb. 16, 2013).

249. *Id.*

250. Greenpeace International, *Request for Permission to Submit Information to the Panel By the Following Non-Parties (Amicus Curiae Submission)*, available at <http://www.greenpeace.org/international/Global/international/planet-2/report/2004/6/amicus-curiae-submitted-to-the.pdf> (last visited Feb. 23, 2013).

251. *State of Florida v. David Davis*, Case No. 75,128, Brief of Amicus Curiae, (Fla. 1989).

252. Case No. WT/DS135/AB/R, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* 2001, App. Body Rep., available at [http://ban.org/library/wto%20asbestos%20AB%20report%20-%20135abr\\_e.pdf](http://ban.org/library/wto%20asbestos%20AB%20report%20-%20135abr_e.pdf) (last visited Aug. 3, 2013); see Mary Footer & Saman Zia-Zarifi, *European Communities- Measures Affecting Asbestos and Asbestos Containing Products: The World Trade Organizations on Trial for Its Handling of Occupational Health and Safety Issues*, 3 MELBOURNE J. INT’L L.120 (2002); see also Foundation for International Environmental Law and Development, *NGOs welcome WTO Green Light to French Ban on Asbestos but remain skeptical about the WTO Dispute Settlement Process*, Mar. 2001, available at [www.field.org.uk](http://www.field.org.uk) (last visited Feb. 16, 2013).

253. International Tribunal for the Law of the Sea, *Written Statement of International Union for Conservation of Nature & Natural Resources*, Aug. 19, 2010, available at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/StatementIUCN.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/StatementIUCN.pdf) (last visited Feb. 23, 2013).

was contrary to the Tribunal's Rules of Procedure, the Tribunal undertook a number of steps, which point to a favorable treatment of the *amicus* submission by these two public interest organizations.<sup>254</sup>

#### A. *ITLOS' Approach to IUCN*

The practice of Case No. 17 refined the meaning of "the intergovernmental organization" under Rule 133.<sup>255</sup> By admitting an *amicus* brief by IUCN, the Tribunal approximated the meaning of "intergovernmental organization" to an NGO, at least as it is understood by the U.N.<sup>256</sup>

The character of organizations invited to submit their views is clarified in the meaning of "intergovernmental organizations" under Article 133 of the Rules of Procedure: "Intergovernmental organizations" is a broader category than "international organizations" under Article 305 of UNCLOS.<sup>257</sup> The latter is characterized by two conditions: 1) It is constituted by States; and 2) its member States have transferred competence to it over matters governed by this Convention, including the competence to enter into treaties in respect to those matters.<sup>258</sup>

On the other hand, "intergovernmental organizations" are those organizations that contain States as members.<sup>259</sup> As Case No. 17 shows, the defining character is not the type of instrument that founded the organization.<sup>260</sup> The IOM was established by an intergovernmental agreement and the UNEP was established by a U.N. General Assembly Declaration, while the IUCN was founded as an Association under the Swiss Civil Code.<sup>261</sup> However, all of the organizations are

254. *Id.*

255. Preamble to the United Nations Convention on the Law, *Annex IX. Participation by International Organizations*, art. 1, available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm) (last visited Feb. 23, 2013).

256. *Id.*

257. Union of International Associations, *Conventional Categories*, available at <http://www.uia.be/2-conventional-categories> (last visited Feb. 23, 2013)

258. *Case No. 17, supra* note 189.

259. International Review of the Red Cross, *Participation of States in the International Conference of the Red Cross and Red Crescent and assemblies of other international organizations*, available at <http://www.icrc.org/eng/assets/files/other/irrc-876-casalin-lamb.pdf> (last visited Feb. 23, 2013).

260. *Case No. 17, supra* note 189.

261. Swiss Civil Code, art. 60, Jan. 1, 2013, available at <http://www.admin.ch/ch/e/rs/2/210.en.pdf> (last visited Feb. 23, 2013).

“intergovernmental” in the sense that States are members of these organizations. In the case of IOM, its membership consists of States only, while IUCN unites States, as well as non-governmental organizations, even though States have more rights.<sup>262</sup>

The practice of Case No. 17 also shows that membership of “intergovernmental organizations,” as opposed to “international organizations” might not be limited exclusively to states. As indicated above, IUCN’s members are States as well as state agencies, NGOs, and individuals.<sup>263</sup>

By admitting the brief by IUCN, ITLOS approximated its interpretation of an “intergovernmental organization” to the definition of an NGO at least as understood by the U.N. The term “non-governmental organization” was first mentioned on the global treaty level in Article 71 of the U.N. Charter, which reads: “The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.”<sup>264</sup> The Charter did not, however, define “non-governmental organization.” A definition was adopted in 1950 by the UN Economic and Social Council which established that for the purpose of consultative arrangements with the Council NGO meant [A]ny international organization which is not created by intergovernmental agreement.”<sup>265</sup> The definition was further elaborated in 1996, providing that “[A]ny such organization that is not established by a governmental entity or intergovernmental agreement shall be considered a non-governmental organization for the purpose of these arrangements, including organizations that accept members designated by governmental authorities, provided that such membership does not interfere with the free expression of views of the organization.”<sup>266</sup> There were other conditions added as well, such as that the aims of an NGO have to be in conformity with the spirit, purposes and principles of the U.N. Charter.<sup>267</sup> The

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262. Economic and Social Council, *Arrangements for Consultation with Non-Governmental Organizations*, art. 1, available at <http://www.un-documents.net/1296.htm> (last visited Feb. 23, 2013).

263. Review of Consultative Agreements with Non-governmental Organizations, E/RES/288(x), art. 8, Feb. 27 1950, available at <http://www.un-documents.net/1296.htm> (last visited Feb. 23, 2013).

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

definition does not, therefore, include possession of a non-profit or public interest aim as a requirement.<sup>268</sup>

IUCN meets this U.N. definition of an NGO. The U.N. definition excludes from recognition as an NGO those organizations that were established solely by governments.<sup>269</sup> IUCN was founded as International Union for Protection of Nature (IUPN) in Fontainebleau in 1948.<sup>270</sup> At the time of founding, it comprised an amalgamation of States and non-governmental organizations.<sup>271</sup> In 1956, IUPN was renamed into IUCN, while its objectives remained.<sup>272</sup> It is hardly doubtful that these purposes correspond to the purposes of the U.N. and its principles.

### B. *The Tribunal's Favorable Treatment of WWF and Greenpeace Brief*

Despite the fact that ITLOS rejected NGO *amicus* submissions based on its Rules of Procedure, in fact, with its actions, the Tribunal subtly welcomed the WWF and Greenpeace brief. Although the *amicus* brief did not become part of the official case file, the actions of ITLOS in regard to the brief, including its display on its website, facilitated its dissemination to a wide audience of the *amici's* arguments. As a result, the submission is noted and discussed at other websites and scholarly blogs.<sup>273</sup> The NGOs themselves refer to their submission as it is displayed on the Tribunal's page.<sup>274</sup> In short, by displaying the submission on its website, the Tribunal granted exposure to the *amici* brief. Moreover, by furnishing the brief to the State parties and intergovernmental organizations, ITLOS supported the process of sharing NGO arguments with the parties, which allowed the parties to take into account the arguments and concerns raised in the brief. In these actions, the Tribunal allowed the NGOs to achieve the aims which would have been attained with their official participation in the case.

First, although the Rules do not expressly authorize or obligate the Tribunal to do so, the Tribunal disseminated the NGO submission to the

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268. Anna Dolidze, *The European Court of Human Rights' Evolving Approach to Non-Governmental Organizations*, in GLOBALIZATION AND GOVERNANCE? (LAURENCE BOULLE ed. 2011).

269. *Id.*

270. W. M. ADAMS, GREEN DEVELOPMENT: ENVIRONMENT AND SUSTAINABILITY IN A DEVELOPING WORLD (3d ed. 2009).

271. *Id.*

272. *Id.*

273. Philippe Gautier, *Letter from the International Tribunal for the Law of the Sea to Mr. Daniel Simons, Greenpeace International*, Aug. 27, 2010.

274. Don Anton, *Possible NGO Amicus in ITLOS Advisory Opinion Case*, <http://donanton.org/2010/08/29/possible-ngo-amicus-in-itlos-advisory-opinion-case/> (last visited Apr. 5, 2013).

State Parties, Seabed Authority, and the organizations that had submitted their statements. The judgment notes that these entities “would be informed that the document was not part of the case file and that it would be posted on a separate section of the Tribunal’s website.”<sup>275</sup> Indeed, while the letter from the Tribunal to the submitter informs them that their submission will not be included in the case file, it includes a promise that “State parties and intergovernmental organizations admitted to participate in the advisory proceedings will be informed of the received of the statement and will receive an electronic copy thereof.”<sup>276</sup>

Second, the Tribunal displayed the *amici* brief on their website,<sup>277</sup> although the Rules of Procedure are also silent on this matter. Article 133 of the Rules of Procedure addresses submission of documents within advisory proceedings.<sup>278</sup> It states, “[t]he written statements and documents annexed shall be made accessible to the public as soon as possible after they have been presented to the Chamber.”<sup>279</sup> The question arises: Which statements and annexed documents are meant under this provision? The reading of Article 133 in its entirety answers the question. In 133(1), the Tribunal is obligated to inform all State parties about the request for the advisory procedure.<sup>280</sup> The following provision allows the Tribunal “to identify the intergovernmental organizations which are likely to be able to furnish information on the question.”<sup>281</sup> Afterward, the State parties and intergovernmental organizations are invited to submit their “written statements and documents annexed” regarding the questions raised in the proceedings.<sup>282</sup>

Thus, according to the Rules, the Court shall make available to the public these documents submitted by States and Intergovernmental Organizations. The Tribunal indeed did so in this case.<sup>283</sup> However, in

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275. Case No. 17, *supra* note 189.

276. *Id.*

277. Case No. 17, *supra* note 189.

278. Rules of Procedure of the Assembly of the International Seabed Authority, *supra* note 208.

279. Rod Powers, *Punitive Articles of the UCMJ Article 134—General article*, available at <http://usmilitary.about.com/od/punitivearticles/a/134.htm> (last visited Feb. 16, 2013).

280. Rules of Procedure of the Assembly of the International Seabed Authority, *supra* note 208.

281. *Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17): International Environmental Law in the Seabed Disputes Chamber*, *supra* note 198.

282. The European Patent Convention, art. 133(3), Nov. 29, 2000, available at <http://www.epo.org/law-practice/legal-texts/html/epc/2010/e/ar133.html> (last visited Feb. 16, 2013).

