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**I. THE AMERICAN BRANCH  
OF THE INTERNATIONAL LAW ASSOCIATION**

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## THE INTERNATIONAL LAW ASSOCIATION AND THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION

The International Law Association was founded in Brussels in 1873 and is considered the preeminent private international organization devoted to the development of international law. As a nongovernmental association with consultative status in the United Nations, its debates at its biennial conferences have in many cases influenced subsequent sessions of the United Nations General Assembly. Academic scholars, practitioners, and government lawyers travel from afar to press adoption of resolutions that have often influenced the development of international law. No major school of international law is now unrepresented at the conferences. Records of the debates and of the resolutions adopted are published by the Association and circulated widely throughout the world.

Members of the Association are grouped into over forty "national" branches. Individuals from countries in which numbers of international lawyers are still too few to form a branch are listed as members of "Headquarters" in London, where the Secretary General of the Association maintains his office. The study of international law is conducted in various committees composed of specialists chosen from the membership to represent widely different approaches. These committees function under a Director of Studies so as to prepare reports that may be presented and debated at the biennial conferences. Resolutions often flow from these debates.

Members of the branches are automatically members of the Association. They appear at conferences as individuals rather than as "national" delegations. There is no voting by branches.

Customarily, one branch after another invites the Association to hold its biennial conference within its country. The chairman of the host branch is elected President of the Association to serve until the next conference. Five members of the American Branch have been Association Presidents.

Members of the Association from the United States of America enter the Association by joining the American Branch. Its history is illustrious, and, indeed, the role of Americans has been notable since the very founding of the Association itself. The history of these events is set forth in the essay prepared by Dr. Kurt H. Nadelmann, which is printed at pp. 2-15 of the 1977-1978 *American Branch Proceedings and Committee Reports* and is found also in 70 *American Journal of International Law* 519 (1976).

Committees of the American Branch, usually paralleling the committees of the Association, study problems in international law. Customarily, these committees prepare reports that are published for each world conference in these *Proceedings of the American Branch*. These reports represent no official United States view, nor even the view of the Branch itself, but rather the divergent views of committee members. In light of this divergence, reports often contain minority positions opposed to the majority. Since members attend the world conference as individuals, minority members of committees may speak as freely on the floor of the conference as the spokesperson for the committee majority.

The American Branch is autonomous. It holds its own annual meeting, elects its own officers, collects its own dues, and appropriates its funds as it wishes, except for that portion of the dues payable to Association headquarters.

From 1873-1882 the Branch existed under the name of "The International Code Committee of the United States." The present American Branch was formally established on January 27, 1922, in New York City as a result of an initiative taken by the American members of the International Law Association who attended the Association's 30th Conference held in 1921 at The Hague: Hollis R. Bailey of Boston, Oliver H. Dean of Kansas City, Charles B. Elliott of Minneapolis, Edwin R. Keedy of Philadelphia, and Arthur K. Kuhn of New York. Hollis R. Bailey became the first President; Arthur K. Kuhn the first Secretary. Chief Justice William Howard Taft was the first Honorary President.

Of the annual or biennial conferences of the International Law Association, five have been held in the United States. At the invitation of the American Bar Association, in 1899, the 18th Conference was held in Buffalo, New York, and, in 1907, the 24th in Portland, Maine. The American Branch was host to the 36th, 48th, and 55th Conferences held in New York City in 1930, 1958, and 1972, respectively.

Among the Presidents of the Association were a number of Americans. David Dudley Field, who had been elected Honorary President at the founding conference in Brussels in 1873, served as President in 1874, 1875, and 1878. Simeon E. Baldwin was President in 1900, and John W. Davis in 1930; Oscar R. Houston served from 1958 to 1960, and Cecil J. Olmstead from 1972 to 1974. Cecil J. Olmstead was Chairman of the Association from 1986 to 1988. Cynthia Lichtenstein is one of the three current Vice-Chairs.

The list of the past American Branch Presidents reads: Hollis R. Bailey (1922); Charles B. Elliott (1923); Harrington Putnam (1924); Robert E.L. Saner (1925); Arthur K. Kuhn (1926); Edwin R. Keedy (1927); Amos J. Peaslee (1928); Edmund A. Whitman (1929); John W. Davis (1930); Oscar R. Houston (1931); Howard Thayer Kingsbury (1932); Paul H. Lacques (1933); Fred H. Aldrich (1934); Joseph P. Chamberlain (1935); William J. Conlen (1936); Lewis

M. Isaacs (1940-1943); William S. Culbertson (1944-1948); J.W. Ryan (1948-1951); Clyde Eagleton (1951-1958); Oscar R. Houston (1958-1959); Pieter J. Kooiman (1959-1963); Cecil J. Olmstead (1963-1972); John N. Hazard (1972-1979); Robert B. von Mehren (1979-1986); Cynthia C. Lichtenstein (1986-1992); Edward Gordon (1992-1994); Alfred P. Rubin (1994-2000); James A.R. Nafziger (2000-2004); Charles D. Siegal (2004-2008); John E. Noyes (2008-2010). The present President is Ruth Wedgwood, elected in 2010.

For more information about the American Branch and its Committees, the current Co-directors of Studies' Report, the Branch's current newsletter, and Branch archives, see the American Branch's website at <http://ila-americanbranch.org/>. The web site also has links to the headquarters site of the ILA in London as well as to other international law sites.

## **ILA COMMITTEES AND STUDY GROUPS**

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**The Use of Private Law Principles for the Development of  
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**Rapporteur:** Alejandro Carballo

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## **II. INTERNATIONAL LAW WEEKENDS**



## INTERNATIONAL LAW WEEKEND 2010

International Law Weekend 2010, held in conjunction with the 90<sup>th</sup> annual meeting of the American Branch of the International Law Association, took place October 21-23, 2010. The opening panel and reception were held at the House of the Association of the Bar of the City of New York, 42 West 44<sup>th</sup> Street, New York City, and the Friday and Saturday panels were held at Fordham Law School, 140 West 62<sup>nd</sup> Street, New York City. The theme of the Weekend, *International Law and Institutions: Advancing Justice, Security and Prosperity*, was addressed in over thirty panels. All panels were open to students and members of the American Branch and co-sponsoring organizations without charge.

The opening panel on Thursday evening, October 21, was entitled *The Role of the United Nations in the Development of International Law*. The panel was chaired by Patricia O'Brien, UN Legal Counsel, and featured Donald McRae, Brian Hook, and W. Michal Reisman.

Panels on Friday morning, October 22, were:

- *The International Court of Justice's Role in Resolving the Kosovo Crisis* (chaired by Valerie Epps)
- *Non-Party Discovery in Aid of Arbitration under the FAA and U.S. discovery in Aid of Foreign and International Tribunals under Section 1782* (chaired by Robert Smit)
- *Private International Law and Cross Border Consumer Redress* (chaired by Louise Ellen Teitz)
- *Disability-Inclusive Development*
- *Global versus Local: International Law and Institutions, Customary Law and Human Rights in Africa* (chaired by Paolo Galizzi)
- *The International Criminal Court: The Way Forward After the Kampala Review Conference* (chaired by Jennifer Trahan)
- *Climate Change, Energy and the Implications for International Law*
- *Update on the European Union and the Treaty of Lisbon* (chaired by Elizabeth Defeis)

- *Book Discussion of Cohen and DeLong, The End of Influence: What Happens When Other Countries Have the Money* (chaired by Cynthia Crawford Lichtenstein)
- *International Litigation and Human Rights* (chaired by Anibal M. Sabater)

Friday's box lunch seminars addressed:

- *U.S. Nuclear Weapon Policy and International Law on Nuclear Disarmament* (chaired by John H. Kim)
- *Legal Mechanisms for Advancing Environmental Human Rights and Environmental Security*
- *Using Mediation to Resolve International Parental Child Abduction Cases*

Panels on Friday afternoon were:

- *The Evolution of Corporate Accountability for Human Rights Abuses*
- *Managing Discovery in International Commercial Arbitration: The Institutional Response* (chaired by Philip D. O'Neill, Jr.)
- *The Limits of International Adjudication*
- *Domestic and International Legal Responses to Emerging Migration Issues* (chaired by Ved P. Nanda)
- *How Does International Development Law Coexist with Traditional Sovereignty over Economic Resources and Activities?* (chaired by Roberto Aguirre Luzi)
- *Responsibility to Protect: The Relationship Between Human Dignity and State Sovereignty* (chaired by Neomi Rao)
- *15 Years of TRIPS Implementation* (chaired by Peter K. Yu)

On Friday evening, October 17, the Permanent Mission of Finland to the United Nations hosted a Gala Reception at the Consulate General of Finland. The American Branch is grateful to the Finnish Mission and the Consulate General for their hospitality and generosity.

Saturday morning, October 23, featured an array of panels. The topics addressed included:

- *The UN Security Council and WMD Proliferation* (chaired by Masahiko Asada)
- *Treaty Claims in U.S. Courts After Medellín v. Texas*
- *War, Philosophy, and International Law* (chaired by Fernando R. Teson)
- *Behind the Red Curtain: Environmental Concerns in the End of Communism* (chaired by Elizabeth Burleson)
- *Evaluating the 1979 Moon Agreement*
- *Is Targeted Killing Legal?* (chaired by Vincent J. Vitkovsky)
- *State Responsibility for Refugees in Times of Occupation* (chaired by Jaya Ramji-Nogales)
- *Bribery: What Is It, What Can Be Done, What Should Be Done, and How to Comply?*(chaired by Mike Koehler and Corinne Lammers)
- *Protecting the Most Vulnerable from Environmental Harm* (chaired by Marilyn Averill)
- *Foreign Official Immunity After Samantar v. Yousuf* (chaired by Beth Stephens)

The American Branch's annual luncheon, held on Saturday, featured David Caron, C. William Maxeiner Distinguished Professor, University of California Berkeley School of Law and President, American Society of International Law. The topic of his speech was *Of Discontinuities: Climate Change, the Oceans and the Law*.

International Law Weekend 2010 concluded on Saturday afternoon with the First Annual Student Career Fair sponsored by ABILA, ILSA, ASIL and the ABA. The Career Fair began with a panel, followed by break-out sessions. The panel was:

- *Pathways to Employment in International Law* (chaired by William Patterson)

Selected panel papers from International Law Weekend 2010 were published in the *ILSA Journal of International and Comparative Law*.

**International Law Weekend 2010 was sponsored by:**

The American Branch of the International Law Association and the International Law Students Association

*in conjunction with:*

American Bar Association Section of International Law

Allen & Overy LLP

American Society of International Law

American University, Washington College of Law

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ILSA Journal of International and Comparative Law

Leitner Center for International Law and Justice

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Oxford University Press

Pace Law School

Seton Hall University School of Law

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Jill Schmieder Hereau, International Law Students Association

Vincent J. Vitkowsky, Edwards Angell Palmer & Dodge LLP

## **Of Discontinuities: Climate Change, the Oceans and the Law**

David D. Caron  
International Law Weekend  
American Branch, International Law Association  
New York City, October 23, 2010

### **Introduction**

Fellow members of the American Branch of the International Law Association, dear colleagues and friends, ladies and gentlemen, it is my distinct honor to join the wonderful tradition of International Law Weekend. I thank your President, Professor John Noyes, for the opportunity to speak to you today. My topic is climate change, and my intent is to approach it through the lens of its implications for oceans, and humanity. Climate change has been a focus of my research for over two decades. I first wrote about the relationship between sea level rise and maritime boundaries in 1989, and other work has followed particularly on the changing Arctic. Today, I step back and speak to you broadly about these topics and the challenge they present to us to map a way forward.

### **I. Two Preliminary Points**

Before looking more closely at climate change from the perspective of the oceans, I emphasize two points concerning climate change generally: one flows from co-directing with Professor Charles Leben of Paris II the Research Center of the Hague Academy on the topic of international disasters in 1995; the other from having worked in the division of Marine Environmental Protection for the U.S. Coast Guard for the west coast of the United States from 1976 to 1979.

As I approached the work that the Academy would undertake on the topic of law and disasters, I asked a scholar of economics what his field taught us about disasters. He replied – “oh that is easy, it is a discontinuity.” And he said that as though that one word, that short answer, freed him from giving the topic one more thought.

By discontinuity, he meant that normally there is a pattern (10 people die a week due to acts of god, 10 barrels of oil are spilled a week), and then

along comes an event that is not continuous with this pattern (an earthquake in Haiti kills hundreds of thousands, an offshore oil platform spills millions of barrels). Sometime later, the underlying pattern, more or less, returns. For him, what was in the middle is simply discontinuous.

My first reaction to this was and remains that although climate change most certainly is a disaster, it is not a simple discontinuity. Depending on the magnitude of the change, climate change will be a grave discontinuity in time and in reach. If change embraces both loss and opportunity, then this is a change in which loss will predominate. And even if the change in climate is slowed, or stopped, the pattern on the other side will be different. This is fundamental change. My second reaction is that it bothered me when this scholar felt that this one word answer of discontinuity freed him from responsibility for thinking any longer about the disasters that periodically rip apart the pattern of our world.

That second reaction leads to my second point. What I knew from my time with the Coast Guard was that – quite contrary to the sense that there is nothing that can be done – we can prepare for discontinuities. We can, even with no idea of the nature of the impending disaster, certainly prepare for the human suffering which follows – thereby limiting the impact of a disaster and thereby reduce the echo, the ripple, of disaster over time. And if you know the type of disaster possibly involved, you can work to reduce the likelihood of the disaster in some cases and reduce the human impact in most. In the occurrence of some discontinuities and most certainly in the depth of suffering that follows such events, there is human complicity.

But in almost every contingency planning exercise I was involved with in the Coast Guard, it was assumed that there would be only one disaster at a time. Climate change, however, strikes directly at that assumption. Depending again on its magnitude, the discontinuity of climate change will be felt in many places at once. It may be that some area of world would appear better off on balance if it is warmer. But I think it very unlikely that any part of the world will be able to stand apart from the series of dramatic shifts that climate change will bring in time. In a sense, climate change is a very slow global earthquake. It is entirely possible that it is not simply a series of discontinuities; rather it may portend a new and much more difficult normal.

I make these two points to recapture for us the sense of concern that first arose when we learned of climate change. I make these two points to recapture a sense of words. The choice of words that the Intergovernmental Panel on Climate Change ("IPCC") uses is significant. Ordinarily, environmental policy speaks about prevention and response. Those are not the words that the IPCC uses. Rather, it speaks of mitigation and adaptation. Mitigation is an acknowledgment that climate change will not be prevented.

Rather we talk about somehow mitigating it; cutting the edges off of how bad this is going to be. Likewise, adaptation is not about somehow responding and cleaning it up, but rather it is about our changing our way through it. Those are very large acknowledgements.

I make these two points so as to urge that we be intellectually honest as to the depth of the possible threat. In the public arena, it is difficult for policymakers to be honest about mitigation and one therefore has to listen to the mitigation discussions very carefully. Mitigation efforts must be encouraged; it is essential because the adaptation task will be a lot harder unless the rate of change is slowed. Mitigation is essential and thus it is important that it not seem pointless, which it is not. But the way policy initiatives are phrased sometimes can leave you with the impression that somehow climate change will be reversed. For example, policymakers often talk about stabilization. "We seek to stabilize greenhouse gasses in the atmosphere by 2040." But "stabilization" in this context does not mean that the concentration of greenhouse gases in the atmosphere will get lower. Rather, it means that our goal is to stop it from going any higher. There's a lot of warming in the pipeline that has not yet been realized. Let me emphasize again, we are in a different ballpark.

## **II. The Implication of Climate Induced Changes in the Oceans**

What are the impacts of climate change for the ocean? Name a physical characteristic of the oceans and it will change. Three fundamental likely impacts on the oceans of increased carbon dioxide and climate change are: (1) an increase in water temperature, (2) a rise in sea level, and (3) an increase in the ocean's acidity level. The approach of the Intergovernmental Panel on Climate Change ("IPCC") to questions of climate change is to first consider ocean-based strategies to mitigate change in the climate by reducing the levels of climate changing gases in the atmosphere and, second, to identify the challenges posed by the need to adapt to the likely impacts of climate change. My comments today focus on this second aspect of adaptation to likely impacts in large part because this is the core challenge posed by a discontinuity.

However, a word about mitigation is appropriate. The primary focus of mitigation is to look to how each sector of human activity contributes to climate change and how the greenhouse gas contribution of each such sector might be reduced. And in the climate change mitigation game, every human activity must make its contribution in terms of reduced emissions. Although it is still early to provide an assessment, the possibility of reduction in emissions from shipping offers some low hanging fruit for reductions and efforts are underway in the IMO. In comparison to mitigation efforts in others areas of human activity,



mitigation of emissions from shipping is advancing, even if slowly. But, although by no means insignificant, the reduction in emission levels from ships can at most play a small part in a larger comprehensive effort. The emissions from offshore oil and gas activities likewise represent a small percentage of global emissions, but here the techniques and law being developed concerning seabed carbon sequestration offer the possibility of substantial reductions, assuming that sequestration can be safely scaled up. Finally, geo-engineering efforts in the oceans will likely take several forms. At least as far as iron fertilization of the oceans, studies thus far indicate that the effort does not result in significant transfer of carbon dioxide from the atmosphere to the deep ocean. Law regarding geo-engineering at present is generally left to national authorities: that gap in international law needs to be addressed before geo-engineering efforts are taken more seriously.

It is the question of the global impacts of climate change upon the oceans, however, that presents the greatest challenges and which I outline so as to place before you the contours of law and policy questions ahead. As mentioned, there are three likely and fundamental impacts that increased atmospheric carbon dioxide and climate change will result in: (1) an increase in water temperature, (2) a rise in sea level, and (3) an increase in ocean acidity levels.