283. *Id.*

addition, the Tribunal did more than it was required to do in accordance with the Rules and displayed the submission of NGO *amici* briefs.<sup>284</sup>

Moreover, the tribunal's response to the submitter includes a promise that their submission will be displayed on the website.<sup>285</sup> The letter specifies how the submission will be presented: "The statement will be placed on the website of the Tribunal in a separate opinion of documents relating to Case No. 17 entitled 'statement submitted by a non-governmental organization.'"<sup>286</sup> The statement would also indicate that it is not part of the official case file.<sup>287</sup> Indeed, the Tribunal followed up on the promise.<sup>288</sup>

## VII. CONCLUSION

International legal process school has captured the modalities of NGO participation in international law-making. This article underscores one more, hitherto overlooked, yet increasingly popular method through which NGOs take part in making international law. Although *amicus curiae* participation procedure originated within the UK and has become a traditional procedural instrument within domestic law of common law countries, an increasing number of international tribunals allows for the *amicus* procedure and accepts and engages with *amicus curiae* briefs submitted by NGOs. Up until now, ITLOS has remained one of the few international tribunals that has not been accepting NGO *amicus* briefs. Case No. 17, however, signals a change in this policy.

ITLOS' approach to *amicus* briefs in Case No. 17 indicates that opportunities for NGO participation in international law-making are expanding. First, by admitting and considering a brief by IUCN under Rule 133, the Tribunal interpreted "intergovernmental organization" as an entity that includes States and non-State actors as founders and members. This precedent approximated "intergovernmental organization" with the term NGO as it is used within the U.N. This practice, if continued, could serve as a pathway for *amicus* briefs by other organizations whose membership is similar to the IUCN.

Second, ITLOS's approach to WWF's and Greenpeace's *amicus curiae* petition showed that the Tribunal is at least partially receptive to

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284. *Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17): International Environmental Law in the Seabed Disputes Chamber*, *supra* note 198.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

hearing NGO claims. Although the Tribunal declined the petition by Greenpeace and WWF, the Tribunal's actual response, including the display of the petition on its website, allowed the dissemination of NGO arguments.<sup>289</sup>

Interestingly, records indicate that the Tribunal judges met in 2004 to review a number of issues with regard to the Rules of Procedure, including the question of *amicus curiae* participation.<sup>290</sup> During the meeting, the Members of the Tribunal discussed whether it was necessary to adopt rules regarding the *amicus curiae* proceedings.<sup>291</sup> In the end, they decided that it was too early to resolve this question. Thus, they determined that the issue should be resolved by considering future developments in the Court's case law.<sup>292</sup>

The decision of the 2004 meeting to discuss the possibility of admitting NGO *amicus* briefs and the judges' conclusion to wait for relevant precedents, demonstrated the readiness of the Tribunal to hear NGO arguments. Case No. 17, which concerned the issue of the seabed, recognized as "common heritage of mankind," served as an appropriate opportunity to hear views about the implications of the case beyond the interests of the immediate parties to the case. Indeed, to represent the interests that are circumvented by the adversarial procedure is one of the inherent functions of the *amicus curiae* procedural instrument, a function which, needless to say, should be performed primarily when the fate of the commons of mankind is at stake.<sup>293</sup>

On a more general level, the cautious welcome by ITLOS to NGO participation is an important development for considering the role of NGOs in international dispute-resolution. ITLOS, along with the International Court of Justice, was still one of the few international tribunals that did not allow for *amicus* submissions by non-State actors.<sup>294</sup> The welcome to NGO briefs in Case No. 17, although timid, might be a sign that that international dispute-resolution is becoming more receptive than before to participation

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289. *Case No. 17, supra* note 189.

290. International Tribunal for the Law of the Sea, *Statement By Mr. L. Dolliver M. Nelson, President of the International Tribunal for the Law of the Sea, on the Report of the Tribunal at the Fifteenth Meeting of the State Parties to the Convention on the Law of the Sea*, June 16, 2005, available at [http://www.itlos.org/fileadmin/itlos/documents/statements\\_of\\_president/nelson/msp\\_160605\\_eng.pdf](http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/nelson/msp_160605_eng.pdf) (last visited Feb. 23, 2013).

291. *Id.*

292. United Nations Convention on the Law of the Sea, SPLOS/122, Mar. 30, 2005, art. 41, available at [http://www.itlos.org/fileadmin/itlos/documents/annual\\_reports/ar\\_2004\\_e.pdf](http://www.itlos.org/fileadmin/itlos/documents/annual_reports/ar_2004_e.pdf) (last visited Feb. 23, 2013).

293. *Id.*

294. *Id.*

by actors other than States. Whether or not more opportunities for NGOs' participation and their active involvement in international, and in particular, international environmental law-making will lead to more legitimate or democratization, of such lawmaking is an issue that future research must answer.

# WHY NATIONS FAIL: 2012 INTERNATIONAL LAW WEEKEND PANEL ADDRESSES LAW AND DEVELOPMENT MOVEMENT, UNDERLYING ASSUMPTIONS, AND CHALLENGES

*Norman L. Greene, Wade Channell, Terra Lawson-Remer, Lara Goldmark, and Eugenia McGill\**

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On October 27, 2012, at International Law Weekend<sup>1</sup> at Fordham Law School, a panel entitled *Rule of Law and Development: Why Nations Fail*

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\* Copyright © (2013) Norman L. Greene, Wade Channell, Terra Lawson-Remer, Lara Goldmark, and Eugenia McGill, with each panelist copyrighting the panelist's own section. The affiliations of the participants, accurate as of the time of the panel discussion, were as follows: Norman L. Greene, New York, N.Y. (program co-chair), an attorney in private practice in New York, N.Y. at the firm since renamed Schoeman Updike Kaufman Stern & Ascher, LLP; Wade Channell, Senior Legal Reform Advisor, United States Agency for International Development, Washington, D.C. (program co-chair); Terra Lawson-Remer, Assistant Professor of International Affairs, The New School; Fellow for Civil Society, Markets, and Democracy, the Council on Foreign Relations; Lara Goldmark, then Technical Area Manager, Private Sector Development, DAI, Bethesda, MD; and Eugenia McGill, Lecturer and Director of the Workshop in Development Practice, School of International and Public Affairs (SIPA), Columbia University. Selected publications of the authors in the field of law and development are annotated below. The remarks have been titled, edited and in some cases amplified for publication and reflect the varying styles of the panelists. Each panelist is responsible only for the content of his or her own remarks; and the remarks only reflect the views of the panelist concerned, not the views of any entity with which such panelist is or has been affiliated.

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1. See *International Law Weekend 2012*, AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION, [http://ila-americanbranch.org/Intl\\_Law\\_Wknd.aspx](http://ila-americanbranch.org/Intl_Law_Wknd.aspx). Among the sponsoring organizations for International Law Weekend are the American Branch of the International Law

*and What We Can Do About It*<sup>2</sup> was presented before an audience of law students and practitioners. The participants in the panel were Norman L. Greene (program co-chair); Wade Channell (program co-chair)<sup>3</sup>; Terra Lawson-Remer;<sup>4</sup> Lara Goldmark; and Eugenia McGill. The remarks of the speakers are set forth below. The purposes of the panel were to explore past and present efforts to enhance international development, moving from poverty to prosperity, including best (and poor) practices, and challenges and unintended consequences, with the implications for United States foreign policy and development programming.

#### I. NORMAN L. GREENE: HISTORICAL PERSPECTIVE ON FOREIGN AID AND AID EFFECTIVENESS

The initial goal underlying U.S. foreign aid, which began through USAID during the Kennedy Administration in 1961 with origins before that time, was enhancing American security.<sup>5</sup> A prevailing notion in the 1960's and beyond was to the effect that if countries were more democratic and not so poor, the result would be less communism, less terrorism, and more security overall for the U.S.<sup>6</sup> Early motivations, however, were joined in part by humanitarian and pro-democratic ones as more human rights activists became involved.<sup>7</sup> Some of the earliest work was famously

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Association, the International Law Students Association, and the Leitner Center for International Law and Justice at Fordham Law School.

2. The title of the panel came from DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* (2012) and was inspired by a host of development literature. For example, see RACHEL KLEINFELD, *ADVANCING THE RULE OF LAW ABROAD: NEXT GENERATION REFORM* (2012); and KENNETH W. DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* (2006).

3. See, e.g., Wade Channell, *Grammar Lessons Learned: Dependent Clauses, False Cognates, and Other Problems in Rule of Law Programming*, 72 U. PITT. L. REV. 171 (2010).

4. See Terra Lawson-Remer, *Property Insecurity*, 38 BROOK. J. INT'L L. 145 (2012). Professor Lawson-Remer's article was recognized in *Free exchange: Property and the Lady: Property rights and economic growth may not always go together*, THE ECONOMIST, March 30, 2013, available at <http://www.economist.com/news/finance-and-economics/21574465-property-rights-and-economic-growth-may-not-always-go-together-property-and> (last visited July 30, 2013) (which noted, among other things, that her thesis that "[s]ecuring the property rights of minorities seems to have no clear consequences for economic growth . . . has big and uncomfortable implications.").

5. KLEINFELD, *supra* note 2, at 39 *et seq.*

6. KLEINFELD, *supra* note 2, at 40, 43. Terrorism concerns existed prior to 911 as well as after. See *id.* at 41 ("By the mid-1970's, Middle Eastern terrorism had become a serious threat to the United States and Europe . . .").

7. KLEINFELD, *supra* note 2, at 46, 48–49, stating:

critiqued in a law review article from the 1970s still read today and summarized in other work.<sup>8</sup>

Motivations aside, choosing what to spend money on in foreign aid is and remains difficult. One should not spend foreign aid money on what does not work in terms of achieving one's goals; rather, one should spend money on what does work. But sometimes the donor does not know the difference, has limited options, or is operating within constraints that restrict best practices.<sup>9</sup> Assessing what needs to be accomplished and selecting and implementing an effective approach are difficult still, and millions of dollars, if not more, are at stake. Historically much money has been spent by donor agencies and countries in building institutions or providing laws that do not work as intended, are undermined by corruption, are simply not used, or otherwise fail of their purpose.<sup>10</sup> Effective use of foreign assistance funds is not only important for societies around the world which receive them, but it is also important for U.S. taxpayers.<sup>11</sup>

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In the 1960s, the security community was joined by an entirely different set of people interested in rule-of-law reform—human rights activists and development practitioners eager to spread democracy . . . . In the 1990s, as part of a larger expansion of democratization efforts across the U.S. government and in the broader development community, USAID created a Center for Democracy and Governance and rule-of-law reform programs were placed within it. The role of the rule-of-law in ensuring democracy and human rights remained a rather small side project of the larger democratic and human rights agenda, but it was now enshrined in the organizational chart.

8. *Id.*; see David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1065; see also Norman L. Greene, *Perspectives from the Rule of Law and International Economic Development: Are There Lessons for the Reform of Judicial Selection in the United States?*, 86 DENV. U. L. REV. 53 (2008) [hereinafter *Perspectives*]; KLEINFELD, *supra* note 2.

9. See e.g., WILLIAM EASTERLY, *THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* 156 (2007):

[T]he official aid agencies simply don't know how to change bad governments into good governments with the apparatus of foreign aid. Bad government has far deeper roots than anything the West can affect. To make things worse, the aid agencies *need* the poor-country government, even a bad government, to fill the role of aid recipient to keep money flowing.

10. See KLEINFELD, *supra* note 2, at 85:

Countries undertaking rule-of-law reform are notorious for passing laws that they ignore, either by design (as occurred habitually in Romania from 2000 to 2004) or from lack of capacity to ensure enforcement . . . . Changing laws when enforcement and implementation are highly unlikely is, on its face, a rather ineffective way of changing behavior."

11. KLEINFELD, *supra* note 2, at 221 ("Governments . . . owe it to their taxpayers to make rule-of-law programs as effective as possible. And as citizens who share a single planet, the success of

For example, the U.S. government through USAID and the State Department<sup>12</sup> funds contracts which they hire outside contractors to perform.<sup>13</sup> But how does one tell which projects are good (likely to succeed or successful) or which contractors are good (same)? Are sufficient resources expended by the government to ensure project and contractor quality, including realistic project and contractor goals and effectiveness? Are funders posting unrealistic contracts or project proposals for bids, such as those with too short-term goals? Do contractors respond to proposals for projects of questionable effectiveness, in order to obtain the business?

Metrics are a special problem. How effective are the evaluative techniques for assessing development projects? How should they be improved? Does the government appropriate enough money for evaluative purposes upon completion of the project?

In 2012, a panelist attended a discussion where the subject was corruption and a government contractor was explaining that his company usually proposed “trainings” to fight corruption to a particular government agency. The attendee’s question to the contractor was whether he had a view on whether trainings worked to combat corruption, and his answer was that he did not have any such view. “Well, why do you propose trainings?” the attendee asked during the question and answer part of the panel. “Because the agency likes to see them and funds them,” the contractor said.<sup>14</sup>

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these programs is important to our own security, and to the well-being of some of the world’s most vulnerable people . . . .”); *see also* ACEMOGLU & ROBINSON, *supra* note 2, at 454 (despite waste in foreign aid, not suggesting that foreign aid “except the humanitarian kind, should cease. Putting an end to foreign aid is impractical and would likely lead to additional human suffering.”); *see also id.* at 453 (questioning effectiveness of conditional aid or lending, noting “the effectiveness of conditional aid appears no better than the unconditional kind. Countries failing to meet those conditions typically receive as much aid as those that do. There is a simple reason: they have a greater need for aid of either the developmental or humanitarian kind.”).

12. Rule of law reform assistance in terms of development aid flows through multiple U.S. government entities, in addition to USAID and State, including “at least 7 Cabinet-level departments and 28 agencies, bureaus, and offices . . . from the Department of Defense to the Department of the Treasury,” and “assistance may be labeled anything from ‘democracy development’ to ‘civil society reform.’” KLEINFELD, *supra* note 2, at 21–22. In the first post-cold war decade, more than \$1 billion was spent, with about the same amount spent annually since 2004. *Id.* at 22.

13. There may also be grants to NGOs, and to that extent, similar issues may arise.

14. Quotes are approximate. The point is that “output metrics” are insufficient to determine actual program effectiveness. KLEINFELD, *supra* note 2, at 200. Put another way, for instance: “If thousands of judges are trained, but the training is of poor quality, the numbers will hardly affect any real problem . . . . Wherever possible, program designers should not include output metrics—and certainly, they should not start with them.” *Id.* *See also id.* at 200 (referencing “contractors [who] are stuck carrying out ten more rote trainings . . . [who] cannot offer the time to assist with real reform.”).

On the same panel was a member of the agency in question that was involved in such funding. The attendee asked whether the member knew whether such trainings were effective, and he said that he did not or was not sure whether they were or not. The attendee then asked: “So why do you fund them?” The member’s answer was to the effect that the agency is trying to improve its ability to determine and then fund effective projects, but the question was otherwise unanswered.

As lawyers, one must question various assumptions, once prevalent, such as the idea that improving laws and courts will necessarily improve economic development.<sup>15</sup> Ample scholarship today questions the premise, but the premise has long-standing roots, and beliefs to the contrary (and in support of the premise) still persist.<sup>16</sup> In some egregious cases, following this view, laws have been simply transplanted to places where they did not fit.<sup>17</sup>

The belief in better laws yielding better democratic and economic outcomes is inspiring if not magical—how wonderful it is just to be able to change countries by changing laws in those countries, with the stroke of the pen or tap on the keyboard, but the situation is not so simple. At one time, I listened to a legal scholar proclaiming how he had been retained to write the constitution of a Middle-Eastern country. How great a project is that

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Other more relevant measurements are “outcome metrics,” or measurements of “the actual effects of a program,” and “impact metrics,” such as “whether the program itself is having an impact on the actual problem.” *Id.* at 200–01.

15. Greene, *Perspectives*, *supra* note 8, at 70 *et seq*; see also KLEINFELD, *supra* note 2, at 53 (“the linkage between formal commercial aspects of the rule of law and economic development is mostly based on guesses and assumptions and remains largely unproven.”). Formal legal institutions are not the sole source of “law,” and informal institutions warrant consideration as well. Greene, *Perspectives*, *supra* note 8, at 80; see generally CUSTOMARY JUSTICE AND RULE OF LAW IN WAR-TORN SOCIETIES (Deborah H. Isser ed., 2011).

16. See KLEINFELD, *supra* note 2, at 51 (“[t]he idea that commercial law, contracts, and fair arbitration are necessary for economic growth had roots that stretch back for centuries.” (Referencing Shakespeare, Max Weber, Douglass North, Hernando de Soto, and others)).

17. See *e.g.*, Greene, *Perspectives*, *supra* note 8, at 60–61; Wade Channell, *Lessons Not Learned About Legal Reform*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 39 (Thomas Carothers ed., Carnegie Endowment for Int’l Peace 2006) at 139; Wade Channell, *Grammar Lessons Learned: Dependent Clauses, False Cognates, and Other Problems in Rule of Law Programming*, 72 U. PITT. L. REV. 171, *passim* (2010) (best practices and approaches in rule of law reform); KLEINFELD, *supra* note 2, at 52–53, 84 (providing example of Albania (citing Channell, *supra*, 72 U. PITT. L. REV.)); and Katharina Pistor, Dan Berkowitz, Jean-François Richard, *The Transplant Effect*, 51 (2) AMERICAN JOURNAL OF COMPARATIVE LAW 163, 171 (2003) (“Transplant countries therefore are likely to suffer from the transplant effect, i.e. the mismatch between preexisting conditions and institutions and transplanted law, which weakens the effectiveness of the imported legal order.”).

one, I wondered, and how does one get to work on that?<sup>18</sup> More realistically, development is more than changing constitutions (constitutional engineering<sup>19</sup>) and law reform.

Care is also needed in using ubiquitous concepts such as judicial independence in non-U.S. contexts. In some contexts, judicial independence has been questioned when used by independent but regressive judges to block progressive human rights advances.<sup>20</sup> Specifically, is judicial independence a benefit when judges are regressive and those who attempt to influence them are progressive? In Morocco, for example, some independent-minded but conservative judges have been opposed to women's rights legislation; and judicial independence was hardly progressive in that context.<sup>21</sup>

For lawyers and law students, studying or working in law and development is a humbling experience. Although legal training has historically been important, so are many other fields; and non-legal or multidisciplinary skills are essential as well, for example, in order to understand country contexts for development and power structures. It is no accident that panelists at the conference included a non-lawyer development professional, a lawyer with a master's degree in non-legal study, and a lawyer with a doctorate in economics. In a message to the many law students at the International Law Weekend panel: Your training may need to exceed your law degree.<sup>22</sup>

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18. Many have obtained that work. See, e.g., KLEINFELD, *supra* note 2, at 52 (following the fall of communism, "American lawyers found themselves stepping off airplanes in Poland, Hungary, and other newly liberated countries, redrafting laws and even constitutions alongside counterparts from the EU, OECD, Council of Europe, and a slew of nonprofit organizations.").

19. See John Mukum Mbaku, *Constitutional Engineering and the Transition to Democracy in Post-Cold War Africa*, INDEPENDENT REVIEW, at 501, 502 (Vol. II, No. 4, Spring 1998), available at [http://www.independent.org/pdf/tir/tir\\_02\\_4\\_mbaku.pdf](http://www.independent.org/pdf/tir/tir_02_4_mbaku.pdf) (last visited June 7, 2013).

20. See, e.g., Norman L. Greene, *International Law Weekend Panel Examines Access to Justice in the Middle East and North Africa Before and After the Arab Spring*, 20 ILSA Q. 22, 23 (2011), available at <http://content.yudu.com/Library/A1uzx4/ILSAQuarterly202/resources/29.htm> [hereinafter *International Law Panel*]; see also Norman L. Greene, *Rule of Law in Morocco: A Journey Towards a Better Judiciary Through the Implementation of the 2011 Constitutional Reforms*, 18 ILSA J. INT'L. & COMP. L. 455 (2012) [hereinafter *Rule of Law in Morocco*].

21. See, e.g., Greene, *International Law Panel*, *supra* note 20, at 22, 23; see also Greene, *Rule of Law in Morocco*, *supra* note 20, at 480.

22. See KLEINFELD, *supra* note 2, at 219 ("Altering power structures and social norms requires adding anthropologists, sociologists, and political scientists alongside the lawyers and judges currently involved in rule-of-law efforts. It also requires teaching local political context and incentivizing the learning of such context.") This need not mean that all interested in development work need credentials in non-legal specialties, but rather that a multi-disciplinary approach is needed for

Finally, addressing the book whose title provided a name to the panel, the historical origins of a country may play a role in development success. According to the authors, countries are more likely to fail if their institutions were historically extractive rather than inclusive. In a wide-ranging historical survey and analysis (too vast to dispute historically), the authors (one an economist and the other a political scientist) describe extractive states throughout many regions and eras, such as colonial states. In classic examples like Belgium and the Congo and others, elites do not share power, they dominate the population, and they “plunder” the country. In countries of that sort, economic failure persists even after the colonialists are gone.<sup>23</sup>

Thus, as the authors note, some independence movements rather than instilling democratic institutions, in a vicious circle, installed new “strongmen” who used the same sort of oppressive institutions left behind for their own benefit. Essentially the country exchanged old thugs for new thugs, with similar and predictable results.<sup>24</sup>

Furthermore, the authors noted that the same causes of poverty occur in dictatorships such as Egypt under the former Mubarak regime, which “is poor precisely because it has been ruled by a narrow elite that have organized society for their own benefit at the expense of the vast mass of people. Political power has been narrowly concentrated, and has been used to create great wealth for those who possess it . . . .”<sup>25</sup>

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development work, regardless whether achieved through self-study and travel, formal graduate or even undergraduate work, or a heightened respect and sensitivity for what other disciplines have to offer.

23. ACEMOGLU & ROBINSON, *supra* note 2, at 90–91

The modern Democratic Republic of Congo remains poor because its citizens still lack the economic institutions that create the basic incentives that make a society prosperous . . . . [P]olitical power continues to be narrowly concentrated in the hands of an elite who have little incentive to enforce secure property rights for the people, to provide the basic public services that would improve the quality of life, or to encourage economic progress. Rather, their interests are to extract income and sustain their power.