As to an increase in water temperature, global climate change has the potential to significantly disrupt the distribution patterns of marine animals by dramatically altering the temperature of the world's oceans, which could result in the local extinction of critical commercial species and the invasion of species into new regions as they search for waters that match their preferences. A growing body of scientific evidence, backed by empirical observations and sophisticated computer modeling of projected impacts, supports the hypothesis that anthropogenic global warming will cause substantial changes to the abundance and distribution of many marine species. While the international community and individual nation states over the last half century has attempted with varying success to manage the living resources of the oceans, these regimes are not designed for, and inadequate responses to, the additional stress that climate change poses for fisheries in the future. Moreover, it is not only the health of a fishery that is called into question. Fisheries law and jurisdiction generally has rested on the assumption that most fish stocks (highly migratory stocks such as tuna being the exception) do not significantly move. Their movement across jurisdictional lines will not only confuse management efforts, but also possibly give rise to private or public conflict. Preexisting agreements were reached when climate science was less sophisticated and climate change was less well understood than today. The challenge posed by significant changes

in the distribution and abundance of marine species will require multilateral engagement.

As to the projected rise in sea level over the coming century, the prospect of this rise threatens many low-lying and heavily-populated areas with inundation and numerous likely secondary effects. In the shorter term, a rising sea level potentially leads to shifts in boundaries in the ocean and, even disputes concerning the valid location of boundaries in the oceans. It must be remembered the ocean zones can be extremely valuable, both in terms of living resources and oil and minerals, and that states have fought over control of marine resources for centuries. Uncertainty regarding ownership of a valuable resource is a fertile ground for conflict between nations or between fishers of different nations. A rising sea level, in addition to the tensions that may result from movement in fish stocks just mentioned, thus may also give rise to uncertainty as to whether a fishing ground is still within one state's exclusive economic control, will tempt others to make use of the resource, and create a situation ripe for conflict.

As to the changes being seen in the acidity level of the ocean, in October of 2008, over 150 marine scientists from 26 different countries met in Monaco to participate in the Second International Symposium on the Ocean in a High-CO<sub>2</sub> world. Noting the severe implications of increased acidity for ability of many creatures, particularly those at the bottom of the food chain, to form carbonate skeletons or protective shells, the Monaco Declaration paints a dire picture of the next 10 years. The Declaration asserts that "ocean acidification is accelerating and severe damages are imminent" and then proceeds to assert that although acidification is rapid, recovery from it would be slow. "Recovery from this large, rapid, human-induced perturbation will require thousands of years for the Earth system to reestablish ocean chemical conditions that even partially resemble those found today." Finally, and particularly significantly, the Declaration observes that geo-engineering strategies are not even a theoretical solution to ocean acidification: "Ocean acidification can be controlled only by limiting future atmospheric CO<sub>2</sub> levels."

All of these changes – the impact of temperature rise, of sea level rise and of ocean acidification – are potentially all of fundamental significance for the well-being of significant portions of humanity. Mitigating the extent of such climate change is a first response, yet it also appears that some of these changes are in the pipeline and are likely to occur. It is noteworthy, however, that some of the challenges that follow from these changes will arise sooner rather than later. Thus possible instability in ocean boundaries in general will occur before eventual inundation of low lying coastal areas. Fish stocks will move relatively slowly, while the drafters of the Monaco Declaration on ocean acidification

sound the alarm that the dire consequences of ocean acidification may come sooner. Clearly, both policy and law need to begin to anticipate these tremendous challenges, some not that far off.

### **Conclusions**

Let me close with these thoughts about change, opportunity and loss, about change and leadership: and here I mean not only leadership in terms of execution of policy but also in terms of the intellectual leadership that provides the map and legitimation of policy – leadership in the framing sense that many of us as academics in this room try to exercise.

A colleague of mine at a recent graduation spoke about the space between reality and one's objectives in life. That space is occupied by choices: the choice between hope and despair, confidence and doubt. This observation was a basis of his counsel to graduates: each of them, each of us, chooses how they view their lives. There is a similar dynamic in leadership. We first must identify our reality. In this sense, it is my firm conviction that intellectually we must acknowledge the depth of the discontinuity that is climate change, we do this not with despair but rather with hope and the conviction that we have a role in transiting this change in the best way possible. Second, we need identify what our choices are, what our objectives are, how law will play a role; that is a central task of the leaders in ideas. The leader does not have luxury of despair, but the leader does have the privilege of identifying realistic objectives.

## INTERNATIONAL LAW WEEKEND MIDWEST 2010

The American Branch's International Law Weekend-Midwest series was inaugurated in February, 2010, at a conference hosted by the University of Denver Sturm College of Law on the theme *Sustainable Development, Corporate Governance, and International Law*.

Panels on Friday afternoon, February 12, 2010 were:

- *International Law and Sustainability* (chaired by Anita Halvorsen)
- *Sustainable Mining and International law* (chaired by Bruce Hutton)

Panels on Saturday, February 13, were:

- *International Issues for Sustainable Energy* (co-chaired by K.K. Duvivier & Lakshman Guruswamy)
- *Sprawl in the USA and Sustainability: A Critical Historic and International Perspective* (chaired by James van Hemert)
- *Corporate Governance (ethics panel)* (chaired by Ian Bird)

The conference also featured lectures by several distinguished speakers. Daniel B. Magraw, Jr, the President of the Center for International Environmental Law, gave the Henry and Mary Bryan Lecture on Friday evening, February 12, on *Climate Change, the Green Economy, and Social Justice: Implications for Sustainable Development*. On Saturday morning, February 13, David Caron, C. William Maxeiner Distinguished Professor of Law, University of California Berkeley School of Law, and President-Elect, American Society of International Law, gave the Myres S. McDougal Distinguished Lecture on *Imagining the Arctic: Reflections on Law, Politics and Sustainability*. The Saturday Luncheon speaker was John C. Dernbach, Distinguished Professor and Director, Environmental Law Center, Widener University School of Law, who spoke on the *Agenda for a Sustainable America*.

International Law Weekend-Midwest was co-sponsored by the Ved Nanda Center for International Law & International Legal Studies Program, the Denver Journal of International Law & Policy, and the International Law Society, all at the University of Denver Sturm College of Law. The Colorado Bar Association also co-sponsored the event.

The proceedings of the conference were published in an issue of the *Denver Journal of International Law & Policy*.

## INTERNATIONAL LAW WEEKEND 2011

International Law Weekend 2011, held in conjunction with the 91<sup>st</sup> annual meeting of the American Branch of the International Law Association, took place October 20-22, 2011. The opening panel and reception were held at the House of the Association of the Bar of the City of New York, 42 West 44<sup>th</sup> Street, New York City, and the Friday and Saturday panels were held at Fordham Law School, 140 West 62<sup>nd</sup> Street, New York City. The theme of the Weekend, *International Law and National Politics*, was addressed in over thirty panels. All panels were open to students and all members of the American Branch and co-sponsoring organizations without charge.

The opening panel on Thursday evening, October 20, was entitled *The Death of Sovereignty*. The panel was chaired by Itzhak Kornfeld and featured José Enrique Alvarez, Christopher J. Borgen, Katherine M. Gorove, and Sean D. Murphy.

Panels on Friday morning, October 22, were:

- *The Proper Place of International Law in the U.S. Grand Strategy*
- *Beyond All Boundaries: The Extraterritorial Grasp of Anti-Bribery Legislation* (chaired by Bruce W. Bean)
- *U.S. Ratification of International Conventions in the 21st Century: Is the Process Broken?* (chaired by John E. Noyes)
- *The Anti-Shari'a Movement—Unconstitutional Discrimination or Homeland Security?*
- *International Surrogacy* (chaired by Barbara Stark)
- *Libya and Lawfulness*
- *Libel Tourism*
- *The European Union's Treaty of Lisbon and its Impact on National Politics and Policies* (chaired by Elizabeth Defeis)
- *Fair and Balanced: The Ethics of International Human Rights Fact Finding* (chaired by Peggy McGuinness)
- *UN Disabilities Convention: Intersecting Dimensions of National Human Rights Implementation*

Friday's keynote speaker was Harold Hongju Koh, Legal Adviser of the United States Department of State, speaking on *International Lawyering for the U.S. in an Age of Smart Power*.

Panels on Friday afternoon were:

- *Pathways to Employment in International Law* (chaired by Will Patterson)
- *Private International Law in Action: The Impact of Recent Private International Law Developments on Domestic Law and Policy* (chaired by Ronald A. Brand)
- *R2P Comes of Age?* (chaired by John Carey)
- *Whither the Regulation of Private Military and Security Companies*
- *Habits of Compliance? International Law and the Executive*
- *Recent Developments in International Commercial Arbitration—the User, the Institutional, and the Lawyer’s Perspective* (chaired by Aníbal M. Sabater)
- *International Financial Reform and the Domestic Response*
- *The Law of the International Civil Service and National Employment Law* (chaired by Dr. Matthew Parish)
- *Many Roads to Justice: Prospects for Strengthening Access to Justice in the Middle East-North Africa (MENA) Region*
- *LGBT Rights in Africa: International Human Rights and Cultural Relativism at a Crossroad* (chaired by Chi Mgbako)

On Friday evening, October 21, the Permanent Mission of Switzerland to the United Nations hosted a Reception. The American Branch is grateful to the Swiss Mission for its hospitality and generosity.

Saturday, October 22, featured panels on the following topics:

- *International Law as Enhancer and Reducer of Domestic Rights and Powers* (chaired by Lori Fisler Damrosch)
- *Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule*
- *Climate Change Geoengineering: Panacea or Pox in the 21st Century?*
- *Africa: The Application of International Criminal Law in a Shifting Political Environment* (chaired by Wambui Mwangi)
- *International Perspectives on Indigent Defense* (chaired by Maha Jweid)
- *CSR & Human Rights—Emerging Risks for Corporate Counsel*

- *The Future of U.S. Trade Negotiations—What is a 21<sup>st</sup> Century Trade Agreement?* (chaired by Claire Kelly)
- *Private Litigation Against Alleged Terrorist Sponsors* (chaired by Captain Glenn M. Sulmasy)
- *The Challenge of Nuclear Abolition: Closing the Gap between International Law and National Politics* (chaired by John H. Kim)
- *Intellectual Property Law in National Politics and International Relations Roundtable*
- *Tribunal Procedure and Ethical Dilemmas for Guantanamo Bay Military Tribunals*
- *The New International Investment Arbitration Lawyer: How Should Lawyers Prepare for the New Generation of Bilateral Investment and Trade Treaties?*(chaired by Norman Gregory Young and Roberto Aguirre Luzi)
- *“Material Support of Terrorism” and Exclusion from Refugee Status: US Supreme Court v. European Court of Justice* (chaired by guy Goodwin-Gill)
- *Current Challenges for the International Criminal Court* (chaired by Jennifer Trahan)
- *Promoting Independence for Human Rights Lawyers Worldwide: The Role of American Lawyers and Law Firms* (chaired by Elisabeth Wickeri)

The Saturday keynote address featured Judge Richard Goldstone, former Justice of the South African Constitutional Court, former prosecutor of the International Criminal Tribunals for Yugoslavia and Rwanda, and Bacon-Kilkenny Distinguished Visiting Professor of Law, Fordham Law School, speaking on *The Future of International Criminal Justice: The Crucial Role of the United States*.

Selected panel papers from International Law Weekend 2011 were published in the *ILSA Journal of International and Comparative Law*.



**International Law Weekend 2011 was sponsored by:**

The American Branch of the International Law Association and the International Law Students Association

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## **The Future of International Criminal Law: The Crucial Role of the United States**

Honorable Richard Goldstone

International Law Weekend

American Branch, International Law Association

New York City, October 22, 2011

Good afternoon. Thank you, Robert and thank you, Ruth for the introduction and for the invitation to give this closing talk for the International Law Weekend. Martin's introduction reminds me of one story which I think I should share. About eight or nine years ago, I was invited to give a keynote address at an American Bar Association lunch at its annual meeting in Atlanta, Georgia, where they were honoring the president of Romania, President Constantinescu. At Atlanta airport, after I had presented my passport, the passport official said to me, "What are you doing in the United States?" and I said, "Well, I'm attending the annual meeting of the American Bar Association." And he looked down and he looked up and he said, "Hey, you're giving a keynote address," and I said, "Yes, that's correct." I buttoned my jacket, stood up tall and I said, "How did you know that?" He said, "Everybody coming in today is giving a keynote address." So, I thanked him for giving me a great opening for my keynote address, but I walked outside very quickly.

The topic of my talk is the future of international criminal justice and the crucial role of the United States. At the outset, it's important to spend a few minutes talking about recent history and especially the huge advances that are being made by international criminal justice. Advances in the law and in legal institutions by their very nature always come after the event. The law changes in consequence of facts on the ground. Whether it's cyberspace, whether it's copyright law, whether it's income tax evasion, the law always comes after the event. That is obviously the case in regard to international criminal law. Unfortunately, or perhaps it's inevitable, the significant changes in international criminal law come about as a result of catastrophes.

The real beginning of modern international criminal law is obviously Nuremberg, and that wouldn't have happened if not for the terrible crimes that were committed by the Nazi leaders. It was the enormity of their offenses that led to the Nuremberg Trials. And it was a scale of criminality, of evil leaders, that has led to other changes and advances in international criminal law.

Probably, the most important legacy to come down from Nuremberg was the idea, the very concept, of crimes against humanity. The idea that some crimes could be so huge that they were perpetrated against all of humankind – not only the immediate victims of those crimes or the people of the country where they were committed, but against human beings all over the world.

That idea led to the extension of universal jurisdiction, which until then had only applied to piracy and possibly to slavery. The Universal Declaration of Human Rights was an outcome of it. The 1949 Geneva Conventions were the first conventions ever in legal history to incorporate universal jurisdiction. So, too, the Apartheid Convention of 1973, which importantly recognized apartheid as a crime against humanity and incorporated universal jurisdiction. That was followed by the Torture Convention of 1984, and it was its recognition of universal jurisdiction that led to the arrest in a London Clinic of the former military leader of Chile, General Pinochet. Since then there have been more than a dozen international conventions dealing with terrorism dating from the 1970's. All of them contain provisions recognizing universal jurisdiction in an effort to avoid safe sanctuaries for terrorists.

It was also anticipated in the immediate period after Nuremberg that there would be a permanent international criminal court. The Cold War put the idea on ice. Again it took catastrophe, genocides, and crimes against humanity in the former Yugoslavia and Rwanda to resuscitate the idea in the global community of setting up an international criminal court. They were followed by the mixed or hybrid courts for Sierra Leone, for Cambodia, for East Timor and Lebanon, and of course the International Criminal Court (ICC), now supported by 119 members of the United Nations.

In recent years, African governments and the African Union have been ambivalent in their relationship with the ICC. But we know that African countries have themselves referred three cases to the ICC – I'll come back to that – and two references came from the Security Council, which was really quite, quite surprising and very exciting for those of us who support the work and the successes of the ICC. Let me say with regard to references from governments, that I think that prosecutors should be very wary of simply jumping into situations at the invitations of governments. Governments don't refer situations to the ICC if it's not perceived by them to be in their own interests. It's obviously a very political decision. It is not a reason to decline jurisdiction but it can be, to use Justice Jackson's immortal phrase, it can be a "poisoned chalice."

There is the recognition, I think we must accept, that these references to the ICC, particularly from the Security Council, have been inconsistent with strict notions of sovereignty. There has been a distinct invasion of the

sovereignty of nations with the ad hoc tribunals too; obviously it was inconsistent with the recognition of the sovereignty of Serbia, Croatia, and Bosnia & Herzegovina when the Security Council used its peremptory Chapter VII powers in foisting the ICTY on the former Yugoslavian states. Similarly, to foist it on a resistant Rwanda that, after initially requesting it, ended up voting against it. And the Security Council virtually said to Rwanda, you requested it, you're now going to get it whether you want it anymore or not. And that's, in fact, what happened.

That by way of background. Let me now turn to the role that the United States of America played in these events. I need not dwell too long on Nuremberg, but I'm sure that there are few people in this room who do not know that it was the United States' insistence that led to the Nuremberg Trials being held at all. It was the United States' view that prevailed over the infamous, or perhaps, notorious resistance and opposition to the idea by Winston Churchill. Churchill wanted to line up the Nazi leaders and summarily execute them. He said, "If everybody knows what they did, why should we give them the benefit or the privilege of having a trial?" But it was the United States, with the surprising support of Stalin, who decided that they should have trials. It wasn't surprising that Stalin wanted to give them a trial – he'd been holding show trials for many decades in Moscow and in his mind, no doubt this would be another show trial and not a genuine court proceeding. But it was the United States that can claim absolute credit for having set up the Nuremberg Trials. And, of course, the contribution of Justice Robert Jackson was crucial in the organization of the Trial, in his celebrated opening address, and in the leadership that he gave at Nuremberg. They were all really quite outstanding.

What of the more recent past? Seventeen years ago the Yugoslavia Tribunal was set up, the first truly international criminal tribunal ever. Nuremberg was not an international tribunal and certainly Tokyo wasn't either. They were multi-national courts set up by the victorious nations, and the judges came from those victorious nations. It was a multi-national court and it was based on the theory that what these nations could do on their own they could do together. Clearly each of the victorious nations and particularly the four nations that set up Nuremberg – the United States, United Kingdom, Russia, and France – could under their domestic laws and under international law have put the Nazi leaders on trial before their own courts. So they pooled their respective domestic jurisdictions and established the Nuremberg Trials. What also must be borne in mind, of course, is that at Nuremberg each prosecutor had his own nationals in his own office. There was no multi-national prosecutor's office. Justice Jackson only worked with Americans and the same applied for the English, the French, and the Russians.