24. ACEMOGLU & ROBINSON, *supra* note 2, at 366 (“[T]he overthrow of a regime presiding over extractive institutions heralds the arrival of a new set of masters to exploit the same set of pernicious extractive institutions.”).

25. *Id.* at 3.

II. WADE CHANNELL<sup>26</sup>: RULE OF LAW AND DEVELOPMENT:  
A BETTER ROLE FOR LAWYERS

Development practice has understandably included an important component of legal reform based on a generally accepted belief that appropriate laws and regulations are needed to structure economic transactions and social relationships. These institutions, as North, Wallis, and Weingast have shown,<sup>27</sup> are critical to the development of nations by creating “open access orders” in which individuals enjoy enforceable rights that allow them to flourish. On the other hand, “limited access orders” restrict the benefits of a stable state to the privileged elites that run the system. This continuum of access—from tightly held privileges to widely enforced rights—greatly defines the level of overall development of countries. Although there are exceptions, there is high correlation between development and access, with privilege-based societies at the bottom of most rankings of human development, and rights-based societies at the top.

Enter the lawyers. Using the simplest logic, it seems quite clear that the difference in countries can also be defined in terms of the laws they adopt and enforce. “Modern” laws structure the economy and social relationships for greater freedoms, resulting in greater growth. Based on this logic, the law and development movements described by Messick,<sup>28</sup> Kleinfeld,<sup>29</sup> and others have sent forth phalanxes of legal professionals from the OECD countries into the less developed world to assist countries in “upgrading” their laws in keeping with “international best practices” so that they could enjoy the benefits of growth and development. Improved laws lead to improved rule of law, which leads to growth and stability. If only it were that easy. It is not.

Rule of law is not about laws, it is about rule. The logic that assumes foreign drafters can solve the problems of failing nations by inserting better-written legislation is a flawed logic. What is needed is systems thinking, something not necessarily taught in law schools, that places the problem of laws and how they are developed into the system of rule.

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26. Wade Channell is a Senior Legal Reform Advisor for the U.S. Agency for International Development (USAID). His remarks are his own, and do not necessarily reflect the opinions or positions of the United States Government or USAID.

27. DOUGLASS C. NORTH, JOHN JOSEPH WALLIS, & BARRY R. WEINGAST, *VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING RECORDED HUMAN HISTORY* (2009).

28. Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, *The World Bank Research Observer*, Vol. 14, No. 1 (February 1999).

29. RACHEL KLEINFELD, *supra* note 2.

Rule of law is a system of relationships between the rulers and the ruled in which no individual is above the laws adopted in that system, but rather all are subject to law. Unlike rule by might or rule by divine right, the rulers and their kin are not exempt from the limits placed on the behaviors of others. This is the backbone of the liberal democratic system of government that characterizes European history and the states arising from that history. Through a complex social contract, the state serves the citizens, who limit the powers of the state—and their own powers—through law and its enforcement.<sup>30</sup>

Rule of law is a relational construct that has been developed from the values and balance of powers within the society. Out of these underlying relationships, numerous countries have slowly developed what Acemoglu and Robinson have called “inclusive” systems (similar to North’s “open access” systems), systems that allow for political and economic competition, freedom of the press, and numerous civil liberties. To the contrary, those nations whose states are founded on rule by might, where an empowered elite shapes the institutions to benefit the few at the expense of the many, have developed unequal if not abusive “exclusive” relationships. These systems then produce laws and institutions that maintain the existing relationships. For example, colonial powers created systems based on their superior power to extract wealth from colonies. Unfortunately for many former colonies, new leaders did not dismantle these institutional structures at independence but merely nationalized them, maintaining their extractive, limited-access nature in place.<sup>31</sup>

Most legal reform projects—those in which development programs focus primarily on writing new laws or improving the efficiency of the judiciary at upholding laws—have shown little measurable positive impact. For systems thinkers, this is not surprising. Normally, laws are produced through consensus-building systems of participation that hammer out an agreement, embodied in the law, on how society should function based on values and power dynamics. Inclusive systems produce inclusive laws that strengthen and maintain the system; likewise for exclusive systems. Laws are the mechanical under-workings that undergird the existing structure, they are not the structure itself. Effective reform most frequently flows

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30. See LIVINGSTON ARMYTAGE, *REFORMING JUSTICE: A JOURNEY TO FAIRNESS IN ASIA* 79–87 (Cambridge University Press, 2012).

31. For an extensive historical analysis of this problem in Africa, see MARTIN MEREDITH, *THE FATE OF AFRICA* (2005).

from changes in the system, which produces changes in the law, not *vice versa*.<sup>32</sup>

The problem has been well demonstrated by Hollywood. In the movie, *The King's Speech*,<sup>33</sup> we see the future king of England, George, Prince of York, suffering from a debilitating speech impediment—an overwhelming stutter. To overcome this, the Prince and Princess of York employ a speech therapist, Australian commoner, Lionel Logue. During an early therapy session, Logue, who recognizes the stutter may be the result of emotional or psychological causes, begins to question Prince George about his childhood and family experiences. The princess immediately intervenes and puts a halt to this line of questioning: “We want you to focus on the mechanics [of speech]. Only the mechanics.” She hopes that muscle exercises for the jaw can cure the problem, without the embarrassment of examining the causes of the condition.<sup>34</sup>

Like the prince's therapy, legal reform assistance that focuses on the mechanics of law rather than its underlying drivers is bound to fail rather than reverse the failure of the nation being assisted. “Mechanical” assistance focuses on laws, rather than rule. While it may seem plausible that foreign experts could catalyze positive changes by drafting laws based on inclusive, open-access values that drive the formation of new, inclusive structures, there is a missing element in this approach. To be effective, legislation must be implemented, not just adopted. A country may adopt various laws recommended (and even drafted) by foreign experts in order to obtain grants, loans, and other foreign assistance, but not to change the behaviors that law is intended to regulate. Or, as an Albanian lawyer once stated ironically regarding foreign reform impact: “We have a lot of great laws, but we haven't implemented them.” Indeed, the Albanian bankruptcy law adopted in 2002<sup>35</sup> to replace an earlier donor-funded law (used only three times), has resulted in a grand total of one (yes, one), bankruptcy case being brought. This German-inspired law may be technically excellent, but it has yet to connect to the underlying culture and societal relationships that must be incorporated if laws are to be used.

This International Law Students Association conference brings together dozens of future lawyers who hope someday to participate in the field of international legal reform and legal development. We sincerely

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32. Armytage, *op. cit. supra* note 30, at 53–57; KLEINFELD, *supra* note 2, at 73–76.

33. THE KING'S SPEECH (2010). See <http://www.kingsspeech.com/>.

34. Fortunately for the unfortunate prince and future king, the therapist prevails in the end.

35. Albanian Bankruptcy Law (No.8901 of 23 May 2002), as amended by Law No. 9919 of 19 May 2008 and Law No.10137 of 11 May 2009.

hope you will join us in this work. But we are here to keep you from following the footsteps of your forebears, the well-intentioned souls who travel the world re-writing other countries' laws without understanding the underlying relationships. The goal of legal reform—and this is what we want you most to understand—is not to reform laws, but to redefine relationships.

Nations fail when they are based on exclusive relationships that disenfranchise significant sectors of the population. This may take the form of discrimination against women or minorities, or show up as needless regulation that protects vested interests from competition. Either way, the mere passage of laws without social consensus (which is the foundation for implementation), will not lead to inclusion or development.<sup>36</sup>

If rewriting laws is not the answer, what can lawyers do to promote reform? Acemoglu and Robinson find that inclusion increases when broad-

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36. See ACEMOGLU & ROBINSON, *supra* note 2, at 3–4:

In fact, Egypt is poor precisely because it has been ruled by a narrow elite that have organized society for their own benefit at the expense of the vast mass of people. Political power has been narrowly concentrated, and has been used to create great wealth for those who possess it, such as the \$70 billion fortune apparently accumulated by ex-president Mubarak. The losers have been the Egyptian people, as they only too well understand.

We'll show that this interpretation of Egyptian poverty, the people's interpretation, turns out to provide a general explanation for why poor countries are poor. Whether it is North Korea, Sierra Leone, or Zimbabwe, we'll show that poor countries are poor for the same reason that Egypt is poor. Countries such as Great Britain and the United States became rich because their citizens overthrew the elites who controlled power and created a society where political rights were much more broadly distributed, where the government was accountable and responsive to citizens, and where the great mass of people could take advantage of economic opportunities.

*See also id.* at 372:

Extractive economic and political institutions, though their details vary under different circumstances, *are always at the root* of this failure. In many cases, for example, as we will see in Argentina, Colombia, and Egypt, this failure takes the form of lack of sufficient economic activity, because the politicians are just too happy to extract resources or quash any type of independent economic activity that threatens themselves and the economic elites. In some extreme cases, as in Zimbabwe and Sierra Leone, which we discuss next, extractive institutions pave the way for complete state failure, destroying not only law and order but also even the most basic economic incentives. (emphasis added).

based coalitions of the disenfranchised form to challenge<sup>37</sup> the existing power structure and distribution of benefits. Knowing this, it becomes clear that lawyers and other reformers will do well to help countries create participatory forms of legislation and regulation, bringing multiple stakeholders to the table to hammer out needed changes. Where this approach has been adopted, implementation has flowed more effectively from legislation.

This participatory approach has had tremendous positive impact in Vietnam in the past ten years. Rather than simply drafting laws for the Vietnamese government, reformers assisted a multi-ministry working group to engage the private sector and other stakeholders in substantive discussions about proposed reforms. Foreign experts helped to craft the substance of the laws, but in response to changing local relationships, in which local stakeholders negotiated consensus on the direction of change. Although scores of new laws have been drafted, the most important was adopted early in the process: A law on laws, mandating public participation in the lawmaking process. As one Vietnamese legislator noted, this approach “has changed the legislative culture of Vietnam.” Indeed, the local private sector is the first to note this movement from an exclusive system of legislation to a much more inclusive system of participation in policy and lawmaking.<sup>38</sup>

Reform programs that focus on passage of laws have limited impact. The point of laws is to reform behavior. This requires a systemic approach leading to effective implementation. Inclusive systems begin with participatory lawmaking, promulgation of new laws, dissemination of that legislation through public and professional education, and implementation through effective subsystems of courts, watchdog organizations, media, and others who ensure that the laws affect behaviors as intended. Many countries do not have such systems in place.

For example, in the early 2000s, post-Yugoslav, Croatia tended to produce laws without significant private sector input through drafting committees led by academics; in one case, a law was passed after being translated from German and transplanted from Germany. Stakeholder reactions often led to revisions later, but not at inception. (Ironically, anecdotal reports indicate that there was greater stakeholder input under Tito's autocratic Yugoslav regime). Likewise, Vietnam had a very top-

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37. Hopefully through peaceful means: as North, *et al.*, have described in VIOLENCE AND SOCIAL ORDERS, *supra*, note 27, changes often entail the threat of violence, if not violence itself. Hopefully, we now have less destructive means of reform.

38. This information is taken from private interviews by Wade Channell in 2011 in Hanoi and Ho Chi Minh City.

down approach until approximately 2004, when outside assistance helped the legislature adopt a more participatory model.

This concept is captured in part by the World Bank Governance indicators under the concept of voice. Low “voice” tends to correspond to low input by broader society into the policy and legislative process.<sup>39</sup>

Lawyers who take a systems approach can have a profound impact on reform initiatives by helping local reformers to change and strengthen systems. They can incorporate participatory methodologies into their projects and assignments, and push back against simplistic, mechanistic designs. But there is more. Lawyers have a role to play working with local experts to redesign curriculum, promote public education, and identify gaps in the enforcement framework. The American Bar Association has used its Rule of Law Initiative (and its predecessors) to introduce clinical education into law schools and promote freedom of information. Donor agencies such as USAID engage dozens of lawyers to assess and analyze gaps in a country’s commercial legal system, utilizing a systems-thinking approach to understand and respond to the drivers of reform as well as the opponents of change. After designing programs based on that analysis, lawyers are employed to assist countries in their efforts to create more inclusive economic institutions, and, sometimes, more inclusive political systems.

As I stated before, we need lawyers in this work; lawyers who understand the substance of laws, but more than that, those who understand the systems that promote or retard inclusive economic and political institutions. Only as we move toward more open access and inclusion can we help nations to succeed rather than fail.

### III. TERRA LAWSON-REMER: PROPERTY INSECURITY

There is a complicated relationship between secure property rights protected by law and overall economic development. Research indicates that overall national economic growth may occur through securing the rights of the elites at the expense of marginalized minorities.<sup>40</sup> Yet some have assumed mistakenly that “if a state is considered to have a high level of property rights security and strong protections for property rights, everyone’s rights are taken as equally secure and the country is categorized as having ‘good institutions.’”<sup>41</sup> That is not the case. To concentrate on

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39. See *The Worldwide Governance Indicators Project*, WORLDWIDE GOVERNANCE INDICATORS, available at <http://info.worldbank.org/governance/wgi/index.asp> (last visited June 7, 2013).

40. Terra Lawson-Remer, *supra* note 4 at 146.

41. *Id.* at 149.

aggregate economic growth exclusively may be to overlook the needs of vulnerable populations.

One example is Brazil's hydroelectric dams encroaching on the property of the indigenous Amazonians, which helped propel Brazil's expanding economy.<sup>42</sup> Expropriation of Native Americans in North America led to the United States' overall growth "through expansion of large plantations and the widespread establishment of small freehold farms for white settlers."<sup>43</sup> When the commons were enclosed in seventeenth century Britain, this, increased property security for the gentry but not the commoners: Viz., "small and medium cottagers who previously had rights to the newly enclosed commons."<sup>44</sup> "Increasing the security of private property rights for the gentry required expropriating the property of small-hold farmers and pastoralists."<sup>45</sup>

If the goal is overall poverty reduction, one needs to pay attention to both overall growth and the need of minorities.<sup>46</sup> Also, law reform is not neutral and there are (or can be) winners and losers wherever there is legal change. Certain legal regimes may adversely affect the rights of some while benefiting others. Thus, "[p]rotecting the property rights entitlement of some inherently requires preventing others from claiming and controlling those same resources."<sup>47</sup>

#### IV. LARA GOLDMARK: INCLUSION, INFORMATION, AND FLEXIBILITY IN DEVELOPMENT

DAI works on all aspects of legal reform—developing the capacity of public and private sector stakeholders to develop proposals, consult with a broader audience, shepherd them through the approval process, and perhaps most importantly—implement them.<sup>48</sup>

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42. *Id.* at 181 ("Belo Monte dam [the world's third largest hydroelectric power plant on the Xingu River, a large tributary of the Amazon] will provide power for Brazil's fast-growing economy while displacing approximately 20,000–40,000 indigenous Amazonian Indians.").

43. *Id.* at 180.

44. *Id.* at 179.

45. Terra Lawson-Remer, *supra* note 4, at 179.

46. *Id.* at 150.

47. *Id.* at 147.

48. See publicly available documentation in the USAID information clearinghouse for reports from the following projects: Improving the Business Climate in Morocco Program; Moldova Business and Tax Administration Reform; Ukraine, Moldova, and Belarus BIZPRO; Bosnia Governance Accountability Program; Cambodia Micro, Small and Medium Enterprise/Business Enabling Environment Component; Vietnam Support for Trade Acceleration and Vietnam Support for Trade

Development firms are hired to deliver results.<sup>49</sup> With policy reform, a development firm gets it right if those results will continue to manifest themselves long after the firm has gone away—because supporting policy reform is not just about getting the right laws on the books. It is about ensuring that local actors have a neutral and safe place to discuss joint and cross-cutting proposals, that proposals get the technical (as opposed to political) attention they need, and that once laws are passed, that a whole series of follow-up activities take place. These may range from drawing up the accompanying regulations, to developing guides for the civil servants responsible for enforcing the law and its associated regulations, and publishing information for the public, about the law, the regulations, and how to use them.

The best projects involve coalitions of stakeholders, leave behind a platform for collaboration, and continue to deliver change long after they have ended.

I am going to tell three stories. Each one illustrates a principle that is key in developing, passing, and implementing laws that contribute to pro-poor development. The principles are inclusion, information, and flexibility.

*(i) Inclusion.*

DAI operates an economic growth project in Somaliland—the Northeastern region which declared independence from Somalia over twenty years ago.<sup>50</sup> In this region there is no “grid”—i.e., no public electric system providing services to citizens. What you have are individual entrepreneurs who operate diesel generators because their enterprise needs electricity—for example, hotel owners. Or entrepreneurs who saw the need and just decided to set up a diesel generator in a certain neighborhood. They are called independent power providers (IPP). The electricity sold in Somaliland is the most expensive in the world (more than a dollar per kilowatt/hour) which makes it possible to imagine renewable energy sources, like wind, being much cheaper.

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Acceleration II; Vietnam Competitiveness Initiative and Vietnam Competitiveness Initiative II; El Salvador Tax Policy and Administration Reform Program; and Jordan Fiscal Reform Project II.

49. Examples of development firms include: DAI, Chemonics, PRAGMA, Nathan Associates, Carana Corporation, Blue Law, DPK Consulting (now owned by Associates in Rural Development which is now owned by Tetra-Tech).

50. See DAI for the United States Agency for International Development (USAID), Report, *Business Enabling Environment Assessment*, in SOMALI-AMERICAN PARTNERSHIP FOR GROWTH: PRIVATE SECTOR ASSESSMENT Chapter 1 (July 2011).

DAI's project has been helping to revise the laws governing the production and distribution of electricity. Originally the expert consultant who has written this kind of law in many countries took a look at the tangled wires running above the city of Hargeisa and said "oh, just grandfather these guys out, they aren't up to standard." "Wait," we said, "isn't it possible to come up with a law that offers incentives for these entrepreneurs to upgrade their services and gives them options to participate in the new investment projects which will be coming in?" Indeed, it seems this is possible and that is just what the project has done. It is important, though, to think proactively about how to include local enterprises in the framework of new laws—if one does not, it is just far too easy for them to be shut out of the next generation of economic activity.

(ii) *Information.*

In the city of Tangiers, DAI worked with the municipal government and a series of other agencies involved in the process of granting construction permits.<sup>51</sup> After a deep look at the data around permit requests,<sup>52</sup> we discovered that while requests made their way relatively quickly to the multi-agency committee, this did not mean that they were any closer to getting approved. The vast majority of the requests, when they went to the committee, were sent back for more information—time and again. So many times that we began to wonder if it would help to place large posters on the wall of the municipal offices, showing applicants what their package needed to contain. For example, if you were building near an airport, or if your building was planning to be used for tourism, or near a religious building, etc., special documents and information were needed. The information needed to pass the safety inspection is not published anywhere, so many buildings failed. Also due to missing information and outdated maps about where the underground water pipes and power lines actually were, plans often could not be approved until someone had actually dug down to identify exactly where the water pipes, power lines, or both were.

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51. See *Breaking the Rules that Bind: Freeing Private Enterprise from the Shackles of Regulation* (Developing Alternatives, Volume 11, Issue 1, Spring 2006); Lara Goldmark, *No More Red Donkeys: Catalyzing Reform in Morocco through a Regional Doing Business Assessment*, in *GROUNDS FOR GROWTH: ENHANCING THE COMPETITIVENESS IMPACTS OF BUSINESS ENVIRONMENT REFORM* (Developing Alternatives, Volume 13, Issue 1, Winter 2009); DAI for the United States Agency for International Development, Report, *Beyond Doing Business: Final Report/Improving Business Climate in Morocco Program* (September 2009) [hereinafter DAI Report].

52. See DAI Report, *supra* note 51, at annexes A11–14.

A set of “if this, then that” questions and a color-coded application form was developed with the municipality to clear up, once and for all, what all of the requirements were to request a construction permit. The system was implemented in Tangiers and is now being rolled out to other cities in Morocco. The story illustrates the key principle that no matter what the law or regulations say, they cannot be used effectively by investors unless they are made clear. In this case, many well-connected investors used to have the involved government agencies hold their hand through the procedures, whereas it was the small, less connected architects and developers that were subject to the “merry-go-round” treatment by the permit committee. Making information publicly available is of greatest benefits to those who would not normally have access.

*(iii) Flexibility.*

This story is relevant to one of the most pressing global issues right now—unemployment in the Middle East and North Africa. The insights come not from a project, but rather from research that I conducted for DAI in anticipation of a project to address issues of urban unemployment in Jordan.<sup>53</sup> I visited the Palestinian refugee camps in and around Amman and asked women and youth about obstacles they faced in obtaining employment. I had been forewarned that, due to cultural issues, women did not want to work. What I found in the course of my research was a bit more nuanced than that.

I discovered that obstacles to women’s participation in the workforce included: lack of childcare options, lack of safe and affordable transport options, and a dearth of flexible scheduling and location options. And the laws were not making it any easier. Until recently (they are working on this law right now in Jordan), it was illegal for women to perform work in their homes—whether for an employer or as a self-employed business owner. For youth, the issues were different, centering around the lack of connection between what they learned at school and what employers were looking for—and what types of jobs were available versus what jobs the youth had been conditioned to seek. DAI’s summer 2012 *Developing Alternatives Journal*, *The Jobs Challenge: Fresh Perspectives on the Global Employment Crisis*, digs deeper into these issues, concluding that a new definition for “flexibility” and accompanying revisions to labor laws

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53. This research was published in the recent DAI employment journal. See Lara Goldmark and Karen Miller, *Flexibility that Works* in *THE JOBS CHALLENGE: FRESH PERSPECTIVES ON THE GLOBAL EMPLOYMENT CRISIS* (Developing Alternatives, Volume 15, Issue 1, Summer 2012).

and regulations would be likely to increase employment of women and youth all over the world.