So when the Security Council, to the surprise of most international lawyers, decided that it had the power to set up an international criminal tribunal for the former Yugoslavia, again it was the United States that provided the impetus and encouraged the Security Council to do that. There were mixed feelings about it: Russia and China were ambivalent about whether it was a good idea. But in the end they voted in favor of establishing the ICTY. Before the end of the Cold War in 1989, this could never have happened. It was the politics of 1993 that provided this window of opportunity. Above all else, it was the leadership of Madeleine Albright, who was then the United States Permanent Representative at the United Nations. It was her personal commitment, it was her drive and enthusiasm that was really the main driver of the Yugoslavia, and later the Rwanda Tribunal. And I say this from personal knowledge and personal involvement. There are many anecdotal illustrations I can give of this role that the United States played. Let me make it clear that without this push from the U.S., the Yugoslavia Tribunal would not have been established in the first place.

Having been established, it had huge teething problems. It took eighteen months before the Security Council found a prosecutor. My appointment was almost a desperation measure and only came about in light of Nelson Mandela's election as the first Democratic President of South Africa. Prior to my appointment, the Security Council had vetoed no less than eight nominees of then Secretary-General Boutros Ghali. Again the United States played a role, I heard afterwards from the then United States Ambassador Princeton Lyman, in ensuring there was a prosecutor appointed late in July of 1994, fifteen months after the Tribunal was in fact established and shortly before the eleven judges were going to resign en masse if there wasn't a prosecutor by the end of July; and that would have been the end of the Tribunal.

In any event, I arrived in The Hague on the 15th of August of 1994, and found a skeleton "illegal office." It was illegal because the prosecutor was the only person under the Security Council statute that could appoint staff, and there hadn't been one in office. (There was a Venezuelan Attorney-General who had been appointed at the end of 1993 but he resigned after three days in office. He did one important thing: he appointed Graham Blewitt, a wonderful Australian prosecutor, as a deputy prosecutor.) When I arrived Graham Blewitt was the only regularly appointed member of the Office of the Prosecutor. In addition to him, there were twenty-three highly qualified American lawyers, investigators, and computer experts who, together with a handful of Australians, had begun to set up the office. The twenty-three Americans had been sent as a gift to the Tribunal by the United States. Again, with this gift there should have been a gift card from then Ambassador Madeleine Albright.

My first crisis arose because of these twenty-three. There's a strange UN rule – and there's good reason for it – to the effect that if any member State makes a gift to the UN, such as these twenty-three outstanding people, the provider, the donor country, has to pay in cash thirteen percent of the cost to them of making the gift. And that would have been many millions of dollars that would have had to be put up by the United States in addition to its having laid out millions of dollars in providing the twenty-three people. There's good reason for the UN rule. If you give twenty-three people to the UN, there is a substantial cost to UN in using them. They need offices, they need secretarial assistance, they need investigative expenses, they need funds for travel. The thirteen percent is an arbitrary amount intended to provide funds that have not been budgeted by the UN. It is to avoid an indirect, unbudgeted amount being expended for a unilateral gift. But the United States said, "No, we've given this gift, this is a special situation, we're not paying the thirteen percent." And when I arrived, the UN headquarters in New York said they were not paying a penny for these twenty-three people. And this, on my first day, was a very unpleasant shock – that twenty-three out of a skeleton staff of forty were going to have to leave and go back home to the United States.

After earnest entreaties during that first week the Secretariat waived the rule for one year. At the end of our second year, faced with the same problem, I went back to New York and to my relief they waived it for a second year. Unfortunately for my successor, Louise Arbour, in the third year, they said, "No, no more." And many of the twenty-three had to go back; some of them stayed on in UN positions. Those twenty-three people – top investigators, top prosecutors, top computer designers, database people, and so on – were absolutely crucial to the start up of that office and enabled us to get indictments out pretty quickly in the months that followed. It was with a fair amount of pride that we got the first indictment issued against Karadzic and Mladic eleven months after the office opened. That would certainly not have happened without the input from the outstanding Americans in the office.

Another crucial area of assistance from the United States was intelligence information. I didn't dare talk about this in public until I was invited a few years ago by the American Bar to join a panel addressing this topic. The then head of the FBI was one of the panel members and during a pre-meeting telephone call I inquired whether I could speak about my experiences as Chief Prosecutor. He said that he would encourage me to do so and that I should regard myself free to do so.

It took many days and many meetings in Washington and in The Hague with United State officials to hammer out an agreement under which the Yugoslavia Tribunal prosecutor would be given classified intelligence

information from the United States. To an extent, the United Kingdom and France later followed suit. We had to build a special fire-proof room in which to keep the information. I had the only key. If there was highly classified material, I had to go see it at the United States Embassy in The Hague. The importance and usefulness of some of that information can't be exaggerated.

A couple of examples. The very first briefing was in Washington DC. There was a huge map on the wall showing the villages that had been attacked by the Serb army in Bosnia. It was part of their great Serbian plan of incorporating into Serbia those parts of Bosnia that had significant number of Serbs living in them. It was that that led to the ethnic cleansing, to the murder and forced evacuation of non-Serbs from those villages. And one could see on the map the swath of villages and the dates on which they were ethnically cleansed: the mosques bombed, women raped, people tortured and murdered. It might have taken us six or seven or eight months to obtain that information using our own resources, but here it was and it wasn't even highly classified information. It saved us months of work.

It obviously couldn't have been a coincidence that within the same month these particular villages and cities containing significant Serb populations were attacked by the Serb army. We had access to hundreds of thousands of victims, of witnesses; there were 300,000 plus alone in Germany. Now, those witnesses didn't have dealings with Karadzic, or Mladic, or the people in their offices. Those people dealt with the camp commanders who tortured them or raped them in their villages and it was their evidence that enabled us to get out those earlier indictments against particular people who they could identify. But we wanted to go to the leadership and it was the evidence of planning, of command and control, that was the basis of the first indictment against Karadzic and Mladic and other leadership in the Bosnian-Serb Army.

In addition, of course, we used the evidence of boasts by Karadzic, the Commander in Chief of the Bosnian-Serb Army, who brazenly and boastfully used to say on television, "Nothing happens in my Army without me knowing." So it was the combination of these things and it was that intelligence information that was crucially important.

I turn to the terrible Srebrenica genocide in July of 1995. We managed to get our hands on a man called Erdemovic. He was one of the people who joined one of the Bosnian-Serb firing squads and he told us that he lost count after shooting and killing seventy-one innocent Muslim men and boys who had been bused out of Srebrenica by Mladic's forces. He told us the story and he produced a map showing where the mass grave was. He was the only eyewitness available to us. I sent to Washington the coordinates of the site of the mass grave and within days we had what became famous photographs taken by



a United States satellite showing that mass grave empty, showing men lined up next to it, and the next day showing it covered over with fresh soil. This was crucial corroboration of the evidence of Erdemovic. It was given to us in confidence. At my request the judges of the ICTY fashioned a new rule that was also reflected in the rules of the Rwanda Tribunal and so, too, in the rules of the ICC. The effect of the rule is that information obtained from a government in confidence may not be used in any way and may not be shared, even with the judges, without the consent of the provider of the information. The information we received from the United States remained under the control of the United States and the prosecutor could use it only as lead information. It was the sort of use we made of the map to which I referred, and in this case to know that what Erdemovic had told us was correct.

A prosecutor in an international court is really a sitting duck for misinformation designed to cause scarce resources to be used on false trails. It was very useful to be able to send reports to Washington and say, "Please tell us whether this is serious, should we be looking into this or should we ignore it?" We often would inform the US Government that they need not provide us with detail, just advice as to whether the report was worth investigating. This assisted us in conserving valuable resources for more important investigations.

When the Rwanda Tribunal was set up I found myself all of a sudden, overnight, the Chief Prosecutor also for Rwanda. The Rwandan government, to their credit, gave us office space, but the offices were empty. We had no furniture, we had no stationary, and certainly we had no computers. The United Nations at that stage was just about on the verge of bankruptcy. The United States was going through one of its severe anti-UN phases and wasn't paying its annual dues to the United Nations. In consequence, the United Nations couldn't afford to give us furniture and computers for the Rwandan Tribunal.

Somebody friendly to me in New York mentioned to me that there was a UN warehouse in Brindisi on the East Coast of Italy full of furniture and computers – everything we needed, they said, was there. And I called the department concerned and they said, "Yes, it is there, but we can't give it to you because if we do we'll have to make entries on our departmental balance sheet and we're bankrupt already." It was that sort of bureaucratic objection. Kofi Annan was then head of peacekeeping and we'd met and become friendly and I called Kofi and I told him I'd heard that the furniture and computers were there, what's the problem? He came back to me promptly the next day and he said, "Well, I've got good news and bad news." "The furniture's there and the computers are there and you can have them." And I said, "What's the bad news?" He said, "The bad news is we can't afford to send them to you." So I picked up the phone and I called David Scheffer, who was then Senior Counsel

in Madeleine Albright's office in New York, and I told him the problem. Within twenty-four hours we had a huge US transport plane bringing us furniture from Brindisi in Italy to Kigali in Rwanda. Now, until then our skeleton staff had been using Coca-Cola boxes as desks and chairs. We had to scrounge paper and pens for them to write on; there were no computers. So you can imagine what a boost this was for the morale of the people in the office.

It was the American staff at the start of the ICTY that played a crucial role in setting up standards of investigation and helping set up the crucial database. We got wonderful gifts from other Americans: Pippa Scott in Los Angeles set up the Balkan Archive, which consisted of hundreds of documentaries taken at the time of the Balkan War, which were integrated into our computer system, again with assistance, too, from American foundations, particularly in that respect from the Open Society Institute.

The United States judges played a crucial role. Gabrielle Kirk McDonald was one of the first of the eleven judges on the court, a former federal judge of Texas. And I know from hearsay, from other judges, of the crucially important role she played in assisting her colleagues to write the rules of practice and evidence that they had to work out for the Yugoslavia Tribunal and which were later adopted almost without change for the Rwanda Tribunal. Judge Pat Wald, also, I know played a very important role in a crucial period when there was a sort of move from common law practices and procedures in the Yugoslavia Tribunal to a more civil law practice and procedure. I know, again, from other judges, the very important role that Judge Wald played during the two years she was there. Since then there was Judge Ted Meron, who was this week appointed for the second time as the President of the Yugoslavia Tribunal. I had introduced Judge Meron to the Tribunal: when I had to argue the first case as Chief Prosecutor to the Appeals Chamber in the Tadic case, I needed a top expert to assist my preparations and I needed to be put through my paces. And Ted Meron came and spent two weeks and set up a "murder board," which nearly killed me in preparing.

The same applied to the other Tribunals: outstanding people came from the United States to the Rwanda Tribunal as well as a lot of money – the United States paid millions of dollars into the trust funds for both the Yugoslavia and the Rwanda Tribunals. Without those millions of dollars, those Tribunals would have foundered, of that there can be no doubt. Similarly, the funding for the Sierra Leone Tribunal and similarly, the funding for the Cambodia Tribunal. I'm merely scratching the surface of the important, crucial support that came from the United States. Other prosecutors at the Sierra Leone Tribunal – David Crane, the first prosecutor and Stephen Rapp, who is now the United States Ambassador for War Crimes, were both outstanding Chief

Prosecutors.

Then, too, it was the United States that was mainly responsible for the 1998 Rome diplomatic meeting that led to the Rome Statute setting up the International Criminal Court. It was literally on the way to Rome that the United States policy cooled off. I don't think there can be any doubt that the chill emanated from the Pentagon, because the military leaders suddenly took fright at the idea of American military leaders and political leaders being answerable to an international court. That led, of course, to the United States' "no" vote, joining only 6 other countries in voting no to the Rome Statute in July of 1998.

In any event, President Clinton signed the Rome Statute as one of his last acts as President. Of course, that was followed by President George W. Bush, who "unsigned" the Statute and who in his first term with the encouragement, no doubt, of Vice President Cheney, but particularly of John Bolton, adopted an attitude and a policy of trying to kill this infant court in its first year. That was the explicit policy of the Bush Administration. They made life difficult for a number of countries that wanted to assist the Tribunal. These countries were threatened with the cutting off of military aid and other sorts of financial assistance; some of them capitulated, some of them didn't.

In any event, that changed during the second administration of President George W. Bush and I remember my amazement. (I'm sure, Ruth, you were probably at the same meeting of the American Society of International Law, which must have been in 2007.) I remember John Bellinger was the Harold Koh of that time and he, at that April meeting on a panel which I happened to be moderating, stated that the United States, the State Department, had decided now to actively assist the prosecutor of the ICC and he said that the assistance had already begun. Those were words I thought I would never hear from a member of the Bush Administration and that was when the change began and was carried forward, when the Bush Administration decided not to veto the reference of the Darfur situation to the ICC. In the first Bush term that could never have happened. Even at the time when it did happen, it was touch and go.

I remember reading a speech by the then Ambassador for War Crimes, Ambassador Prosper, at that time, two weeks before the Security Council vote, that said the United States would veto any reference of Darfur to the Security Council because doing so will give the Court credibility. And of course he was correct – it did give the Court credibility, but he was incorrect, in that the State Department won that battle. If my memory serves me it was Colin Powell, who was then Secretary of State, who declared that what was happening in Darfur constituted genocide. That was followed by unanimous support and a resolution expressing that same view by both the Senate and the House of Representatives.

The State Department realized that its African policy would be in tatters if the United States then vetoed a reference of the Darfur situation to the ICC.

And of course none of us expected that we would so quickly see a unanimous decision of the Security Council that we did earlier this year in the case of the reference of Libya to the ICC. So, the United States, from being the main driver in setting up the ICC, changed for a period of four, five, six years into being an opponent of the Court and since then has again gone back to being a supporter of the ICC, at least in the extent of giving it assistance. This was begun, as I've indicated, in the second term of President Bush, and has continued with greater momentum into the Obama Administration.

Now, the Court clearly has serious problems ahead of it. We've been hearing some of them in a number of the panels that went on yesterday and today, and especially the one earlier today that John Washburn and President Song and Bill Pace were on – a very excellent panel. Delays in prosecutions, problems from the African Union, and more recently, unfortunately for the first time, financial problems, which John Washburn talked about earlier today, where some of the countries supportive of the Court are now behind a move to have a zero increase budget. That would cause huge cut-backs in essential areas of the Court's work. So, until the last few weeks when I've been talking about the ICC, I've been telling people that it doesn't matter that the United States is not a member of the Assembly of States Parties, doesn't contribute one cent to the budget of the ICC, because amongst the nations that have ratified the Rome Statute there is every single member of the European Union, Japan, and many other wealthy countries. I now have to eat my words. There is a financial need, and a growing one, in the present financial climate, which all of us throughout the world are suffering from at the moment.

Allow me to say a word about the fear of the United States of bias on the Court. That too was talked about at an earlier panel on the ICC. One important factor that is not appreciated by the United States and many other countries is there is an insurance that comes with having an international professional office. There are no secrets between members of a prosecutor's office. You're dealing with senior lawyers, senior people – investigators from forty, fifty, sixty countries. If there was a bias, an unprofessional bias, against any country in that sort of office, it would become public in less than 24 hours, I can assure you. When I was Chief Prosecutor, I invited the Russian Government to send us a very senior lawyer for our office. If we'd have had an anti-Serb bias, which we were accused of having by Serbia, a senior Russian lawyer would have reported this to his bosses in Moscow, now wouldn't you think? It's a pity there's no American Judge on the ICC – if there was an anti-US bias, or an anti-anybody bias on the ICC in the prosecutor's office, the

judge's chambers, or the registry, what would an American do? Go along with it? Remain silent? Obviously not. It would become public, there'd be a resignations. It is insufficiently recognized that there is a professional assurance in an office populated by independent lawyers and judges that would rarely activate any unprofessional, let alone dishonest bias.

Let me conclude by saying that the United States is different from other major nations that oppose the ICC. Russia is not ambivalent, China is not ambivalent. For them the ICC is poison. They don't like it, and if war criminals get impunity – so be it. That's not the position in the United States. The United States has this ambivalence: the people of this country, 90% I would guess, don't approve of war crimes, don't approve of war criminals and would wish to see more criminals punished for crimes that they committed against their own people or other people. But there is this political fear – suspicion – that powerful countries including the United States have in respect of international organizations. So that's the United States' exceptionalism. It's shared, to an extent, by India – also a democracy. As long as India fears war with Pakistan, or Pakistan fears war with India, they don't want to bring themselves within the purview of the ICC. And bear in mind, the United States didn't object at all to being within the jurisdiction of the Yugoslavia Tribunal at the time of the NATO attacks on Kosovo. And Russia, in fact, launched complaints of war crimes against the members of NATO, including the United States. The prosecutor decided there was insufficient evidence, but the United States didn't for a moment say, 'We are not going to get involved in the Kosovo campaign unless we're not within the jurisdiction of the Yugoslavia Tribunal.'

So there's no more effective way of withdrawing impunity for war criminals than to strengthen international justice. It's not only the investigations and the trials, but it's the message that is sent – there must be many autocratic leaders not sleeping well at night when they see the fate of Milosovic, albeit that he didn't see the end of his trial. He nonetheless ended up dying in a prison cell where he'd been for a couple of years. Karadzic is now in the same prison, Mladic is now in the same prison. And worse even are the deaths this week of Gaddafi, from a country whose people had suffered crimes for almost four decades. And there is President Al Bashir of Sudan, whose arrest warrant seriously inhibits his ability to travel. So the only way to start reducing this sort of extreme criminal conduct is to strengthen international criminal justice both domestically and internationally. That is a challenge, I think, for civil society in the United States, and the answer lies, really, with what people in this room can do in your own society, for those of you who are American citizens, to encourage your people, your leaders, to do more in assisting international criminal justice. Thank you very much.