V. EUGENIA MCGILL: ENSURING GENDER INCLUSION IN  
LAW AND POLICY REFORM

The title of Acemoglu and Robinson's book, *Why Nations Fail*,<sup>54</sup> raises questions about how and why nations fail particular groups of citizens, including ethnic, racial, religious and sexual minorities, and women. As Terra Lawson-Remer has found for ethno-cultural minorities, nations can "succeed" in terms of a range of national development indicators,<sup>55</sup> and still "fail" to provide equal opportunities and protect the rights of particular groups.<sup>56</sup> In the case of gender discrimination and inequality, the marginalized group typically represents half the population.

Acemoglu and Robinson link state failure with "extractive" political and economic institutions, and find conversely that "successful states" are those with more "inclusive" political and economic institutions.<sup>57</sup> From a gender perspective, it is important to unpack this concept of "inclusive institutions." In the United States, for example, our collective understanding of "inclusion" and "pluralism" has expanded considerably since the 18<sup>th</sup> century, for example, to include people of color, women, and more recently, people with disabilities, and people with different sexual orientations. However, the project of realizing a more inclusive society is clearly unfinished. With respect to gender inclusion, despite substantial progress, women worldwide still have relatively less access to land, credit, technical assistance, and other resources; women are still underrepresented in key decision-making bodies; and women are still underpaid relative to men in most professions and jobs.<sup>58</sup>

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54. ACEMOGLU & ROBINSON, *supra* note 2.

55. Because of the limitation of metrics such as Gross Domestic Product, virtually all development agencies and developing country governments now use multiple indicators and indices—such as the Human Development Index, Gender Inequality Index and Multidimensional Poverty Index—to measure development trends. *See, e.g.*, UNDP, *Human Development Report 2011: Sustainability and Equity—A Better Future for All*, 133–52.

56. Lawson-Remer, *supra* note 4.

57. ACEMOGLU AND ROBINSON, *supra* note 2, at 429–30.

58. *See, e.g.*, WORLD BANK, WORLD DEVELOPMENT REPORT 2012: GENDER EQUALITY AND DEVELOPMENT; UNITED NATIONS, 2009 WORLD SURVEY ON THE ROLE OF WOMEN IN DEVELOPMENT: WOMEN'S CONTROL OVER ECONOMIC RESOURCES AND ACCESS TO FINANCIAL RESOURCES, INCLUDING MICROFINANCE.

To understand how state institutions become more “inclusive” over time, lawyers and legal scholars typically point to constitutional amendments, law reforms, and judicial decisions. However, it is important to recognize that these legal reforms are often driven by social movements, such as the civil rights movement, the women’s movement, and the gay rights movement in the United States. As Wade Channell noted, equitable laws are important but not sufficient to ensure inclusive institutions, and this certainly applies to gender inclusion. Because efforts to promote gender equality involve changing deeply entrenched social norms, the more successful efforts have involved broad-based coalitions, including civil society advocates and news media together with progressive lawmakers, bureaucrats, and judges. The more successful approaches have also involved multiple strategies—for example, law reforms combined with public awareness campaigns, training of judges and government bureaucrats, and the introduction of accountability mechanisms, all over a period of time. In South Korea, for example, the women’s movement and its allies used a variety of strategies to eventually abolish the discriminatory headship system.<sup>59</sup>

In international development assistance, it is important to recognize that gender equality projects need to be internally defined and driven. However, external actors can provide valuable resources, including information on legal and other approaches that have worked in similarly situated countries, and funding for research, exchanges, consultations, and awareness-raising. For example, several development organizations provided support for the internally-driven process to draft and enact gender equality laws in the Philippines and Viet Nam.<sup>60</sup>

Development organizations also need to scrutinize their own programs to make sure they do not inadvertently reinforce existing inequalities or contribute to new forms of inequality. For example, as early as 1970 the Danish economist Ester Boserup documented the ways in which colonial land administration practices had undermined women’s traditional access to and control over land, with lasting consequences in many developing countries.<sup>61</sup> However, donors have continued to support gender-blind land reform projects in developing countries, resulting in the distribution of new

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59. Doowon Suh, *The Dual Strategy and Gender Policies of the Women’s Movement in Korea: Family Headship System Repeal through Strategic Innovation*, 44 (2) *Sociological Focus* 124 (2011).

60. See, e.g., UNIFEM [now UN Women], *EVALUATION REPORT: UNIFEM PROGRAMME—FACILITATING CEDAW IMPLEMENTATION IN SOUTHEAST ASIA*, 25 (2008).

61. ESTER BOSERUP, *WOMEN’S ROLE IN ECONOMIC DEVELOPMENT* (1970).

land titles or land use certificates primarily to male “heads of households.”<sup>62</sup>

Why do law and policy “experts” and practitioners continue to overlook gender issues in their work, especially in the areas of governance and economic law? Many forms of gender inequality are embedded and normalized in institutions—for example, in the apparently neutral concept of “head of household.” Law and policy practitioners are also influenced by their own assumptions about the roles and capabilities of men and women, which they may apply unconsciously to their work in other countries, thereby missing or misunderstanding local gender issues. However, there are a few practical steps that law and policy advisors can take to promote more gender-equitable institutions:

- 1) Always assume that a proposed law or policy reform *will* have different impacts on men and women, and analyze the potential consequences of the reform on that basis;
- 2) Study the social impact of similar reforms in other countries, and make use of available resources on gender, law and policy to anticipate how the reform could differently affect women and men (or particular groups of women and men);<sup>63</sup>
- 3) Consult with local experts on gender and development and women’s rights; and
- 4) Ensure that women are represented in any consultations with local stakeholders (*e.g.*, local bar associations, business or trade associations, labor unions or other civil society organizations).

## VI. CONCLUSION

This program brought together scholars, writers and practitioners in the field of development aid if not to solve the problems of aid effectiveness at least to ask the right questions and advance the conversation in the field. The program had a subtle recruitment message as

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62. In response to these initial results in Kyrgyzstan and Tajikistan, UNIFEM (now UN Women) and some bilateral donors have been supporting further law reform, training and awareness-raising to try to increase women’s ownership (or joint ownership) of land. UN WOMEN, UN WOMEN IN EASTERN EUROPE AND CENTRAL ASIA, 7 (2012).

63. *E.g.*, ASIAN DEVELOPMENT BANK, GENDER, LAW AND POLICY IN ADB OPERATIONS: A TOOL KIT (2006); UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME, DESIGNING AND EVALUATING LAND TOOLS WITH A GENDER PERSPECTIVE: A TRAINING PACKAGE FOR LAND PROFESSIONALS (2011); WORLD BANK, GENDER DIMENSIONS OF INVESTMENT CLIMATE REFORM: A GUIDE FOR POLICY MAKERS AND PRACTITIONERS (2010).

well. There is no more compelling profession today than participating in the effort to alleviate poverty worldwide,<sup>64</sup> an extraordinarily difficult field but one which draws major talents throughout government and other donor agencies, academia, and development practitioners.

Keeping in mind the audience for the panel, in the words of panelist Wade Channell, “we need lawyers in this work: Lawyers who understand the substance of laws, but more than that, those who understand the systems that promote or retard inclusive economic and political institutions.” But not just lawyers can participate. As William Easterly wrote:

There is a role for everyone . . . who cares about the poor.  
If you are an activist, you can change your issue from

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64. The development field also encompasses counter-human trafficking, an effort advanced by USAID through its 2012 policy and otherwise and by other U.S. Government agencies. See USAID, *Counter-Trafficking in Persons Policy*, Feb. 2012 [2012 USAID Policy], available at [http://transition.usaid.gov/our\\_work/democracy\\_and\\_governance/technical\\_areas/trafficking/pubs/C-TIP\\_Policy.pdf](http://transition.usaid.gov/our_work/democracy_and_governance/technical_areas/trafficking/pubs/C-TIP_Policy.pdf) (last visited June 7, 2013); see 2012 USAID Policy, at 1 (“The [USAID] 2012 Counter-Trafficking in Persons Policy is a direct response to the fact that trafficking in persons (TIP) is a massive development problem affecting millions of men, women, and children around the globe.”) and p. 3 (“conditions that allow trafficking to flourish” include “lack of viable economic or educational opportunities, gender and ethnic discrimination, corruption, and weak governance and rule of law.”); and USAID, *Counter-Trafficking in Persons Field Guide*, Apr. 2013, available at [http://www.usaid.gov/sites/default/files/documents/2496/C-TIP\\_Field\\_Guide\\_Final\\_April%205%202013.pdf](http://www.usaid.gov/sites/default/files/documents/2496/C-TIP_Field_Guide_Final_April%205%202013.pdf) (last visited June 7, 2013); see also U.S. Department of State’s *Trafficking in Persons Report* (2012), available at <http://www.state.gov/j/tip/rls/tiprpt/2012/> (last visited June 7, 2013). The *USAID Field Guide* references the President’s Interagency Task Force to Monitor and Combat Trafficking and the multiple federal agencies involved in the effort, including State, Justice, Defense, Health and Human Services, Homeland Security, Labor, Agriculture, Education, and EEOC. See *id.* 34–37 (“Annex B. Roles and Responsibilities of USG Entities in Combatting Trafficking,” listing and describing work of agencies, noted in the publication as being taken from the U.S. Department of State’s website).

USAID recently sponsored a contest to engage university students in developing anti-trafficking solutions and strategies. See USAID, *Challenge Slavery: The Counter-Trafficking in Persons Campus Challenge*, available at <http://www.usaid.gov/traffickinginpersons> (last visited Jan. 22, 2013); see also *id.* (“The challenge, promoted at *ChallengeSlavery.org*, calls on university students, in the United States and around the world, to offer creative ideas and solutions to prevent trafficking and provide assistance to victims and survivors.”). For the selection of winning proposals in March 2013, see USAID Press Release, *USAID Announces Winners of the Campus Challenge to Combat Human Trafficking*, Mar. 22, 2013, <http://www.usaid.gov/news-information/press-releases/usaaid-announces-winners-campus-challenge-combat-human-trafficking> (last visited April 20, 2013); see also <https://www.challengeslavery.org/tech-contest> (specifying winning projects) (last visited April 20, 2013). Part of the campus challenge initiative includes research grants to scholars at universities and research institutions worldwide for Counter-Trafficking in Persons (C-TIP) Research Challenge Grants. See <http://www.iie.org/Programs/USAID-Democracy-Fellows-and-Grants-Program/Grant/Current-Opportunities> (last visited May 11, 2013).

raising more aid money to making sure that the aid money reaches the poor. If you are a researcher or student of development, you can search for ways to improve the aid system, or for piecemeal innovations that make poor people better off, or for ways for homegrown development to happen sooner rather than later. If you are an aid worker, you can forget about the utopian goals and draw upon what you do best to help the poor. Even if you don't work in the field of helping the poor, you can still, as a citizen, let your voice be heard for the cause of aid delivering the goods to the poor.<sup>65</sup>

The panelists hope that the panel and this article play a role in encouraging their attendees and readers to ask the right questions, read the leading development literature, learn from local experts, and take up the challenge.