## INTERNATIONAL LAW WEEKEND WEST 2011

International Law Weekend-West was held on Saturday, February 26, 2011 at Southwestern Law School in Los Angeles, which was also celebrating its 100th anniversary. The theme of the conference was: *2021: International Law Ten Years from Now*. The conference examined a broad range of legal areas including coping with and adjusting to the challenges of conflict, technology, and globalization in the modern era. Panels identified significant developments or issues related to a specific area of international law – e.g., international arbitration and litigation, international finance, international transactions, international trade, international human rights, climate change and international environmental law, international criminal law, and legal developments of note in Latin America or Asia – and analyzed their potential impacts in shaping the future of international law. The conference also examined current international issues and trends.

Michael Traynor, President Emeritus and Council Chair, American Law Institute and Co-Chair, ABA Commission on Ethics 20/20, was the luncheon keynote speaker, on the topic *Do We Need a New Foreign Relations Restatement? International Law from 1987 to present . . . to 2021*.

International Law Weekend-West was presented in conjunction with the Southwestern Journal of International Law. Co-sponsors included the American Bar Association Section of International Law, the American Society of International Law, the Los Angeles County Bar Association International Law Section, the State Bar of California International Law Section, the Association of Media & Entertainment Counsel, the Drucker Graduate School of Management, and the Inter-Pacific Bar Association.

The *Southwestern Journal of International Law* published articles written for the conference in a symposium issue.

## The Future of the Foreign Relations Law of the United States

Michael Traynor

International Law Weekend West

American Branch, International Law Association

Los Angeles, February 26, 2011\*\*

I will discuss the following issues. First, I will start with a snapshot of the relevant beginnings of the American Law Institute's two *Restatements of the Foreign Relations Law of the United States*. Second, I will summarize key developments since publication of *Restatement (Third)* in 1987. Third, I will review the various ways that the ALI might consider an update. Fourth, I will describe the issue presented by the Supreme Court's being an active and controversial decision-maker. Fifth, I will mention the relationship between foreign relations law and the conflict of laws. Lastly, I will venture specific suggestions. I speak only in my individual capacity and not in a representative capacity.

The Restatement describes the foreign relations law of the United States as consisting of "international law as it applies to the United States" and "domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences."

### I. BRIEF HISTORY

In 1955, the ALI began preliminary study of what became, in 1965, a restatement in the ALI's *Restatement (Second)* series. There was no Restatement First of foreign relations law. As the Reporters then stated, this initial Restatement represented "the opinion" of the ALI "as to the rules that an international tribunal would apply if charged with deciding a controversy in

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\* President Emeritus and Chair of the Council Emeritus, American Law Institute; Senior Counsel, Cobalt LLP, Berkeley, California. Keynote talk at the Southwestern Law School International Law Weekend, February 26, 2011. I acknowledge with appreciation the suggestions of Bennett Boskey, Barry Carter, Geoffrey C. Hazard, Jr., Carolyn Lamm, Hans Linde, Robert Lutz, Margaret McKeown, and Peter Trooboff. The views stated here are personal.

accordance with international law.”

In 1980, the ALI considered the first *Tentative Draft* of what was then called the “Foreign Relations Law of the United States (Revised).” It eventually became *Restatement (Third)*. The Reporters, led by Chief Reporter Louis Henkin, noted that the law had “undergone dramatic changes . . . .” They stated that the Constitution itself refers to the “law of nations” and that international law “is part of the law of the United States, respected by Presidents and Congresses, and by the states, and given effect by the courts.” Director Wechsler said the project was a “revision and expansion” and presented “a much more extensive analysis of the nature of international law and its relationship to the internal law of the United States, including the special role of the federal courts as its expositor.” President Ammi Cutter also noted the “extraordinary development in the whole area of international law . . . .”

In 1986, after further consideration, a controversial but important deferral of one year within which to get the views of the government, and review by a special committee, the final draft was approved by the ALI. President Perkins stated that the project “deals with a vitally important and inevitably controversial set of subjects.” Bennett Boskey, now our esteemed Treasurer Emeritus, noted “that the manner in which we’ve gone about this subject is in the nature of an experiment for the Institute.” Additionally, in the *Conflict of Laws*, “where portions of the Restatement have become seriously out of date but not in a manner to require a redo of the entire Restatement,” we “asked . . . [the Reporter] to hold a watching brief for a couple of years on it and he has come up with certain revisions that may point the way in the future to handling other Restatements that are partly but not hopelessly out of date.”

In 1987, the ALI published *Restatement (Third)*. It was a singular achievement.

## II. DEVELOPMENTS SINCE 1987

*Restatement Third* has been cited frequently by courts and commentators.

The ALI, recognizing the increasing global implications of its work, has undertaken additional international projects, for example, in international insolvency law, transnational civil procedure, foreign judgments, international intellectual property, world trade law, and international commercial arbitration. It has worked with the International Institute for the Unification of Private Law (UNIDROIT) and with the International Insolvency Institute. It has convened or cosponsored meetings in various world venues to discuss specific projects as well as the possibility of an institute comparable to the ALI such as the new European Law Institute and a potential institute in Latin America.



Numerous developments have also occurred, not only in familiar areas such as antitrust, securities, and patents, but also in the following areas: human rights and the treatment of aliens; the immunities or lack of immunities of foreign officials; universal jurisdiction and piracy; the Alien Tort Statute; international child abduction, and child support; the “effects” test as a basis for jurisdiction; prescriptive jurisdiction and the reasonableness test for determining the reach and applicability of domestic legislation and regulations (a test that I prefer but note has been controversial from the outset); the adoption by the U.N. General Assembly of the U.N. Convention on Jurisdictional Immunities of States and Their Property; the state secrets privilege; the political question doctrine; exhaustion of remedies; the law applicable to U.S. victims of international terrorism; exceptions to the Act of State doctrine; the consideration of foreign sources of law in judicial decision-making; transnational libel law; the environment and climate change; world trade and international investment law; intellectual property; the Hague Convention on Choice-of-Courts Agreements and related issues of state law and “cooperative federalism;” the law governing terrorism and detention; censorship of Internet communications; and the development of cooperative relationships as well as occasional hostile confrontations such as the Ecuador-Chevron litigation. Significant debate has also occurred about fundamental principles, including customary international law, the Supremacy Clause, the role of the Supreme Court in interpreting treaties, and the role of state law.

These developments are attended by ongoing globalization; transactions across borders; litigations and arbitrations that involve multiple jurisdictions; advances in technology, including the Internet and social media; the breakdown of the distinction between public and private law; and the emergence of various international tribunals. Our courts are addressing an increasing number and variety of international and foreign relations law cases. In recent years, for example, the U.S. Court of Appeals for the Ninth Circuit has decided key cases involving various issues, including the Alien Tort Statute; the Convention Against Torture; the Foreign Sovereign Immunities Act; the Trafficking Victims Protection Act; extradition; immigration, deportation, and asylum; the foreign affairs doctrine; child abduction and custody; foreign arbitration awards; consular notification; and treaty preemption.

### III. POSSIBLE FORMS FOR AN ALI PROJECT

If the ALI were to undertake a new project, what form might it take?

The ALI is known for its Restatements, which state the law as it is and

optimally should be stated, as well as more recently for its Principles of the Law, which state the law as it should develop, and for its statutory projects, which articulate principles and accompanying statutory language for legislatures, and by extension courts, to consider. It is also known for launching the Statement of Essential Human Rights, which contributed to the Universal Declaration of Human Rights. And the Reporters' Study entitled *Enterprise Responsibility for Personal Injury* set the stage for the *Restatement (Third) of Torts*.

The ALI remains open to new approaches to implementing its purposes "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." It could, for example, consider a comprehensive revision, as it did when it first undertook what became *Restatement (Third)*, or selected revisions, as it did with the *Conflict of Laws*. It could consider a simple Statement rather than a Restatement or develop an ongoing web-based project that it could update more frequently than Restatements. Such a dynamic project could mitigate the impact of the "Faustian bargain" that Professor Richard Falk describes as achieving clarity of doctrine "by taking a snapshot at a given point in time, and then freezing perceptions until the next photo opportunity, that is, the next restatement." It could co-sponsor an updating project or a new project with one or more other institutions such as UNIDROIT, the American Society of International Law (ASIL), or the International Law Association (ILA). It could initiate a project with attendant conferences, as it did with Georgetown Law Center on what is now known as the Sandra Day O'Connor Project on the State of the Judiciary. I expect that there will be other possibilities.

On the question of whether the ALI should undertake any project, varying views were expressed at an ASIL forum last year. Some point to the many and rapid developments, the unsettled controversies, and the enormous potential scope as grounds for deferring a project. Others point to the need for careful, objective analysis and the strength of the ALI as an institution that can address developments and controversy and offer a reasoned voice.

The history of the first two restatements suggests that developments provided a reason for the ALI to act and that controversy was not a deterrent. Indeed, the Reporters themselves recognized the need for review, revision, and restatement "at least once in every generation."

With regard to the scope issue, the ALI has addressed a similar problem in torts as well as in property with separate restatement projects and attendant coordination.

## IV. THE ISSUE OF THE SUPREME COURT'S BEING A KEY DECISION-MAKER

In restating the law, the ALI usually chooses from among the best judicial decisions, state and federal, as well as from relevant statutes and other sources of the law. In general, the ALI has refrained, wisely in my view, from trying to restate constitutional law. The ultimate audience for constitutional work is the Supreme Court, which could render a restatement provision obsolete.

The foreign relations law of the United States involves significant constitutional matters, including the role of Congress and the references to the "law of nations" and to "commerce with foreign nations" in Article I; the power of the President under Article II; the role of the federal judiciary under Article III; the Supremacy Clause in Article VI; and the powers reserved to the states by the Tenth Amendment.

The Supreme Court has engaged actively in foreign relations law, for example, in taking a reasonableness approach in *F. Hoffmann-La Roche Ltd v. Empagran* to prescriptive jurisdiction under the antitrust laws. In *Sosa v. Alvarez-Machain*, the Court held that under the Alien Tort Statute claimants can at least bring claims for a modest number of international law violations comparable to offenses against ambassadors and piracy. In *Samantar v. Yousuf*, the Court also held that former foreign government officials are not immune under the Foreign Sovereign Immunities Act from liability in this country to their victims for torture, rape, and murder (although they may enjoy immunity under customary international law and federal common law). The Court was also actively engaged in its foundational rulings in the *Guantanamo* cases.

These rulings are not without controversy. Even more controversial are the rulings in the recent *Medellin v. Texas* and the *Morrison v. National Australia Bank Ltd.*, cases.

In *Medellin*, the Court held that a judgment of the International Court of Justice (ICJ), which restricted the effect of procedural defaults under the Vienna Convention on Consular Relations, did not have binding effect in U.S. courts and was not self-executing despite the Optional Protocol under which the United States had acceded to ICJ jurisdiction and the U.N. Charter under which the United States undertook to comply with ICJ decisions to which it was a party. The Court also held ineffective the President's Memorandum for the Attorney General that the United States would "discharge its international obligations" under the ICJ decision "by having State courts give effect to the decision" and by requiring the state courts to reconsider the capital sentence of a convicted murder who had been denied his right to confer with Mexican consular officials. The Court viewed congressional action as necessary.

Justice Stevens concurred in the judgment, while acknowledging that "there

is a great deal of wisdom in Justice Breyer's dissent" and stating that "this case presents a closer question than the Court's opinion allows." He also said that the Court's judgment "does not foreclose further appropriate action by the State of Texas."

Justice Breyer dissented, stating that "I would find the relevant treaty provisions self-executing as applied to the ICJ judgment" and that "the President has correctly determined that Congress need not enact additional legislation." Justices Ginsburg and Souter joined in dissent.

Shortly after the Supreme Court's decision, and notwithstanding Justice Stevens' reference to "appropriate action," Texas executed Medellin.

The majority decision has provoked extensive criticism. International law scholar Thomas Franck, for example, states that now "there is no real incentive for other states to enter into treaties with us, as they would be exchanging their binding commitment for an essentially worthless promise by Washington to see what it can do to obtain the voluntary compliance of the fifty states of the Union."

In the *Morrison* case, the Court, in its opinion by Justice Scalia, invoked a general presumption against extraterritoriality in addressing the scope of section 10(b) of the Securities and Exchange Act of 1934 and raised the bar on the burden of proof, holding that in the absence of statutory language of extraterritoriality, the presumption can only be rebutted by proving what Congress actually intended, *i.e.*, that there is an "affirmative indication" in the statute that it "applies extraterritorially." The Court ruled that "Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange and the purchase or sale of any other security in the United States."

Imposing on Congress a heavy burden to rebut the presumption may disregard the policy of the statute and the government's interest in applying it as well as subvert the nation's interests in protecting its foreign commerce and in advancing "values central to the international state system," as a recent review of extraterritoriality notes. In some instances, Congress may not wish to confront the extraterritoriality issue or would prefer to leave it to the courts. In many instances, the special interests who can afford lobbyists will have a far better chance to influence Congress than persons without such means such as victims of securities fraud, antitrust violations, or environmental pollution. The Court's approach in *Morrison* also calls into question the extraterritorial reach of many laws that Congress has already passed, including other provisions of the securities laws. It is contrary to the restrained and enlightened approach of the *Empagran* case and *Restatement (Third)*. Its quest for a bright-line territorial rule is reminiscent of Professor Joseph Beale's failed quest for territorially-

based rules in the *Restatement (First) of Conflict of Laws*; indeed, it exceeds even the ambition of Beale, who at least recognized the “effects” test, as the petitioners urged when they cited Beale in their brief in *Morrison*.

In response, Congress, in the Dodd-Frank Wall Street Reform and Consumer Protection Act, provided explicitly for extraterritorial jurisdiction of certain actions initiated by the Securities Exchange Commission (SEC). It also called for a study by the SEC on extraterritorial private rights of action.

On May 3, 2011, the ALI sponsored a conference on the Extraterritorial Application of the U.S. Securities Laws. At that conference, some commentators noted that the Court’s supposed bright-line rule is ambiguous (*e.g.*, when a security is dually listed on an American exchange and a foreign exchange) as well as over-inclusive and under-inclusive. Professor Jack Coffee made the related and important suggestion that “the simplest, least controversial change would be to give U.S. citizens or residents the ability to sue U.S. companies (and possibly New York Stock Exchange (NYSE) listed companies) under Rule 10b-5, regardless of the location of the transaction.”

I would be concerned if the ALI attempted to merely restate what international scholars, judges, and lawyers conclude after careful analysis is questionable or bad law, even if it is final because it comes from the Supreme Court. I would prefer the ALI to set forth an independent statement or principle, notwithstanding the possibly contrary example of a particular Supreme Court case. That approach would not involve restating questionable or bad law. It would involve calling it out and appealing, through reason and analysis, to a larger international audience and to a future Supreme Court to take a different view. It would be contributing as Franck states to “a cooperative international legal system.” The ALI’s independent and nongovernmental approach can introduce “an element of stabilization into international disputes,” as Professor Karl Meessen suggests. The ALI should not subordinate its view to what could be a very narrow majority or plurality of justices at a particular time. Moreover, the ALI can continue to respect the Supreme Court as an independent institution that has the final word on the meaning of its own precedents. The ALI can alert the Court and give it an informed opportunity to elect to be in step with persuasive and internationally recognized analysis and scholarship and not isolated from it. It might also help the Court identify unifying themes that transcend at least some of the tensions reflected in specific cases.

Consider the issue percolating in the lower federal courts whether corporations are subject to liability under the Alien Tort Statute. In *Kiobel v. Royal Dutch Petroleum Co.*, a panel of the Second Circuit recently held that they were not. Judge Pierre Leval issued a separate opinion saying that “the majority opinion deals a substantial blow to international law and its

undertaking to protect fundamental human rights. According to the rule my colleagues have created, one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form." The panel recently denied rehearing and the full court voted 5-5 to deny a rehearing *en banc*.

Suppose the Supreme Court eventually holds that corporations are not subject to liability under the Alien Tort Statute. Should the ALI "restate" such a decision? Apart from the limitations of the statute, the ALI might consider stating a principle that corporations are *not* immune from liability for harm caused or profits made from slave trading or other abuses of human rights.

The ALI is a prized institution in the life of our country. It is a trusted institution. In large measure, although not everyone will agree, that reputation is due to its careful process, its objectivity, and its willingness to consider and to try to resolve competing viewpoints. I hope, therefore, that the ALI will maintain its independence, traditions, process, and reputation while it continues to tackle the subject of foreign relations law and other subjects.

#### V. THE POSSIBLE RELATIONSHIP BETWEEN FOREIGN RELATIONS LAW AND THE CONFLICT OF LAWS

At the decisive 1986 annual meeting, Professor Fritz Juenger, a noted conflict of laws scholar, asked the important question whether the Restatement of Foreign Relations Law introduces "a new set of choice of law conflicts rules in private matters that have nothing to do with the regulatory topics that we're discussing now — securities, antitrust — so that we have more stringent principles on choice of law in international cases . . . than we have in interstate relations . . ." Reporter Andreas Lowenfeld responded that "it is certainly true that some of the teachings of private international law, as well as public international law conflicts of law, are part of the intellectual source materials from which we worked. . . . But all the Sections that we use here to illustrate—taxation, antitrust, securities, and so on — are really designed to focus on the exercise of prescriptive jurisdiction by the states, which you might say is public law. So it is not a Restatement of international conflicts of law; it's the next shelf down in the library."

When the *Restatement (Third)* was published, the Reporters made clear that they were concentrating on public law in addressing prescriptive jurisdiction.

In the separate section on Jurisdiction to Adjudicate, however, they specifically referenced the *Restatement (Second) of Conflict of Laws*. A significant development here is the Internet. So far, the Supreme Court has left

the lower courts, federal and state, to wrestle with its pre-Internet cases that are governed by the Due Process Clause and fact-intensive; however, it recently decided two products liability cases that tested and limited jurisdiction over foreign defendants.

Symeon Symeonides, a scholar of the conflict of laws, in a recent email exchange with me, raised the important question whether the ALI, before commencing a Restatement Fourth or similar project on foreign relations law, should first develop a Restatement Third of the Conflict of Laws. He is a powerful advocate for such a Restatement. I responded that from a foreign relations project we might learn ideas that could help enhance a project someday on the conflict of laws. I have been opposed to starting just another Restatement of Conflict of Laws and think that the subject first needs a “systematic overhaul.”

There are useful interrelationships between the fields. International lawyer Peter Trooboff, for example, urges “the teaching of the act of state doctrine from a conflicts as well as a foreign relations law perspective.” Moreover, the line between public law and private law is not as distinct as perhaps it was when the Restatement Third was published. Consider, for example, cross-border issues of family law (*e.g.* child custody, divorce, adoption, and inheritance), air and water pollution, fraud, copyright infringement, defamation, and whether a foreign country judgment sufficiently meets basic principles of due process to be entitled to recognition and enforcement in the United States. Such issues implicate both public law and private law issues and, potentially, international treaties.

If the ALI commissions early papers and a more comprehensive study, it could begin to consider the possible relationship between developing a modern work on foreign relations law and a modern work on the conflict of laws. Indeed, in historical terms, “domestic conflicts principles were derived from international law, rather than domestic law,” as Professor Joel Paul has noted. Moreover, as Professor Ernest Young has stated, the line between foreign and domestic affairs is “becoming increasingly difficult to draw in a globalized world.”

## VI. SOME SUGGESTIONS

On balance, I think the ALI should undertake a project and that it should not just leave matters as they are. I also, however, do not think that it should begin immediately by selecting reporters for and creating drafts of a Restatement Fourth. The four steps I suggest taking necessarily depend on approval by the ALI’s Director, presently Professor Lance Liebman of the

Columbia Law School, its Program Committee, presently chaired by U.S. District Judge Lee Rosenthal, and its Council.

*First*, with such approval, the ALI might commission a few short papers on selected subjects.

*Second*, the ALI might convene an invitational meeting of key scholars, judges, practitioners, government representatives, and selected foreign participants. They could consider the papers and the areas of the law that should get priority attention and that might benefit from ALI treatment; the areas that call for further study; and the areas that may already have been attended to in other projects, perhaps judgments and world trade. The participants might also consider whether there should be some subdivision or segmentation of projects so that particular areas are addressed in reasonable scope and time. For example, might there be segmented projects, with two (or possibly more) running concurrently, say on jurisdiction (including civil, criminal, and regulatory jurisdiction; the prescriptive reach of statutes and regulations; and personal jurisdiction over natural persons, legal persons, and governmental entities of all types, including international organizations), immunities, and related subjects (such as, for example, the act of state doctrine, the state secrets privilege, exhaustion of local remedies, and the political question doctrine); on human rights, the Alien Tort Statute, and universal jurisdiction; on the law of the sea; on the foreign relations law of the environment, including water; and possible other new areas? There could be different advisers and reports (though sometimes with some overlap) as well as a coordination effort. Given that *Restatement (Third)* selected certain subjects and excluded others, it could be worthwhile to understand whether areas formerly excluded are potentially ripe for new ALI treatment now.

In addition to such matters, the ALI and its conferees should seek clarity in organizing the project lest it become merely a grab-bag of currently interesting issues that happen to cross national boundaries. Although the ALI may well decide to retain the title “Foreign Relations Law of the United States,” it will need to consider the implications of doing so given the developments in international law and in the conflict of laws discussed above, including the breakdown of the public-private distinction and the foreign-domestic distinction. As Hans Linde pointed out in a thoughtful message to me, “The old title ‘Foreign Relations Law of the United States’ neatly conveyed a central idea—that the work was not a Restatement of the Law of Nations but of the American law as applied to relations with other nations. It serves less well to convey what ‘foreign relations’ fall within its scope once it extends beyond those that constitute the substance and the procedures of dealings between the U.S. Government and their foreign counterparts.”



*Third*, if the papers and discussions are promising, the ALI, continuing its consultative process, might commission a deeper study of various related areas *for* the ALI rather than *by* the ALI, much as it did with its enterprise liability study.

*Fourth*, if the study seemed promising, the ALI could begin a project. It could do so by itself or with one or more co-sponsors. Any major effort would take resources, probably including significant grants from foundations.

A new project, attended by periodic conferences, could be a Principles project, a "Statement" or "Prestatement" project or, subject to resolution of the Supreme Court issue, still use the term "Restatement," either in a Fourth version or a "Revised" Third version. Or it could have some other name or format. Andreas Lowenfeld's comment at last year's ASIL forum bears noting: "The really important thing is the research." He also said that "we didn't like the word 'restatement.' We didn't like the term 'foreign relations.' Really, it's international law . . . ." It would not be necessary to name the project at the beginning, keeping in mind then President Carter's remark in 1980 that we could wait a few years before christening the baby.

In the early 1940s, as peace after World War II became a realistic prospect, two crucial lawyer-initiated events occurred: The Statement of Essential Human Rights, initiated by the ALI, and the Future of International Law Project, initiated by Reginald Heber Smith, with the help of Louis B. Sohn, who later served as one of the Reporters on *Restatement (Third)*. A series of conferences among international law specialists throughout the United States and Canada and their report influenced the San Francisco conference in 1945 to finalize the United Nations Charter.

As an idealistic ten year old, I observed the formation of the United Nations in San Francisco. Gathered on the stage at the Opera House, world leaders worked diligently for an international structure promising a beleaguered world security and peace. As a still idealistic seventy seven year old, it would be heartening indeed to observe, and perhaps even participate in, the formation of a project promising a still beleaguered world unifying principles of foreign relations law, starting with our country.

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## INTERNATIONAL LAW WEEKEND MIDWEST 2011

The second International Law Weekend Midwest was held at Case Western Reserve University School of Law on September 9, 2011. The theme of the Weekend was "International Law in Crisis."

The conference featured the following panels:

- *Universal Jurisdiction in Crisis and the 50<sup>th</sup> Anniversary of the Eichmann Trial* (chaired by Michael Kelly).
- *International Economic Law in Crisis or Merely in Times of Crisis?* (chaired by Juscelino Colares)
- *Piracy: New Threats, New Responses* (chaired by Robert Strassfeld)
- *Climate Change—What does Hope Look Like?* (chaired by Elizabeth Burleson)
- *Northern Africa and the Mideast: To Where?* (chaired by Paul Williams)
- *Crisis in the Courtrooms: International Law and Domestic Litigation* (chaired by Cassandra Robertson)
- *International Law and the War on Terror: A Ten-Year Retrospective* (chaired by Ved Nanda)

American Branch President, Professor Ruth Wedgwood gave the opening lecture. The Honorable Richard Goldstone, former Justice of the Constitutional Court of South Africa and former prosecutor of the International Criminal Tribunals for Yugoslavia and Rwanda, gave the luncheon lecture on *The Crisis in the Implementation of International Law*.

The symposium was cosponsored by the Frederick K. Cox International Law Center, the American Society of International Law, and the American National Section of the International Association of Penal Law.

The *Case Western Reserve Journal of International Law* published a special symposium double-issue with the articles generated from the Weekend.

## **The Crisis in the Implementation of International Law**

Honorable Richard Goldstone  
International Law Weekend Midwest  
American Branch, International Law Association  
Cleveland, Ohio, September 9, 2011<sup>•\*</sup>

PROFESSOR MICHAEL SCHARF: Good afternoon, everybody. Wow! We have quite a crowd in here. Hopefully, we are not violating the fire marshal's law. I know the overflow room is also full. Welcome back to our conference, "International Law in Crisis."

It is my extreme pleasure to introduce to you today's luncheon speaker. Many of you came to this conference because you were interested in what he has to say. We have a record crowd at this conference.

We had 190 preregistered people, which is way more than we usually get, and we also have probably about a thousand people watching us live and another 10,000 will watch it in archive.

Let me start by telling you about Richard Goldstone's career and then about his special relationship with this institution as part of my introduction.

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<sup>•</sup> This article originally appeared in the *Case Western Reserve Journal of International Law* and is reprinted with permission. The original citation is: Richard Goldstone, *The Crisis in the Implementation of International Law*, 44 CASE W. RES. J. INT'L L. (2011).

<sup>\*</sup> Richard Goldstone is a former Justice of the Constitutional Court of South Africa. He also served as a prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda.

Richard Goldstone was a pioneer in fighting Apartheid and the Goldstone Commission<sup>1</sup> the first commission that bears his name was one of the most important institutions that helped dismantle Apartheid in South Africa.

When the Yugoslavia tribunal was formed and I was working at the State Department as Attorney Adviser for U.N. Affairs they were struggling to find somebody that could be acceptable to the whole international community, to be the first prosecutor of an international tribunal since Nuremberg.

It took them fourteen months and dozens of candidates before they all settled on a consensus on Justice Richard Goldstone.

At the time, Richard had just been appointed to the Constitutional Court.<sup>2</sup> It was like our Supreme Court, and so he had to ask for a leave of absence, which Nelson Mandela gladly gave him. I am sure there were some tough negotiations, but it was similar to when Robert Jackson took a leave of absence from our Supreme Court to be the first prosecutor of the Nuremberg Tribunal.<sup>3</sup>

When Richard created the Yugoslavia tribunal, and I used that word intentionally because he was the founding father, he was the one who took a tribunal that most people thought was just put together as a Band-Aid or just some kind of propaganda tool to show the West was doing something when it refused to put ground forces or air forces to stop the atrocities in Bosnia.

Nobody really thought it was going to succeed. Nobody thought that the top ten people that Eagleberger had identified as the worst culprits would ever see justice.<sup>4</sup> And yet, over the years, especially because of the dint of Richard Goldstone's personality and his politics and his fundraising and

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<sup>1</sup> See generally *Commission of Inquiry Regarding the Prevention of Public Violence and Intimidating (Goldstone Commission)*, HUMAN RTS. INST. S. AFR., <http://www.hurisa.org.za/gold.htm> (last visited Jan. 19, 2012) (providing information on how the Goldstone Commission was formed and its investigations during Apartheid).

<sup>2</sup> *Judges: Judge Richard Goldstone*, CONST. COURT S. AFR., <http://www.constitutionalcourt.org.za/site/judges/justicerichardgoldstone/index1.html> (last visited Jan. 19, 2012) (noting that Goldstone served as a judge of the Constitutional Court of South Africa from July 1994 through October 2003).

<sup>3</sup> See generally John Q. Barrett, *The Nuremberg Roles of Justice Robert H. Jackson*, 6 WASH U. GLOB. STUD. L. REV. 511 (2007) (discussing how Justice Jackson was uniquely suited to be a prosecutor in the Nuremberg Tribunal).

<sup>4</sup> See LEILA NADYA SADAT & MICHAEL P. SCHARF, *THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI* 275 (2008) ("The list of persons named by Eagleburger included Slobodan Milosevic, President of the Federal Republic of Yugoslavia (Serbia and Montenegro); Radovan Karadzic, leader of the self-proclaimed Serbian Republic of Bosnia and Herzegovina; and General Ratko Mladic, commander of the Bosnian Serbs military forces.").

everything he did to create this little institution and turn it into a huge tribunal that dwarfed Nuremberg, they got Milošević, the leader of Serbia.<sup>5</sup> They got Mladić, the main general.<sup>6</sup> They got Karadžić.<sup>7</sup>

In fact, of all the indictees, every single one has now been arrested and brought to justice in The Hague.<sup>8</sup> Nobody would have thought that would happen, and that's because of Richard Goldstone.

Now, when Richard left the tribunal back on the Constitutional Court, he took on a series of other important work. He worked on the issue of Kosovo's status, and he worked, of course, as the dean mentioned this morning, on the very controversial Goldstone Commission report.<sup>9</sup>

For the law school, however, he had played also a very special role. I met Richard 19 years ago at a conference in Syracuse, Sicily, and we established what became a very active academic consortium—that is based and headquartered here at Case Western Reserve—where we do work for all of the international tribunals.<sup>10</sup>

We started working for the Yugoslavia tribunal when it expanded to the Rwanda Tribunal.<sup>11</sup> We also expanded when David Crane<sup>12</sup> became the chief

<sup>5</sup> *Milosevic Charged with Bosnia Genocide*, BBC NEWS (Nov. 23, 2011), <http://news.bbc.co.uk/2/hi/europe/1672414.stm>.

<sup>6</sup> Dan Bilefsky & Doreen Carvajal, *Serb Ex-General Accused of Massacre is Captured*, N.Y. TIMES, May 27, 2011, at A1.

<sup>7</sup> Editorial, *Trying Karadzic*, N.Y. TIMES, Oct. 27, 2011, at A30 (noting that it took 13 years and “enormous” international pressure for Serbian officials to arrest Karadzic).

<sup>8</sup> *Milosevic Charged with Bosnia Genocide*, *supra* note 5; *Serbia Extradites Ratko Mladic to the Hague*, BBC NEWS (May 31, 2011) <http://www.bbc.co.uk/news/world-europe-13607980>; *Trying Karadzic*, *supra* note 7.

<sup>9</sup> See generally *United Nations Fact Finding Mission on the Gaza Conflict*, U.N. HUMAN RIGHTS COUNCIL, <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/factfindingmission.htm> (providing the text of the Goldstone Report, methodology information, and webcasts of the public hearings).

<sup>10</sup> See generally *Frederick K. Cox International Law Center: Special Student Opportunities*, CASE W. RES. UNIV. SCH. OF LAW, [http://law.case.edu/centers/cox/content.asp?content\\_id=29](http://law.case.edu/centers/cox/content.asp?content_id=29) (last visited Jan. 19, 2012) (describing international tribunal externships available to students).

<sup>11</sup> See generally *General Information*, INT'L CRIM. TRIB. FOR RWANDA, <http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited Jan. 19, 2012) (describing what the Rwanda Tribunal is and why it was created).

<sup>12</sup> See generally *Profile: David M. Crane*, SYRACUSE UNIV. COLLEGE OF LAW, <http://www.law.syr.edu/deans-faculty-staff/profile.asp?fac=152> (last visited Jan. 19, 2012) (providing a summary of David Crane's professional accomplishments).

prosecutor for the special court of Sierra Leone.<sup>13</sup> Richard suggested you might want to have Professor Scharf and his students help you out as well. So we took on that; same thing with Cambodian Tribunal and the Special Tribunal for Lebanon.

In addition, one of our favorite alumni—who is profiled in the upcoming “In Brief,” which is our alumni magazine—Chris Rassi, started his career as Justice Goldstone’s law clerk at the Constitutional Court in South Africa<sup>14</sup> as did an alumni or as did both an alumni and a colleague who is now down at Cleveland State, who also has invited Richard to speak there this afternoon. And he will be, after he leaves here, Cleveland gets a double dose of Richard.

Now, from the tribunal work we did, we ultimately, together with the Public International Law and Policy Group, our program doing this work for tribunals, were nominated for a Nobel Peace Prize,<sup>15</sup> and it has brought a lot of good attention to the work we do. It also has really helped build up this program.

Now, over the years, Richard has come, no matter how busy he was, and spoken at our conferences. He has been a Klatsky endowed lecturer, which is a human rights lecture.<sup>16</sup> He has spoken at major conferences we have had. Three years ago, maybe it is four now, he was selected to get the honorary degree from this university. So he is an alumnus of this university, and we are proud of him, no matter how controversial some people think his report is.

I will say this: as the dean suggested, we love controversy here because that’s what an academic institution does, so last year we had a program that, unfortunately, Richard was not able to come to, where we debated for hours the Goldstone Commission report, and several of the panelists here have written articles, and these are available still, available out in the hall.

If you want to see the dissection of every dotted ‘I’ and crossed ‘T’ and everything in the Goldstone Commission report, we did that. So we don’t shy

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<sup>13</sup> See *id.* (noting that Crane served as the founding chief prosecutor of the Special Court for Sierra Leone).

<sup>14</sup> See *Christopher Rassi Joins the Washington Office*, THOMPSON HINE LLP, <http://www.thompsonhine.com/publications/publication1204.html#3181> (last modified Sept. 14, 2007) (“Mr. Rossi served as law clerk to the Honorable Yvonne Makgoro, Constitutional Court of South Africa.”)

<sup>15</sup> *Michael Scharf ’88 Nominated for Nobel Peace Prize*, DUKE L. NEWS & EVENTS, <http://www.law.duke.edu/features/2005/scharf.html> (last visited Jan. 19, 2012).

<sup>16</sup> See *Frederick K. Cox International Law Center: About the Center*, CASE W. RES. UNIV. SCH. OF LAW, [http://law.case.edu/centers/cox/content.asp?content\\_id=26](http://law.case.edu/centers/cox/content.asp?content_id=26) (last visited Jan. 19, 2012) (listing Goldstone as a Klatsky Endowed Seminar in Human Rights lecturer).



away from critique here. But we didn't invite him today to talk about the Goldstone report.

Lots of stuff is going on in the world about international law and crisis. We have Gadhafi on the run.<sup>17</sup> We have got al-Bashir, who has been indicted by the ICC.<sup>18</sup> We have lots of major international criminals that need to be brought to justice.