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65. EASTERLY, *supra* note 9, at 383–84.

# FROM REPRESSION TO RESPECT: AN INTEGRATED APPROACH TO THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

*Flávio C. Bettarello\**

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## I. INTRODUCTION

This article is composed by this introduction, three interrelated chapters, and a conclusion. The first chapter discusses what kind of Intellectual Property Rights (IPR) system is better from a social welfare perspective. In its assessment, the text identifies three orders of negative effects that may arise as side effects of higher levels of IPR protection: endogenous effects (barriers to innovation), exogenous effects (social costs), and systemic effects (tension with other rights and values). The second chapter discusses different possibilities for enforcement strategies, and suggests a threefold strategy based on a repression component, an educational component, and an economic component. The chapter also recognizes that IP enforcement shall be a collective action rather than an activity solely orchestrated by right holders. The final chapter relates the findings of the two prior ones to the international IP discussions and negotiations. It poses that there is no “one-size fits all” model agreement, and that flexibilities are central to the system inasmuch as they guarantee the policy space required to calibrate international IP provisions to each country-specific reality.

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## II. A BALANCED APPROACH TO IPR PROTECTION

It is important to protect Intellectual Property Rights. Therefore, we must take into consideration that more IPR protection is not necessarily better. The IP system is not an end in itself, nor is its objective to grant private actors (the right holders) any sort of unjustified overcompensation. As James Boyle explains, the IP system's:

[G]oal is to give us a decentralized system of innovation in science and culture . . . . [T]he creation of limited legal monopolies called intellectual property rights gives us a way of protecting and rewarding innovators in art and technology, encouraging firms to produce quality products, and allowing consumers to rely on the identity of the products they purchased. The laws of copyright, patent and trademark are supposed to do just that—at least in some areas of innovation—*provided* the rights are set at the correct levels, neither too broad nor too narrow.<sup>1</sup>

The key concept of the aforementioned excerpt is that IPR may only fulfill its ultimate goal if, and only if, there is a fine balance of the rights' levels.<sup>2</sup>

First, from an endogenous perspective, if the system is off-balance it may hamper innovation instead of fostering it. Originally, copyrights and patents were supposed to confer property rights only in expression and invention, respectively.<sup>3</sup> “The layer of ideas above, and of facts below, remained in the public domain for all to draw on, to innovate anew.”<sup>4</sup> Only a proper balance between the public domain and the realm of private property may lead to optimal innovation.<sup>5</sup> Too much protection unnecessarily restricts the knowledge-pool available to the next generation of innovators. The public domain available to “creative manipulation” conducive to innovation may be seriously limited if we have database rights over facts, patents over methods, copyrights over scientific articles. Thus, it is possible that an overprotection of IPR works *against* innovation.

Second, from an exogenous perspective, an IP system is not costless. The protection of IPR has a significant social cost. For example, it has long been recognized that patents impose costs on society because they keep out

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1. James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 9 DUKE L. & TECH. REV. 1, 1 (2004).

2. *Id.* at 8.

3. *Id.* at 2.

4. *Id.*

5. *Id.*

competition, enabling rights holders to raise prices and lower outputs.<sup>6</sup> As Federal Judge Richard A. Posner exposes:

When patent protection provides an inventor with more insulation from competition than he needed to have an adequate incentive to make the invention, the result is to increase market prices above efficient levels, causing distortions in the allocation of resources; to engender wasteful patent races—wasteful because of duplication of effort and because unnecessary to induce invention . . . to increase the cost of searching the records of the Patent and Trademark Office in order to make sure one isn't going to be infringing someone's patent with your invention; to encourage the filing of defensive patents (because of anticipation that someone else will patent a similar product and accuse you of infringement); and to encourage patent "trolls," who buy up large numbers of patents for the sole purpose of extracting licensee fees by threat of suit, and if necessary sue, for infringement.<sup>7</sup>

Third, from a systematic perspective, IP suppliers' rights must be weighed against IP buyers' rights, which may be entitled to greater protection. This is another example of possible costs associated with an IP regime.<sup>8</sup> The Universal Declaration of Human Rights provides for rights that may eventually be in conflict with IPR protection, such as the right to education (Article 26), the right to proper health care (Article 25), and freedom of expression (Article 19).<sup>9</sup> The Declaration, an expression of a consensus among the international community, represents a binding system of shared values subjectively accepted by the universe of humanity.<sup>10</sup> Accordingly, some argue that the "human rights approach" is necessary to

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6. Gary S. Becker, *Reforming the Patent System Toward A Minimalist System*, THE GARY-POSNER BLOG (Sept. 30, 2012, 9:17 PM), <http://www.becker-posner-blog.com/2012/09/reforming-the-patent-system-toward-a-minimalist-system-becker.html> (last visited Feb. 23, 2013).

7. Richard A. Posner, *Do Patent and Copyright Law Restrict Competition and Creativity Excessively?*, THE GARY-POSNER BLOG (Sept. 30, 2012, 10:30 PM), <http://www.becker-posner-blog.com/2012/09/do-patent-and-copyright-law-restrict-competition-and-creativity-excessively-posner.html> (last visited Feb. 23, 2013).

8. If one considers the IP regime as a stand-alone system related to innovation, then these costs would be exogenous. If one adopts a monist approach of a sole international legal system globally related to general welfare, then these costs would be endogenous.

9. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948).

10. NORBERTO BOBBIO, *THE AGE OF RIGHTS* 15 (1996).

IP law.<sup>11</sup> Specifically, the type and level of protection afforded under any IP regime shall facilitate and promote progress in a manner that will broadly benefit members of society individually and collectively.<sup>12</sup> “Intellectual property and human rights must learn to live together.”<sup>13</sup> Traditionally, there have been two dominant views of the human rights and IPR “cohabitation.” The “conflict view” emphasizes the negative impacts of intellectual property on rights, such as freedom of expression or the right to health, while the “compatibility model” emphasizes that both sets of rights strive towards the same fundamental equilibrium.<sup>14</sup> The latter view should be prioritized.

Therefore, there are at least three different dimensions—endogenous, exogenous, and systemic—that point to the necessity of achieving a fine balance for IPR protection. It is just as important to have *maximum* standards for IPR if there is a call for minimum IPR standards. Instead of using a positively inclined line or curve to represent the relationship between IPR protection and global welfare, it is better to use an inverted parabola with a positive relation till, an optimal point, and a negative relation from there on. To add some complexity to the model, one must not forget that the optimal point of this inverted parabola varies according to the specificities of any given economic, scientific, and/or cultural reality. Specifically, the level and type of IPR protection that corresponds to the maximum point of welfare depends on conditions that are close to country-specific.

The assumption that an appropriate IPR protection is necessarily a balanced one is crystallized in the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).<sup>15</sup> Article 7, which concerns the treaty’s objectives, provides that:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation

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11. Audrey Chapman, *Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science*, 9 DUKE L. & TECH. REV. 1, 2 (1996); see also Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1041 (2007); see also Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47 (2003).

12. *Id.*

13. Daniel J. Gervais, *Intellectual Property and Human Rights: Learning to Live Together*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 3 (2008).

14. *Id.*

15. Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Jan. 1, 1995, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.<sup>16</sup>

Moreover, the TRIPS Agreement expressly recognizes that an IPR regime should not jeopardize public health and nutrition, and that the IPR system should cohabit with a policy space that can be used “to promote the public interest in sectors of vital importance to [the members’] socio-economic and technological development.”<sup>17</sup> The TRIPS Agreement also points to the eventual need of “appropriate measures . . . to prevent the abuse of intellectual property rights by right holders,”<sup>18</sup> and incorporates the possibility of flexibility in its provisions.<sup>19</sup> If we interpret the spirit of the TRIPS Agreement and take into account the aforementioned articles, it is clear that the treaty sets the groundwork for the elaboration of country-specific IP systems that will deliver the optimal balance of IPR protection, and maximize the general welfare of their corresponding societies.

Despite this apparently straightforward interpretation of the TRIPS Agreement, the first trend observed after the conclusion of the treaty in 1994 was one of indiscriminate and rapid legislative deployment.<sup>20</sup> The assumption that “more IPR protection is better” was taken for granted, and model laws were adopted in many countries regardless of their development level.<sup>21</sup>

In the years to follow, this “addition phase” could not be justified by empirical data.<sup>22</sup> There was no proof that more IPR protection following a pre-defined model was conducive to development in poorer countries. This

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16. *Id.* art. 7 (emphasis added).

17. TRIPS Agreement, *supra* note 15, art. 8.1. *See, id.* art. 27.2 (discussing the exclusion from patentability of inventions that might attempt against the *ordre public* or morality, or that could do harm to human, animal or plant life or health or cause serious prejudice to the environment). *See also*, TRIPS Agreement, *supra* note 15, art. 27.3(a) (giving the members the option to exclude from patentability “diagnostic, therapeutic and surgical methods for the treatment of humans or animals”).

18. *Id.* art 8.2.

19. *Id;* *see, e.g.*, TRIPS Agreement, *supra* note 15, art. 13 (discussing limitations or exceptions to copyright on special cases), art. 30 (discussing limited exceptions to the exclusive rights conferred by a parent), and art. 31 (discussing other use of the subject matter of a parent without authorization of the right holder).

20. DANIEL J. GERVAIS, INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA 68 (Daniel Gervais ed., 2007).

21. Daniel J. Gervais, *Implenting WIPO’s Development Agenda*, WILFRID LAURIER UNIVERSITY PRESS 2009 (Jeremy De Beer, ed.), available at <http://www.iadb.org/intal/intalcdi/PE/2009/04152.pdf>, (last visited Feb. 11, 2013).

22. *Id.*

fact, coupled with escalating public health issues posed by the HIV and malaria pandemics, started a “subtraction phase” (“less IP is better”) around the year 2000.<sup>23</sup>

Finally, a certain middle ground was reached coincidental to the discussions that culminated in the launch of WIPO<sup>24</sup> Development Agenda in 2007.<sup>25</sup> This third phase of the TRIPS Agreement is informed by what Gervais defines as calibration narratives.<sup>26</sup> The calibration process is based on:

- 1) The recognition that developing countries are very different . . . and consequently may need different implementations of TRIPs;
- 2) The recognition that below certain developmental thresholds, the introduction of high levels of intellectual property protection will not generate positive impacts . . . ;
- 3) The growing belief that intellectual property protection is necessary to develop innovation and draw foreign direct investment (including technology transfers) but in itself is insufficient to achieve developmental objectives;
- 4) Consequently, the recognition that any complete TRIPs implementation must form part of a broader strategic initiative; and, finally
- 5) The recognition that the sudden introduction of high levels of protection and enforcement may induce significant negative welfare impacts, which must also be managed.<sup>27</sup>

Hopefully, with dynamic adjustments, this calibration process will lead to a perfectly balanced approach to IPR protection worldwide, with tailor-made solutions for countries in different cultural and developmental situations. An important step towards this goal is the recognition that IPR protection is not a panacea. Another step is the understanding that when one talks about Brazil, China, the United States, or Germany, he or she is not talking about “markets,” but about countries, nations, people, and societies. These nation-states and societies may have different aspirations and/or views regarding their economic systems, and we must not forget that

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23. *Id.*

24. World Intellectual Property Organization.

25. *See* Gen. Rep. adopted by the Assemblies, 43rd Sess., Sept. 24–Oct. 3, 2007, WIPO Doc. A/43/16 (Nov 12, 2007), *available at* [http://www.wipo.int/edocs/mdocs/govbody/en/a\\_43/a\\_43\\_16-main1.pdf](http://www.wipo.int/edocs/mdocs/govbody/en/a_43/a_43_16-main1.pdf) (last visited Jan. 9, 2012).