And there is nobody in the world who knows that topic better than Richard Goldstone. We asked him to come here and talk about that. So his speech today will be about that. He would like his questions and answers to be on that subject.

After this, there is going to be another panel about the Middle Eastern crisis, and if we want to go back to talking about the Goldstone report, we can do that on that panel, but for this panel, we are focusing on this expertise that Richard Goldstone brings that nobody else really has in the world, and we are so happy to have him here.

Please join me in welcoming him.

[Applause.]

HON. RICHARD GOLDSTONE: Well, Michael, thank you very much for your very warm introduction. It is a great pleasure and privilege to be back at Case Western. I have made a number of visits here and spoken at similar seminars and other functions to which Michael has referred I would add that I have had a very warm relationship with Michael for almost two decades in which we have worked together in many areas of international humanitarian law.

I hope too many of you won't be disappointed that I am not going to talk about fact finding missions. I don't believe that they are directly relevant to the issue of whether international law is in crisis.

Let me say only this: the view I have just expressed is based on the fact that fact finding missions are not judicial; they are not quasi-judicial; they don't make the law.<sup>19</sup> They provide or may not provide, as the case may be, factual

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<sup>17</sup> Kareem Fahim, Anthony Shadid, & Rick Gladstone, *Qaddafi, Seized by Foes, Meets a Violent End*, N.Y. TIMES, October 21, 2011, at A1.

<sup>18</sup> See *ICC Indictment of Sudanese Leader*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/7924195.stm> (Mar. 4, 2009) (quoting excerpts from the arrest warrant of Sudanese President Omar al-Bashir).

<sup>19</sup> See generally *The United Nations Human Rights System*, HUMAN RTS. EDUC. ASSOC, [http://www.hrea.org/index.php?doc\\_id=437](http://www.hrea.org/index.php?doc_id=437) (last visited Jan. 19, 2012) (explaining the procedures and practices of fact-finding missions).

background and possibly even legal views, which are not binding on anybody, but may or may not be useful to political bodies or to legal bodies out there.<sup>20</sup>

We heard an excellent introduction to this conference yesterday evening, of all places at the Rock and Roll Hall of Fame. I must say I didn't envy David Crane talking in that atmosphere, but he overcame problems that I would have thought were impossible to overcome, and it was a very sober, somewhat pessimistic introduction to the topic.

He was wise to set that tone for a conference that is on "The Crisis of International Law." I am more optimistic. I don't believe I am a starry-eyed optimist, but I am an optimist, and that optimism has led me to decide to talk not about the crisis of international law, but rather the crisis in the *implementation* of international law.

I imagine that all of you, like me, were frustrated at not being able to attend all of today's panels because they have all been excellent and warrant congratulations to Michael and his colleagues on the organization of yet another outstanding conference with a gathering of outstanding people who are so well qualified to talk to the various topics that we have been feasting on today.

International law—far from being in crisis, is being relied upon and called in aid more frequently by international leaders than ever before.<sup>21</sup> The current relevance of international law could never have been anticipated but a few years ago.

The question, as I have already indicated, that we have to ask ourselves, is whether international law can fulfill the expectations of those relying upon it. Let me say, too, by way of warning, that too many people place too much of a load on the law. The law is but one tool, and in many respects an insignificant tool in the development of peace and security and economic sustainability. The law is a tool in that regard, but without the political will, without the necessary economic resources, it cannot be a magic wand that is going to cure the most serious problems that the world community is facing.

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<sup>20</sup> *Id.*

<sup>21</sup> See Harold Hongju Koh, *The Obama Administration and International Law*, U.S. DEPT. STATE (Mar. 25, 2010) <http://www.state.gov/s/l/releases/remarks/139119.htm> ("[O]beying our international commitments is both right and smart, and that is a message that this Administration, and I as a Legal Adviser, are committed to spreading."); see also *Merkel Demands Respect for International Law*, SPIEGEL ONLINE (Sept. 11, 2006), <http://www.spiegel.de/international/0,1518,436359,00.html> (quoting Chancellor Angela Merkel: "Apart from determination and international unity, respect for international law, tolerance and respect for other cultures should be the maxims of our actions.").

Allow me do two things: First, to point out the huge developments in various areas of international law; and second, when I have done that, to talk about its implementation.

And let me start with the area that I know best and to which Michael has referred, and that is international criminal law and, in particular, the International Criminal Court (ICC). When the International Criminal Court was agreed to in Rome in the middle of 1998, there was this huge threshold of sixty ratifications before the Court could begin to operate.<sup>22</sup> This was seen by the majority of optimistic people as a huge threshold that would take at least a decade to reach.

But, as we know, it took less than four years, and amazingly, today 117 of the 193 members of the United Nations have ratified the Rome Treaty.<sup>23</sup>

It is interesting looking at the 117 nations by year and region:<sup>24</sup> Africa thirty-two;<sup>25</sup> Latin America and the Caribbean twenty-six;<sup>26</sup> Asia and the Pacific Guard, sixteen,<sup>27</sup> and Europe and the CIS countries forty-three.<sup>28</sup> It is a huge, huge development, and it includes the 43 from Europe, including every member of the European Union.<sup>29</sup>

It is possible that the so-called Arab Spring might bring more Arab countries into the ICC fold, and there has been an unfortunate shortage of Arab countries who ratified the Rome treaty, for reasons that speak for themselves.

So far, Tunisia has come out of this Arab Spring and has now ratified the Rome Treaty. Others may follow and depending on developments in those countries they might become democracies. It is democratic nations more than others that accede to the Rome Treaty and are prepared to make themselves parties to international humanitarian law efforts.

Then there is the use of the ICC by governments. It is a strange irony that African countries, three of them, have approached the ICC and said “please

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<sup>22</sup> *Ratification of the Rome Statute*, COAL. INT’L CRIM. COURT, <http://www.iccnw.org/?mod=romeratification> (last visited Jan. 19, 2012).

<sup>23</sup> *The States Parties to the Rome Statute*, INT’L CRIM. COURT, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Jan. 19, 2012).

<sup>24</sup> *Ratification of the Rome Statute*, *supra* note 22 (now 120 since Cap Verde joined on Oct. 11, 2011).

<sup>25</sup> *The States Parties to the Rome Statute*, *supra* note 23 (now thirty-three since Cap Verde joined on Oct. 11, 2011).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; *About the EU: Countries*, EUROPA, [http://europa.eu/about-eu/countries/index\\_en.htm](http://europa.eu/about-eu/countries/index_en.htm) (last visited Jan. 19, 2012).

come and investigate what's happening with regard to war crimes in our country."<sup>30</sup>

The first three cases before the ICC—from Uganda, from the Central African Republic, and the Democratic Republic of the Congo—came from governments.<sup>31</sup> Again, nobody anticipated at all in 1998 or 2002 when the Court began, that cases would come before the Court from governments.<sup>32</sup>

It was assumed that all the cases would be initiated by the prosecutor using his own what are called *proprio motu* power, his power of referring cases for confirmation to a pretrial chamber of the International Criminal Court.<sup>33</sup>

Three came from the African Government.<sup>34</sup> Of the remaining three before the Court, two came, again to the amazement of the most optimistic supporters, from the Security Council.<sup>35</sup> It had been assumed that the Security Council for the then foreseeable decades would not refer cases to the International Criminal Court because of the United States veto and the Russian veto and Chinese veto.<sup>36</sup>

Powerful countries don't like international courts. Powerful countries don't like international adjudication at all. Powerful countries don't like people

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<sup>30</sup> *All Situations, INT'L CRIMINAL COURT* <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/> (last visited Jan. 19, 2012) (noting the first three ICC situation referrals of Uganda and the Democratic Republic of the Congo in 2004 and the Central African Republic in January 2005).

<sup>31</sup> *Id.*

<sup>32</sup> See Paola Gaeta, *Is the Practice of 'Self-Referrals' a Sound Start for the ICC?*, 2 J. INT'L CRIM. JUST. 949, 950–51 (2004) (describing the widespread backlash expected from countries pressed to self-refer cases to the ICC).

<sup>33</sup> *Id.* at 951 (noting the significant difficulties expected with using the other jurisdictional triggers of Security Council referrals and complaints brought by an unconnected State Party to the Court).

<sup>34</sup> *All Situations, supra* note 30.

<sup>35</sup> Luigi Condorelli & Annalisa Ciampi, *Comments on the Security Council Referral of the Situation in Darfur to the ICC*, 3 J. INT'L CRIM. JUST. 590, 590–91 (2005) (noting the 2005 referral of Sudan regarding the Darfur crisis); *Security Council Imposes Sanctions on Libyan Authorities in Bid to Stem Violent Repression*, U.N. NEWS SERVICE (Feb. 26, 2011), <http://www.un.org/apps/news/story.asp?NewsID=37633> [hereinafter *Security Council Imposes Sanctions*].

<sup>36</sup> See Johan D. van der Vyver, *Jurisdiction of the International Criminal Court*, CASE W. RES. UNIV. SCH. OF LAW – FREDERICK K. COX INT'L LAW CTR. WAR CRIMES RESEARCH PORTAL (Sept. 23, 2003), [http://law.case.edu/war-crimes-research-portal/instant\\_analysis.asp?id=5](http://law.case.edu/war-crimes-research-portal/instant_analysis.asp?id=5) (describing the obstacle a Permanent five veto poses to any Security Council referral).

from other nations looking over their shoulders and giving judgment on what they are doing.

Two cases were referred by the Security Council and one during the second term of President George W. Bush. In his first term he went to extreme lengths to try and kill this court in its infancy. At his urging, a compliant Congress—passed what then seemed and seems even more today to be ridiculous legislation, including what has been called the Hague Invasion Act, which authorizes American troops to rescue Americans who might be brought before the court in The Hague.<sup>37</sup> It really stretches the imagination that the Congress of the United States could even consider, let alone pass, legislation of that nature.

John Bolton famously stated that the happiest day of his career, was that during which he informed the Secretary General of the United Nations that the United States was withdrawing its signature from the Rome Treaty.<sup>38</sup> It was the same Administration in its second term that decided not to veto the reference of the Sudan of the Darfur situation to the International Criminal Court.<sup>39</sup> One never knows and certainly the odds on that happening were thought to be just about zero.

Two weeks before the United States announced it would not veto the referral, the then-Ambassador for War Crimes in the Bush Administration, Pierre Richard Prosper said that the United States “will veto the reference

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<sup>37</sup> American Service-Members’ Protection Act of 2002, Pub. L. No. 107–206, 116 Stat. 820 (2002) (codified as amended at 22 U.S.C. § 7401, § 2008) (granting the President “all means necessary and appropriate” to free any American serviceperson being tried before the Court); see also Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Toward the International Criminal Court*, 36 CORNELL INT’L L. J. 415, 423 (2004) (noting the pejorative European reference to the act as the “Hague Invasion Act”).

<sup>38</sup> Orentlicher, *supra* note 37, at 421 (noting that the Bush Administration rejected the Court due to its unbridled power); Robert C. Johansen, *The Impact of US Policy toward the International Criminal Court on the Prevention of Genocide, War Crimes, and Crimes Against Humanity*, 28 HUM. RTS. Q. 301, 301–02 (2006) (indicating that the un-signing was unsurprising to observers); Van der Vyver, *supra* note 36 (presenting then-Undersecretary of State for Arms Control and International Security’s opposition to the ICC).

<sup>39</sup> Corrina Heyder, *The U.N. Security Council’s Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court’s Function and Status*, 24 BERKELEY J. INT’L L. 650, 650 (2006) (noting the U.S. decision to abstain from the vote rather than exercising its veto as expected).

because a reference by the Security Council will give the International Criminal Court credibility.”<sup>40</sup>

He was right. It did give it credibility, but he was wrong that the U.S. would exercise its veto. And who would have believed that, as recently as this year, the United States would vote affirmatively for such a resolution. The Obama Administration voted affirmatively to refer the Libyan situation to the ICC, which is resulting, as we know, in the indictment of three Libyan leaders, including Gadhafi as well as one of his sons and his security chief.<sup>41</sup>

So there is reason for optimism in a situation where pessimism had really overtaken the events and the prophecies that people were making with good rational reason.

I might say in parentheses that I initially questioned the timing of the reference of the Libyan situation to the ICC. The Security Council for the first time used the so-called principle of the responsibility to protect because that is what it was doing by authorizing NATO powers to assist the rebels fighting against the regime of Muammar Gadhafi.<sup>42</sup> The Security Council exercised its powers in order to protect civilian lives in Libya. The reference to the ICC seemed to me to be premature and might well have been postponed until the end of hostilities.

I am happy that my concerns have proven to be ill founded. The fighting is coming to an end and so too is the Gadhafi regime.<sup>43</sup> What will come in its place, we have to wait and see. If there is some form of democratic government, if decent operating courts of law can be set up, even one with international assistance, I certainly would strongly support a trial of Gadhafi in

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<sup>40</sup> See Johansen, *supra* note 38, at 321 (noting Ambassador Prosper’s explanation that “[w]e don’t want to be party to legitimizing the ICC”).

<sup>41</sup> Press Release, Security Council, Security Council Approves ‘No-Fly Zone’ Over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, By Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011).

<sup>42</sup> *Libya: Implementation of UN Resolution 1973 for the Protection of Civilians; Urgent Action Required in Cote d’Ivoire; Deteriorating Situation in Abyei*, INT’L COAL. RESPONSIBILITY TO PROTECT (Mar. 25, 2011), <http://www.responsibilitytoprotect.org/index.php/component/content/article/136-latest-news/3335-crisis-alert-libya-implementation-of-un-resolution-1973-for-the-protection-of-civilians-urgent-action-required-in-cote-divoire-deteriorating-situation-in-abyei> (noting Resolution 1973 as the first implementation of military action under the responsibility to protect doctrine).

<sup>43</sup> Louis Charbonneau, *U.N. Ends Mandate for NATO Operations in Libya*, REUTERS (Oct. 27, 2011), [www.reuters.com/article/2011/10/27/us-libya-un-idUSTRE79P6EC20111027](http://www.reuters.com/article/2011/10/27/us-libya-un-idUSTRE79P6EC20111027) (indicating British Foreign Secretary William Hague’s optimistic sentiments for Libya’s future following the cessation of NATO operations).

Libya, subject to his being able to be given a fair trial but by acceptable international standards, a big “if”.

I think that the Libyans have a long way to go in forming a government at all, let alone a democratic government, but if they can do that, then the complementarity on which the international court is based would favor a trial in Tripoli or somewhere in Libya rather than in The Hague.<sup>44</sup> I am not optimistic that that will happen, and if it doesn't, then, of course, the International Criminal Court must insist on the arrest warrant being carried out, and Gadhafi, if he is arrested, being tried in The Hague.

There is also the possible resort to a mixed domestic and international tribunal along the lines of the Special Court for Sierra Leone. That Court is regarded as having been a success and much credit for that must go to David Crane. On the other hand there is also the Special Tribunal for Lebanon.<sup>45</sup> The jury is still out but the prospects of accused persons appearing before that tribunal appear to me to be highly unlikely.

The intention, as I understand it, and it is possible under the statute under which that court operates, is that there will be a trial in absentia. I certainly don't like trials in absentia. I believe they bring cold comfort to the victims, and from a prosecutor's point of view, they are poison because if the accused person is ever brought to court, the trial in absentia is rendered void, and defense counsel have a wonderful opportunity of cross examining major witnesses who already have given evidence in the trial in absentia. Another problem, incidentally, with trials in absentia is, it makes important witnesses marked people for assassination, and that's another huge danger of trials in absentia.<sup>46</sup>

Let me move away from criminal justice and look at a couple of other areas of international law and decide whether they are in crisis. There is the International Court of Justice, the so-called World Court.<sup>47</sup> When I was in The

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<sup>44</sup> Alison Cole, *A Hybrid Court Could Secure Justice in Libya*, THE GUARDIAN (Oct. 27, 2011), <http://www.guardian.co.uk/law/2011/oct/27/hybrid-court-justice-libya?newsfeed=true> (indicating that while the principle of complementarity favors a trial in Libya, hybrid courts such as the Special Tribunal for Lebanon are another alternative).

<sup>45</sup> *Id.*

<sup>46</sup> Cf. Patricia M. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 220 (2002) (noting the common usage of threats and other intimidation methods to dissuade witnesses from testifying in the Yugoslav war crimes trials).

<sup>47</sup> See generally TERRY D. GILL & SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 23 (6th ed. 2003) (providing an excellent background resource on the function, structure, and work of the World Court).

Hague in the middle 1990s, that court was almost ignored. I remember they had about two cases, one or two cases a year, and I remember my bemusement when I met with some of those judges of the International Court of Justice, who complained that they were overworked. It was really Parkinson's law: they worked harder on two cases than they would have on two hundred cases because they had nothing else to do. That has changed considerably. The International Court of Justice presently has eighteen cases actively going on in front of its judges.<sup>48</sup> Only governments can litigate in front of the International Court of Justice.<sup>49</sup> No individuals, no organizations, only governments, and they can't be forced to do so.<sup>50</sup> They go there willingly because they want to have their dispute settled by the International Court of Justice. So there has been a proliferation, relatively speaking, of cases before the International Court of Justice, and these are brought by governments.

The World Trade Organization's Appellate Body is a good example of the huge increase in the use by governments of international law.<sup>51</sup> Until sixteen years ago, trade disputes between members of the World Trade Organization were settled by quasi-diplomatic proceedings between governments.<sup>52</sup> The system was directed not at litigating differences; the system was directed at finding solutions and frequently by way of compromise. It was usually diplomats who argued the cases in that court, not lawyers.

Today the WTO dispute settlement system is really based on the rule of law.<sup>53</sup> There are now binding outcomes and the final court of appeal, the Appellate Body of the WTO sitting in Geneva.<sup>54</sup> By way of a footnote, the reason it is called the Appellate Body, I understand on good authority, was to satisfy the United States and make it comfortable for the United States to join an

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<sup>48</sup> *Cases*, INT'L COURT OF JUSTICE, <http://www.icj-cij.org/docket/index.php?p1=3&p2=1> (last visited Jan. 19, 2012) (listing 17 cases pending or under deliberation as of Nov. 3, 2011).

<sup>49</sup> GILL & ROSENNE, *supra* note 47, at 266 (referencing Article 34.1 of the Statute of the International Court of Justice declaring that only states may be parties before the Court).

<sup>50</sup> *Id.* (referencing Article 36 of the Statute).

<sup>51</sup> Claus-Dieter Ehlermann, *Experiences from the WTO Appellate Body*, TEX. INT'L L.J. 469, 476 (2003) (noting that the Appellate Body of the WTO "has grown in size over the last years, in order to match the increasing caseload of the Appellate Body").

<sup>52</sup> John H. Jackson, *Dispute Settlement and the WTO - Emerging Problems*, 1 J. INT'L ECON. L. 329, 331-32, 338 (1998).

<sup>53</sup> *Understanding the WTO: Settling Disputes - A Unique Contribution*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm) (last visited Jan. 19, 2012) ("The WTO's Procedure underscore the rule of law, and it makes the trading system more secure and predictable.").

<sup>54</sup> *Id.*



appellate court that wasn't called a court.<sup>55</sup> So they called it the Appellate Body to make it palatable in Washington, D.C.

That does not matter; it works. The present chairman of that court is an American, Jennifer Hillman.<sup>56</sup> She has said, and I quote, from a yet unpublished piece: "the parlance of disputes has shifted from one of compromise and settlement to one of winners and losers, victories and defeat. Many precedents have grown up in that court. They are persuasive rather than binding authority."<sup>57</sup>

It is interesting to see the countries that use that Appellate Body of the WTO, and we are talking about many billions of dollars involved in the cases that come before it. The major user has been the United States. It has initiated ninety-eight cases before the appellate body and has defended over a hundred.<sup>58</sup> The European Union initiated eighty-five; defended seventy.<sup>59</sup> Canada initiated thirty-three; defended seventeen.<sup>60</sup> They are followed by Brazil and India, Mexico, Argentina, Korea, Japan and Thailand, all those countries significant users of the appellate body of the WTO.<sup>61</sup>

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<sup>55</sup> *Dispute Settlement – Appellate Body*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dispu\\_e/appellate\\_body\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm) (last visited Jan. 19, 2012).

<sup>56</sup> *Id.*

<sup>57</sup> See Fabien Gelinas, *Dispute Resolution as Institutionalization in International Trade and Information Technology*, 74 FORDHAM L. REV. 489, 492 (2005) (discussing the Appellate Body's creators' intent to preclude a case ruling from having binding precedential effect).

<sup>58</sup> *United States of America – Member Information*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/countries\\_e/usa\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/usa_e.htm) (last visited Jan. 19, 2012) (listing 98 cases that the U.S. has initiated as complainant and 113 cases it has defended as respondent).

<sup>59</sup> *European Union – Member Information*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/countries\\_e/european\\_communities\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm) (last visited Jan. 19, 2012) (listing 85 cases that the E.U. has initiated as complainant and 70 cases it has defended as respondent).

<sup>60</sup> *Canada – Member Information*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/countries\\_e/canada\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/canada_e.htm) (last visited Jan. 19, 2012) (listing 33 cases that Canada has initiated as complainant and 17 cases it has defended as respondent).

<sup>61</sup> *Understanding the WTO: The Organization – Members and Observers*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Jan. 19, 2012) (follow hyperlink of the desired country for information on the number of complaints initiated and defended by the country).

What appears to me as the most significant development is the use being made in recent years of the WTO Appellate Body by China: first, in defending cases, and now, more frequently, as an initiator of complaints before that body.<sup>62</sup>

Finally, with regard to that body, what is also significant is that in the overwhelming number of cases it has heard, according to Jennifer Hillman, the WTO requirements have been found to have been substantially violated, and orders of compliance were issued by the appellate body.<sup>63</sup> In almost every case, the United States, China, India, you name them; the countries have carried out the orders and the decisions of the appellate body of the WTO.

Turning to the European Court of Human Rights; it has a backlog, apparently, of well over one hundred thousand cases and the number continues to grow, many of them coming from Russia who submitted to the jurisdiction of that court.<sup>64</sup>

So one sees in these areas—and there are others—that there is an increasing reliance on international law. So, far from being in crisis, it is being used more and more and being called in aid more and more. I now turn to the area where I would suggest there is crisis, and that is in the ability of most of those courts to satisfy the calls that are being made on them.

Let me go through the ones I have referred to. I needn't refer to the WTO because one sees there that it is being used, and it is coping well.

What about the criminal courts? The ad hoc tribunals are winding down.<sup>65</sup> The Sierra Leone tribunal is winding down.<sup>66</sup> The Cambodia tribunal

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<sup>62</sup> *WTO Disputes Overtake 300 Mark*, WORLD TRADE ORG. (Sept. 11, 2003), [http://www.wto.org/english/news\\_e/pres03\\_e/pr353\\_e.htm](http://www.wto.org/english/news_e/pres03_e/pr353_e.htm) (listing one case China had initiated as complainant and no cases it had defended as of Sept. 11, 2003); *China – Member Information*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/countries\\_e/china\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/china_e.htm) (last visited Jan. 19, 2012) (listing eight cases China has initiated as complainant and 23 cases it has defended as respondent).

<sup>63</sup> See Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 J. INT'L ECON. L. 397, 398 (2007) (“Of the 109 adopted panel or panel/Appellate Body reports, in nearly 90% of these cases the panel and/or the Appellate Body have found WTO violations.”).

<sup>64</sup> See *Mammoth Backlog Prompts European Rights Court Reforms*, BBC NEWS (Feb. 19, 2010), <http://news.bbc.co.uk/2/hi/europe/8525524.stm> (citing a backlog of 120,000 cases at the European Court of Human Rights, 27,000 of which originated in Russia).

<sup>65</sup> See Guido Acquaviva, *Was a Residual Mechanism for International Criminal Tribunals Really Necessary?*, 9 J. INT'L CRIM. JUST. 789, 795 (2011) (describing the U.N.'s creation of an International Residual Mechanism for Criminal Tribunals, which

hasn't got too much life left in it.<sup>67</sup> The steam has already gone,<sup>68</sup> and as David Crane indicated last night, in a very few years from now the only International Criminal Court will be the permanent ICC.<sup>69</sup>

And David with every good reason was bemoaning the fact that with that court is the one court in respect of which the United States influence has diminished. I suggest though not to the point of extinction. I think the United States will always play a crucial role in that court, even if it doesn't ratify the Rome Treaty. The United States will continue to play a role because of the activities of civil society in this country. Many of the people responsible for those activities are sitting in this room, and you know who you are. Without you and without your efforts, international criminal justice wouldn't have notched up the successes that it has over the last seventeen, eighteen years.

But the ICC is facing crises. It is facing crises, mainly of perception, but again, as I think David Crane indicated, perceptions are a fact. It is not just a theory. What people perceive is a fact. Their perceptions may be right. Their perceptions may be wrong. But they have to be taken into account.

The perception in Africa is that the International Criminal Court is anti-African, and was set up by Western countries to investigate Africans.<sup>70</sup> Of

will result in the ICTR beginning to wind down in July 2012 and the ICTY beginning to wind down in July 2013).

<sup>66</sup> See Juliette Rousselot, *13 Years of International Justice*, HUMAN RTS. NOW BLOG (July 17, 2011, 9:00 AM), <http://blog.amnestysusa.org/justice/13-years-of-the-international-criminal-court/#more-22476> ("[T]rials are winding down at the Special Court for Sierra Leone, which is expected to render a verdict in the Charles Taylor case in the next few months . . .").

<sup>67</sup> See Mike Eckel, *Cambodia Genocide Tribunal May End Prosecutions Prematurely*, WASH. TIMES (May 4, 2011), <http://www.washingtontimes.com/news/2011/may/4/cambodia-genocide-tribunal-may-end-prosecutions-pr/> ("Human Rights Watch expressed concern Wednesday that the tribunal will shut down its operations after the current case and abandon plans for trials of other former Khmer Rouge officials.").

<sup>68</sup> See *supra* notes 65–67 (discussing the winding down of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia).

<sup>69</sup> David Crane, *An Age of Extremes: International Law in Crises – Eight Challenges*, 44 CASE W. RES. J. INT'L L. (forthcoming 2012).

<sup>70</sup> See ALEXIS ARIEFF ET AL., CONG. RES. SERVICE, INTERNATIONAL CRIMINAL COURT CASES IN AFRICA: STATUS AND POLICY ISSUES 26 (2011), available at [http://assets.opencrs.com/rpts/RL34665\\_20110307.pdf](http://assets.opencrs.com/rpts/RL34665_20110307.pdf) ("The ICC's investigations in

course, that perception exists and is being nurtured by politicians, and sometimes I will suggest by dishonest politicians because it is completely unfair for the reasons I have mentioned. One of the six cases before the International Criminal Court has been referred by the prosecutor; the other five, as I indicated, three by governments, two by the Security Council.<sup>71</sup> The court didn't choose those situations. The court was chosen to look into those situations.

That perception is going to remain until, I hope, in the coming few years International Criminal Court is going to become seized of situations that don't only relate to sub-Saharan Africa. So that's the one problem of perception.

The second problem, of course, is the number of governments that have failed to honor their international legal obligations. No international law can be of any utility, can be of any force, unless there is a political will of the parties, of the governments, of the nations' parties to them to carry them out and to adhere to them.

This is the greatest problem and weakness of international law. No international court, no international body has or in any of our lifetimes, will ever have its own police force or own army to execute its judgments.<sup>72</sup> It is now and will remain completely dependent on the support and cooperation from national governments.

That's a fact of life, and I read some years ago, somebody, and I have forgotten who it was, said: "if there is a problem with no solution, it is not a problem. It is a fact, and you have to deal with it."<sup>73</sup>

[Laughter.]

And the fact of international law is that it depends and will always depend on the cooperation of national governments, and that's not a problem; it is a fact, and it has to be dealt with. And, of course, that's the importance of the United States certainly until now.

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Africa have stirred concerns over African sovereignty, in part due to the long history of foreign intervention on the continent.").

<sup>71</sup> *Situations and Cases*, INT'L CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited Jan. 19, 2012).

<sup>72</sup> See, e.g., Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM. RTS. J. 13, 24 (2003) ("[T]he ICC's success will largely depend on international cooperation, especially insofar as the Court commands no police force of its own.").

<sup>73</sup> James Joyner, *NATO: Problems with No Solutions?*, ATLANTIC COUNCIL (Apr. 28, 2010), [http://www.acus.org/new\\_atlanticist/nato-problems-no-solutions](http://www.acus.org/new_atlanticist/nato-problems-no-solutions) ("But, as Shimon Peres noted and Donald Rumsfeld popularized, 'If a problem has no solution, it may not be a problem, but a fact, not to be solved, but to be coped with over time.'").

David knows, I know, all chief prosecutors know—past and present—that the United States played *the* crucial role in making these courts work. The ad hoc tribunals wouldn't have been set up without the United States' support, and it was mainly Madeline Albright who was responsible for it.<sup>74</sup>

Having been set up, they wouldn't have succeeded. We wouldn't have gotten intelligence information. We wouldn't have had sufficient staffing. We wouldn't have had sufficient money, but most important of all the courts wouldn't have gotten their major culprits before them without the political and economic power of the United States and its willingness to force governments to cooperate with the Court.

Milošević wouldn't have been there. Karadžić wouldn't have been there now. Mladić wouldn't be there now. The leading generals, Gotovina<sup>75</sup> and the others who came to the international court, the Rwanda tribunal succeeding, none of those things would have happened. I know from my own experience none of those things would have happened without active support from Washington, D.C.

So it is a problem that the international court has. It hasn't been as fortunate as these other courts were, but that seems to be changing, and that support can be forthcoming from Washington even if the United States does not join as an active party.

Of course, those of us who support the International Criminal Court would rejoice if the United States would ratify the Rome Treaty, and that's the big question out there, and that is whether the court will succeed in the coming decade and more. I have no doubt that eventually the United States will ratify the Rome Statute.

And I say that because the people of this country don't approve of war criminals. The people of this country don't want war criminals to have impunity, and if the United States government and the United States President and the

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<sup>74</sup> See MADELEINE ALBRIGHT & BILL WOODWARD, MADAM SECRETARY 183 (2003) ("[T]he Clinton administration, the leading financial contributor [to the ICTY], didn't waver. . . . We made cooperation with the tribunal a top issue in all our bilateral relationships with governments both in and outside the region."); VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION 159 (2008) ("Moreover, some Western diplomats, particularly in the U.S. State Department, viewed the [ICTR] as key to ensuring peace and stability in Rwanda and elsewhere in Central Africa.").

<sup>75</sup> See Marlise Simons, *U.N. Court Convicts Two Croatian Generals of War Crimes and Frees a Third*, N.Y. TIMES, Apr. 16, 2011, at A9 (describing the crimes and trial of General Gotovina).

Senate come to the conclusion that it is in the interests of the United States to join, they will do it.

They are not going to do that unless they are convinced that it is indeed in the interests of the United States and understandably so. No legislature, no president, no head of state, no parliament is going to take a step that they believe is not in the interests of the country that they lead and represent.

Let me draw this to a conclusion by referring to a recent book some of us, I am sure some of you have read, Joseph Nye's book called "The Future of Power."<sup>76</sup> He convincingly distinguishes on the one hand between the transition of power between states, and he talks importantly of the transition of power between Asian and Western states and particularly the rise of China and India.<sup>77</sup>

That's the transition of power and the fear by many in this country, and other Western countries, that the United States' preeminence is on a downward curve, and China and India are on an upward curve, a topic we are not going to discuss today. He opposes to this transition of power the diffusion of power, the diffusion of power between governments, from governments to non-state actors and in particular non-governmental organizations.<sup>78</sup>

This diffusion has been facilitated by the side of the world in which we are living, and we see many examples of it right now: the tent cities in Israeli cities; the Arab Spring; none of these things would have been conceivable without cyber power; the riots in London and so forth.<sup>79</sup>

As Nye put it: "in a world where borders are becoming more porous than ever before, to everything from drugs to infectious diseases to terrorism nations must mobilize international coalitions and build institutions to address shared threats and challenges."<sup>80</sup>

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<sup>76</sup> See generally JOSEPH S. NYE, JR., *THE FUTURE OF POWER* (2011) (examining the changes and development of governmental power since the Cold War to project how power will evolve in the future).

<sup>77</sup> *Id.* at 177–86 (describing China's rise in power); *Id.* at 173–75 (describing India's rise in power).

<sup>78</sup> *Id.* at 119 ("The real issue related to the diffusion of power is not the continued existence of the state, but how it functions. . . . In a world of global interdependence, the agenda of international politics is broader, and everyone seems to get into the act.").

<sup>79</sup> See Brett Van Niekirk et al., *Analyzing the Role of ICTs in the Tunisian and Egyptian Unrest from an Information Warfare Perspective*, 5 INT'L J. COMM. 1406, 1407–08 (2011), available at <http://ijoc.org/ojs/index.php/ijoc/article/viewFile/1168/614> (discussing various social activist movements that have employed information and communications technology (ICT) to pursue their goals).

<sup>80</sup> Joseph Nye, *Joe Nye Answers Your Questions on the Future of American Power*, CNN WORLD (Mar. 15, 2011), <http://globalpublicsquare.blogs.cnn.com/2011/03/15/joseph-nye-answers-your-questions-on-the-future-of-american-power/>.

A current illustration of the relevance of NGOs relates to the CICC, the Coalition for the International Criminal Court. It is an amazing organization, the largest non-governmental organization I guess in the world.<sup>81</sup> It is a coalition of over two and a half thousand NGOs from over 120 countries and it is brilliantly led by an American, William Pace, out of his office in New York.<sup>82</sup>

There has been concern about the qualifications of some of the judges who have been appointed to the International Criminal Court over the last decade. With the full consent of the leaders of the Assembly of States Parties, the CICC set up a panel of five individuals, with no international powers at all.<sup>83</sup> It is an NGO.<sup>84</sup> It is the Independent Panel on the Election of Candidates to the ICC.<sup>85</sup> It has already begun its work. There is presently the process to elect six new judges to the Court. The election will be held during December of this year. I was appointed to chair the Committee. Judge Pat Wald of Washington D.C. is vice chairing it.<sup>86</sup> Hans Corell, the former Undersecretary General for Legal Affairs from Sweden, is on it.<sup>87</sup> Judge O-Gon Kwon from the Yugoslavia tribunal is on it,<sup>88</sup> and Cecelia Medina from Argentina, a leading Latin American judge and lawyer, is the fifth member.<sup>89</sup> What is our brief? We are to have regard to all the documentation that comes to the Assembly of States parties and relevant governments. Relying solely on the relevant provisions of the Rome Treaty, which sets out the qualifications of judges,<sup>90</sup> we will issue a public report prior to the election stating whether the candidates are qualified or not qualified.

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<sup>81</sup> *About the Coalition*, COAL. INT'L CRIM. COURT, <http://www.iccnw.org/?mod=coalition> (last visited Jan. 19, 2012) ("The Coalition for the International Criminal Court (CICC) includes 2,500 civil society organizations in 150 different countries working in partnership . . .").