26. Gervais, *supra* note 13, at 11.

27. *Id.*

“essentially, intellectual property is but one of several ingredients of a successful national innovation policy.”<sup>28</sup>

### III. A HOLISTIC STRATEGY FOR IPR ENFORCEMENT

The previous chapter stressed the relevance of a balanced approach to IPR protection and the importance of solutions that are country-specific. This same approach must be extended and applied to the design of enforcement policies. In fact, the last of the forty-five WIPO Development Agenda recommendations reads as follows:

To approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns, with a view that “the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”, in accordance with Article 7 of the TRIPS Agreement.<sup>29</sup>

The Development Agenda, therefore, explicitly recognizes that IPR enforcement should also consider the specificities of the *loci* where it is being applied. Again, there is no panacea. While IPR protection types and levels shall be calibrated to respond to concrete situations, the actions to enforce these rights must also be balanced according to each specific case, with the maintenance of policy space for adjustments. This balance must take into account not only the concerns of the right holders, but also all the stakeholders involved.<sup>30</sup> Also, while IPR violations should be remedied, any sort of abuse of IP enforcement procedures must be prevented. A ceiling for IPR enforcement is at least as important as the establishment of minimum standards.

In order to strike a balance on the enforcement side of the IP regime equation, a holistic and flexible strategy must be devised. Very often, the only remedy that is proposed against IPR violations is repression. Even as we acknowledge the importance of repressive measures, it is necessary to

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28. *Id.*

29. WIPO Rep. of the Provisional Comm. on Proposals Related to a WIPO Dev. Agenda (PCDA), Sept. 24–Oct. 3, 2007, WIPO Doc. A/43/13 Rev. (Sept. 17, 2007).

30. The Contribution of, and Costs to, Right Holders in Enforcement, Taking Into Account Recommendation 45 of the WIPO Dev. Agenda, Document Prepared by WIPO President, IQsensato, Geneva, 5th Sess., Nov. 2–4, 2009, WIPO Doc. ACE/5/10 (Sept. 8, 2009).

integrate other tools to the enforcement kit. I suggest a threefold approach, based on a repression component, an educational component, and an economic component.

While the repression leg of the tripod focuses mainly on the supply side of pirated and counterfeit goods, the educational and the economic legs focus on the demand side. This is important because, in many developing countries, even if piracy imposes an array of costs on IP right holders, it also provides to a large percentage of the population access to goods (from recorded music, to film, to software) that they would otherwise be unable to purchase.<sup>31</sup> In this context, the question of pricing and distribution is central.

Multinational companies that practically dominate the international media and software markets maintain in developing countries, with few exceptions, prices near or occasionally above the United States and Europe.<sup>32</sup> At the same time, technological advancements significantly lowered the cost of pirating these companies' products, flooding the bases of the consumption pyramid (the poorer classes) with products that, if original, could not be realistically acquired. In this scenario, possibly more effective than the intensification of repression efforts would be a change in the IP right holders' business models.<sup>33</sup> If they could adjust their pricing to attend the demand of consumers with lower income in developing countries, many of these would shift their purchase behavior from pirated goods to original ones.<sup>34</sup> Many companies are already searching for a pricing strategy that allows them to capture larger chunks of developing mass markets, making them win on scale.<sup>35</sup> Governments may also help these new business models to succeed by providing, for example, tax-breaks to some selected classes of products, making them more affordable to the average consumer.<sup>36</sup> Intuitively, it seems that the resources demanded by this type of strategy are lower than those demanded by pure repression strategies, which rely solely on operational law enforcement.

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31. Media Piracy in Emerging Economies: Price, Market Structure and Consumer Behavior, Document Prepared by Vice President of the American Assembly, 6th Sess., Dec. 1–2, 2010, WIPO Doc. ACE/6/5 (Sept. 6, 2010) [hereinafter *Media Piracy*].

32. *Id.* at 16.

33. *Id.* at 4.

34. *Id.*

35. Public Policies for Combating Piracy in Brazil, Document Prepared by Executive Secretary for Nat'l Council against Piracy, 3rd Sess., May 15–17, 2006, WIPO Doc. ACE/3/14 (May 9, 2006).

36. *Id.*

The economic component is also instrumental to the success of the educational component. The objective of the latter is to build a stronger “IP culture” in the long run through education and public awareness campaigns.<sup>37</sup> The success of this informational strategy, though, is conditioned by its link to the consumers’ economic reality. Thus, a successful educational component rests over the viability of presenting a tangible option to the general public—that, for a reasonable price difference, they may shift from pirated to original merchandise.

What comes clearly out of this proposed threefold approach is that the effectiveness of any effort to prevent IP violations is directly proportional to its ability to congregate the different pertinent stakeholders. A winning strategy must include the support of IP right holders, the Government, consumers, and the society in general. Enforcement should be a collective action. Not only would this raise the possibility of success of the initiatives undertaken, but it would also lower the probability that abusive enforcement measures occur.

Balanced and flexible IPR enforcement policies should have two dimensions of integration: (1) tools, combining repression with educational and economic measures; and (2) agents, congregating all the relevant stakeholders. With this kind of holistic strategy, the simplistic view of enforcement as repression shall give place to a culture of true respect towards IPR.<sup>38</sup>

#### IV. INTERNATIONAL TREATIES: ONE-SIZE DOES NOT FIT ALL

We already saw that more is not necessarily better—both when we are talking about IPR protection and when we are referring to enforcement actions. Balance in both cases is key. This fine balance is delicately consubstantiated in the TRIPS Agreement and the flexibilities of its regime, which allows each country to dynamically adjust some of the treaty provisions to their own cultural, scientific, and development specificities. One-size does not fit all, even if it is “extra-large.”<sup>39</sup>

Nonetheless, there is a proliferation of the treatment of IP issues at bilateral and plurilateral interactions in detriment of multilateral *fora*. It is not uncommon for the developed countries with offensive interests in IPR protection to look for different venues to attain their objectives. If a consensus cannot be reached at the multilateral level, these countries can

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37. See Media Piracy, *supra* note 31.

38. *Id.* at 6.

39. Boyle, *supra* note 1, at 9.

engage in “forum-shopping,” and search for opportunities to push through their agendas in talks with one or a few trade partners.

Usually these talks are asymmetrical and involve partners with significantly different levels of development. In these cases, the developing partners “are not the *demandeurs* in the area of IP where their general attitude has been rather defensive and of damage limitations.”<sup>40</sup> In many cases, the defensive, developing partners accept higher levels of IP protection<sup>41</sup> as part of the bargain. Developing partners may gain concessions in other areas where they have offensive interests by accepting IP rules in the package. In the case of talks involving symmetrical, developed partners, there is also room for concerns because any TRIPS-plus agreement may affect the whole international IP system as they regulate the relationships of right holders of those countries and third parties that are either users or distributors of the protected goods across the globe (*e.g.*, border measures targeted at products in transit).

The bilateral or multilateral adoption of higher IPR protection standards collides with the delicate balance that animates the TRIPS regime. Some authors affirm, “TRIPS-plus enforcement standards should be avoided in the negotiation of FTAs and EPAs, as compliance with the TRIPS Agreement already provides a strong framework for the exercise and defense of IPRs.”<sup>42</sup> The elimination of the policy space that developing countries are entitled to under the TRIPS flexibilities is certainly harmful. Moreover, these TRIPS-plus agreements almost never contain clauses to prevent distorted uses of a highly protective regime, abusive resort to IPR protection, or enforcement measures that are detrimental to legitimate trade and to public interest issues, such as health or nutrition.<sup>43</sup>

We then face an apparent paradox. We need tailor-made, country-specific solutions to establish effective IP regimes that are conducive to social welfare, but these solutions are better achieved in a multilateral environment, rather than on bilateral or small groups’ discussions. At the specialized multilateral *fora*, such as WIPO or the WTO,<sup>44</sup> the discussions are open to more than 140 countries and the decision-making process is

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40. Pedro Roffe, *Intellectual Property Provisions in Bilateral and Regional Trade Agreements: The Challenges of Implementation*, CIEL, Oct. 6, 2006, (emphasis added) available at <http://ictsd.org/downloads/2009/01/roffe-2020fta20implementation20sa20dialogue-pdf.pdf> (last visited February 9, 2013).

41. *Id.*

42. Carlos M. Correa, *The Push for Stronger Enforcement Rules: Implications for Developing Countries*, 22 ICTSD INTELLECTUAL & SUSTAINABLE DEV. SERIES (Feb. 2009).

43. *Id.*

44. WORLD TRADE ORGANIZATION, <http://www.wto.org> (last visited Feb. 7, 2013).

relatively transparent and inclusive, with the interests of several different stakeholders well represented. Consequently, the answer to the paradox is that, at the multilateral level, it is easier to defend the flexibilities that—as an integral part of the system rather than the suspension of it—assure to each country the necessary policy space to find their own balance for IPR protection.

## V. CONCLUSION

The article demonstrated that questions related to IPR are complex. Most of the easy, simplistic assumptions can be quickly refuted as false, or at least incomplete. More IPR is not necessarily better. An IPR regime does not necessarily conduce to innovation and development. There are several social costs related to an IPR system that must be considered. Enforcement of IPR cannot be a one-dimensional action. There is no “one-size fits all” in terms of model laws to be rapidly deployed in different nation-states.

One way to address this complex scenario is through an integrated and multi-dimensional approach that simultaneously recognizes that:

- (i) IPR protection needs to be balanced;
- (ii) Enforcement policies needs to be holistic and inclusive; and
- (iii) International discussions must be multilateral, while preserving the built-in flexibilities of the TRIPS system.

While a maximalist view does not prevail when it comes to IPR protection, it has far more chances to accurately reflect the ideal *locus* for IP discussions. These discussions and the decision-making process related to IPR must be transparent and stretch out to all relevant interested parties. However, we must keep in mind that these discussions do not have to come up with a solution that is globally applicable. Most probably, this kind of solution does not exist. What the exercise must produce is a system of dispositions that takes into account the particularities of each player and leaves room for constant adjustment and calibration.

Each society has its own aspirations, and these aspirations, together with its cultural and developmental realities, will define the right balance of IPR protection and related enforcement measures that shall be applied. If every society can freely decide which IPR system is better, we will have a world where it is much easier for a culture of respect towards Intellectual Property Rights to flourish.



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