<sup>82</sup> *Id.* (describing CICC membership statistics); *CICC Convenor and Staff*, COAL. INT'L CRIM. COURT, <http://www.iccnw.org/?mod=convenorstaff> (last visited Jan. 19, 2012) ("Mr. William R. Pace has served as the Convenor of the Coalition for an International Criminal Court since its founding in 1995.").

<sup>83</sup> *About*, INDEP. PANEL ON ICC JUD. ELECTIONS, <http://www.iccindependentpanel.org/about> (last visited Jan. 19, 2012) (summarizing the creation of the Panel, its mandate and its membership).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *About*, *supra* note 83.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*; see also Rome Statute of the International Criminal Court, art. 36, U.N. Doc. A/CONF.183/9 (July 17, 1998) (outlining the qualification, nominations and election of judges).

If we hold any candidate to be “unqualified” we will furnish reasons for that opinion.

The hope is that this should act as a deterrent against governments putting forward candidates who are likely to be held to be unqualified. However, the point I want to make is: who would have thought five years ago that governments represented in the Assembly of States parties, now 119 countries,<sup>91</sup> would welcome an NGO doing this work?

It is a really a good example, I think, of what Joseph Nye calls the diffusion of power to NGO's.<sup>92</sup> Of course, this diffusion carries its danger. Al Qaeda is also the result of this sort of diffusion. So diffusion from governments to non-governmental organizations can be for good, and it can be for evil. So again, it is a phenomenon that one must watch.

Finally, I was impressed with the last panel before the luncheon adjournment on global warming.<sup>93</sup> I went to that panel because I know so little about it. I thought it was a good opportunity to learn something, and it seemed to me that *there* is an area of international law that is in crisis because insufficient has been done about it. More law is needed, and more political will is needed in order to comply with the tremendous needs that were so articulately and very clearly pointed out by that panel.

So I hope I have said sufficient to demonstrate that far from being in crisis international law continues to be an essential tool; international courts using international law are being called upon more frequently to help resolve some of the most difficult and important problems facing our global community.

Thank you very much.

[Applause.]

PROFESSOR SCHARF: Thank you very much for those insightful remarks. We will now have fifteen minutes of questions. Just come up to the microphones and line up behind each other. Please identify where you are from and your name and then ask the question.

AUDIENCE MEMBER: My name is Kevin Hartman. I am a student here at Case.

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<sup>91</sup> *The States Parties to the Rome Statute*, *supra* note 22 (now 120 countries since Cap Verde joined in Oct. 2011).

<sup>92</sup> See Robert O. Keohane & Joseph D. Nye, Jr., *Introduction*, in *GOVERNANCE IN A GLOBALIZING WORLD* 22 (Joseph S. Nye & John D. Donahue eds., 2000).

<sup>93</sup> See *International Law in Crisis*, CASE W. RES. UNIV. SCH. OF LAW – FREDERICK K. COX INT'L LAW CTR., [http://law.case.edu/centers/cox/content.asp?content\\_id=191](http://law.case.edu/centers/cox/content.asp?content_id=191) (last visited Jan. 19, 2012); see also *International Law in Crisis – Panel 2B*, YOUTUBE (Sept. 23, 2011), <http://www.youtube.com/watch?v=XYdpmysEFQ>



I was just going to ask you, the Security Council has referred al-Bashir to the ICC, and consistently, he has traveled to other African states without being taken to the ICC. And I was wondering, is there any law around holding the leaders for harboring him to the ICC from justice and what can be done about this in the future?

HON. RICHARD GOLDSTONE: Well, of course, this is perhaps one of the most vivid examples of some of the problems that are being faced by International Criminal Court and its reliance on government. It is disgraceful that at least one government, which is a party to the Rome Treaty, allowing President al-Bashir under an arrest warrant to come into the country and not to arrest him.<sup>94</sup> But that's the exception.

As a South African, I am proud that our government indicated to President al-Bashir that he was the only African leader not being invited to the inauguration of our President Jacob Zuma.<sup>95</sup> The ambassador from the Sudan was called in and was told that his president is not being invited because we would be obliged to arrest him and hand him over for trial in The Hague.<sup>96</sup> In another situation, the government of Botswana made a similar declaration,<sup>97</sup> and at least one other government, Kenya, canceled a visit from al-Bashir after they were pressured to do so.<sup>98</sup>

But this is the problem, and it is not the first time it arose. The arrest warrant against al-Bashir has rendered it very difficult for him to be a head of state. Heads of state have a problem if they can't travel freely, and he can't travel freely.

That is obviously a way in which he is being largely marginalized. There is no European nation that he can visit. He can't attend a meeting in the

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<sup>94</sup> See *Chad Refuses to Arrest Sudan's Al-Bashir*, CBC NEWS, <http://www.cbc.ca/news/world/story/2010/07/21/chad-sudan-bashir.html> (last updated July 21, 2010) (reporting on Chad being the first ICC member state to not arrest Al-Bashir); *Kenya's ICJ Moves to Court to Seek Bashir's Arrest*, E. AFRICAN (Nov. 18, 2010), <http://www.theeastafican.co.ke/news/-/2558/1056094/-/om9rrez/-/index.html> (noting that the Kenyan Government failed to arrest Al' Bashir when he visited in August 2010); *Omar Al-Bashir Arrest Requested Rejected by Malawi*, BBC NEWS AFRICA (Oct. 14, 2011), <http://www.bbc.co.uk/news/world-africa-15308198> (quoting the Prime Minister to the effect that it was not Malawi's "business" to arrest Al-Bashir).

<sup>95</sup> *Bashir Will Not Be Invited to Zuma's Inauguration*, ICC OBSERVERS (Apr. 26, 2009), <http://icc-observers.org/2009/04/26/bashir-will-not-be-invited-to-zumas-inauguration/>.

<sup>96</sup> *Id.*

<sup>97</sup> *Botswana Stands by the International Criminal Court*, REPUBLIC BOTSWANA (July 28, 2010), <http://www.gov.bw/en/News/Botswana-stands-by-the-International-Criminal-Court-/>.

<sup>98</sup> *Kenya's ICJ Moves to Court to Seek Bashir's Arrest*, *supra* note 94.

United States or Canada. The former was a party to the Security Council resolution and the latter has ratified the Rome Treaty.<sup>99</sup> No doubt the United States would wish to see al-Bashir brought to trial.

So this is a mixed report, but more and more countries that ignore their international obligations are going to be castigated. They are going to be isolated because if countries refuse to carry out their international obligations in that area, they are going to be distrusted. Governments who don't carry out their obligation are going to be suspect.

And people will start worrying about doing trade with them because if they break their word in that respect, they will break their word in the other respect. More frequently governments have to comply with international law if they want to have credibility.

AUDIENCE MEMBER: Thank you.

HON. RICHARD GOLDSTONE: But to answer your question directly, there is nothing that can be done against the leaders of those countries because it is not criminal to not to carry out your obligation.<sup>100</sup> It is a breach of the international treaty, but it is not a criminal offense.<sup>101</sup>

AUDIENCE MEMBER: My name is Nick Weiss. I am a second year law student here at Case, and you talked about this briefly, but the ICC has indicted Gadhafi, and the transitional government has also said that it would like to prosecute. Which of these two courts do you think should prosecute Gadhafi?

HON. RICHARD GOLDSTONE: Well, I think I did refer to that briefly in my opening remarks. The International Criminal Court in The Hague, the permanent court, is referred to as a court of second choice.<sup>102</sup> The court that has the first right to investigate and prosecute and punish war criminals is the court of the country from where that person comes, not International Criminal

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<sup>99</sup> See Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, To Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 3, 2005) (although the Resolution was adopted, the U.S. abstained from voting).

<sup>100</sup> See Frederic L. Kirgis, *Treaties as Binding International Obligations*, AM. SOC. INT'L L. (May 1997), <http://www.asil.org/insight9.cfm> (noting treaties do not legally bind parties).

<sup>101</sup> *Id.*

<sup>102</sup> *ICC at a Glance*, INT'L CRIM. COURT, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/> (last visited Jan. 19, 2012); see also Rome Statute of the International Criminal Court, *supra* note 90, art. 17 (outlining issues of admissibility).

Court.<sup>103</sup> It is really a reverse of the situation that existed with the United Nations tribunals who had first choice.<sup>104</sup>

The International Criminal Court may not get involved in any criminal case if a country whose courts have jurisdiction wish to do so themselves.<sup>105</sup>

Take an example: If a soldier from the United Kingdom was to be charged with war crimes committed in Afghanistan or Iraq, the United Kingdom could say to the International Criminal Court “we will investigate.” If the United Kingdom does that and investigates in good faith, then regardless of the outcome, International Criminal Court would have no jurisdiction.<sup>106</sup>

And there is no reason in my view why that shouldn’t—in theory—apply in Libya. The question is: it can only happen if the local court, if the domestic court is willing and able to hold a fair trial under international standards.

If and when Libya will have a court that can hold an open and fair trial by international standards, your guess is as good as mine. If that does not happen within a short time, it seems to me that the international court is the only court with effective jurisdiction.

If I was in the position of the chief prosecutor or the judges of that court, I would insist on the international court proceeding against Gadhafi unless and until a Libyan court, if necessary, with assistance from other countries in the international community is able to put on the trial.

And let me say, I favor the principle of complementarity not only because that’s what the Rome Statute provides but it is also first prize in any justice system that trials should take place at or as close to the scene of the crimes as possible. That’s where the victims are.

If a criminal justice system is to have credibility, it should function at home. One of the problems for the Yugoslavian tribunal and the Rwanda tribunal has been that the trials took place many thousands of miles away from where the crimes were committed.

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<sup>103</sup> *ICC at a Glance*, *supra* note 102.

<sup>104</sup> See Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT’L L. 383, 385 (1998) (describing International Tribunals as having primacy over national courts).

<sup>105</sup> *ICC at a Glance*, *supra* note 102; see also Rome Statute of the International Criminal Court, *supra* note 90, art. 17.

<sup>106</sup> See *Frequently Asked Questions*, INT’L CRIM. COURT, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/Frequently+asked+Questions/> (last visited Jan. 19, 2012) (explaining that “complementarity” prevents ICC jurisdiction unless the country is unwilling or genuinely unable to investigate the alleged crime).

There is often no alternative. If there is an alternative, it should be preferred.

AUDIENCE MEMBER: Thank you.

AUDIENCE MEMBER: Thank you. My name is Jessica Feil. I am a student here at Case. You mentioned it briefly in your speech, but I was wondering if you thought the criticisms of the international court being too focused on Africa? Could you expand a bit on whether or not you think it is a legitimate criticism?

HON. RICHARD GOLDSTONE: Well, as I have said, I think it is a very unfair criticism for the reasons I mentioned, and that is the African governments can hardly complain if they themselves are responsible. I understand the perception, the perception of the African Union, of a number of states.

It is peculiar that you have an International Criminal Court mainly supported by Northern and Western countries and the only cases before the court happen to be African. This looks like, to many people, a sort of neocolonial Western imperialistic decision to go against African countries.

And let me say what exacerbates it: It is the failure to go against powerful countries. War crimes we know have been committed ad nauseam by Russia, by China, by other Asian countries.<sup>107</sup> They are not before International Criminal Court. They are not there because they are not prepared to join in. They are not prepared to ratify their own treaty.<sup>108</sup> And they have got vetoes in the Security Council.<sup>109</sup>

So one has to be a little bit sympathetic to the African perception. I think it is unfair, and as I say, it is going to continue to exist until non-African countries come before International Criminal Court.

AUDIENCE MEMBER: Thank you.

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<sup>107</sup> See generally Wenqi Zhu & Binxin Zhang, *Expectation of Prosecuting the Crimes of Genocide in China*, in CONFRONTING GENOCIDE 173, 174 (René Provost & Payam Akhavan eds., 2011) (explaining that China lags behind the international effort to prosecute for international crimes); Christopher W. Mullins, *War Crimes in the 2008 Georgia – Russia Conflict*, 51 BRIT. J. OF CRIMINOLOGY 918 (2011) (addressing the war crimes committed by both Georgia and Russia).

<sup>108</sup> See Valeriane Toon, *International Criminal Court: Reservations of Non-State Parties in Southeast Asia*, 26 CONTEMP. SE. ASIA 218, 219 (2004) (noting the uneasiness of Russia, China, and the United States over the ICC).

<sup>109</sup> *Id.*; see also U.N. Security Council: Membership in 2012, <http://www.un.org/sc/members.asp> (last visited Jan. 19, 2012) (noting the voting process, and veto power of current members in the Security Council).

AUDIENCE MEMBER: I am Claude Welch from the University of Buffalo. I wondered if you could speak to the possibility that appointing an African prosecutor might help to reduce the concerns that are expressed, the critiques you just spoke of both in your remarks and in response to the last question.

HON. RICHARD GOLDSTONE: Well, you know, the present prosecutor's term of office ends in the middle of next year, and there is already a search committee being set up by the Assembly of States parties to look for a new prosecutor.<sup>110</sup> And there is a lot of talk out there, newspaper articles, rumor, that for the reason you mentioned there should be an African prosecutor.

And one of the front runners is the present Deputy Chief Prosecutor, Fatou Bensouda, who is a black African.<sup>111</sup> I have a problem with the theory that the prosecutor should come from a particular continent, but having said that, as an African, if an African is, all things being equal, the best person to be the chief prosecutor, great.

That's a matter for celebration, but I certainly would be against the appointment of somebody simply because of the country they come from or the color of their skin. I think the most appropriate, the best qualified person, should be appointed. And if that person happens to come from an Asian country, so be it.

I certainly would be strongly against appointing somebody simply because they come from a particular continent where there are other candidates with better qualifications.

AUDIENCE MEMBER: Thank you very much.

AUDIENCE MEMBER: Hi. My name is Danielle Fritz, and I am a law student here at Case. A few months ago the U.K. foreign minister suggested that it might be a good idea to negotiate in exile for a peace deal with Gadhafi.<sup>112</sup>

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<sup>110</sup> See *CICC Elections Team Questions and Answers on the ICC Prosecutor Election*, COAL. INT'L CRIM. COURT (Sept. 15, 2011), [http://www.iccnw.org/documents/CICC\\_Elections\\_Team\\_QandA\\_ICC\\_Prosecutor\\_Election\\_150911-1.pdf](http://www.iccnw.org/documents/CICC_Elections_Team_QandA_ICC_Prosecutor_Election_150911-1.pdf) (describing the process of electing the Prosecutor for the ICC in 2011).

<sup>111</sup> Mark Kersten, *The ICC's Next Top Prosecutor: The Candidates*, JUSTICE IN CONFLICT (June 3, 2011), <http://justiceinconflict.org/2011/06/03/the-iccs-next-top-prosecutor-the-candidates/> (giving a brief bio of each of the candidates for ICC Prosecutor).

<sup>112</sup> Bridget Kendal, *Could Gaddafi Go into 'Internal Exile' in Libya*, BBC NEWS (July 26, 2011), <http://www.bbc.co.uk/news/uk-14298472> (reporting on the possibility of peace deal with Qaddafi); but see Mary Beth Sheridan, *Moammar Gaddafi Killed in Rebel Custody as Last Loyalist Holdout in Libya Falls*, WASH. POST (Oct. 20, 2011), <http://www.washingtonpost.com/world/gaddafis-home-town-overrun-conflicting-reports->

Are these agreements ever in the interest of international peace?

HON. RICHARD GOLDSTONE: You know, one must distinguish—it is a great question—one must distinguish between political decisions being made with regard to international justice and courts on the one hand and legal decisions on the other.

In my view and it is something that David Crane and I have often debated and not always agreed on. In my view, the prosecutor and judges should take legal decisions. They have been appointed not to be politicians, and if they were, they would make the lousiest politicians in the world. I have no doubt about that.

[Laughter.]

HON. RICHARD GOLDSTONE: They may even not be the greatest lawyers, but they would be the worst politicians. It is not their calling.

Secondly, they are not parties to any peace negotiations. They don't know what's going on. I agree with David that prosecutors should not have their heads in the cloud and should be aware of the effect of what they do. In the case of Gadhafi, I have no doubt the court's job is to get him on trial for terrible crimes he has committed in the very recent past.

If it can be established—and it is a very big “if”—that peace would come to Libya if Gadhafi was given asylum in some lovely haven like Zimbabwe, that would be a question to be determined by politicians, not by lawyers, and the politicians who would have to decide that would be those on the Security Council.

The Rome Treaty setting up the International Criminal Court provides that the Security Council can order proceedings in that court to be suspended for successive periods of one year.<sup>113</sup> If there was rational evidence that could persuade the necessary majority of the Security Council with no veto cast by on the of the Permanent Members that it is in the interest of the people of Libya that Gadhafi should not be prosecuted, that would be a political decision.

And frankly, I wouldn't lose any sleep if they took that decision, but it is not a decision I believe should be taken in The Hague. The prosecutor has no power to make it anyway, I am happy to say, and the judges may or may not have the authority to take such a decision but they certainly wouldn't do it if the prosecutor didn't request them to do so.

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on-his-fate/2011/10/20/gIQAMwTB0L\_story.html (announcing Gadhafi was shot to death by rebel fighters who seized him from a drainage pipe).

<sup>113</sup> Rome Statute of the International Criminal Court, *supra* note 90, art. 16 (outlining the deferral of investigation or prosecution).

So I think there are very few cases where giving effective amnesty or asylum to the worst war criminal, is going to bring any enduring peace, and certainly, it has been the experience in the last seventeen years, since there have been international criminal courts, that justice and prosecution have assisted rather the peace rather than the converse.

PROFESSOR SCHARF: Last question. Ruth.

PROFESSOR RUTH WEDGWOOD: Well, I certainly agree with you that Ocampo, I think, has done a very prudent job in steering the court and giving it sea legs.<sup>114</sup> Three quick, each hard questions, though, none probably admitting yes or no answers.

Just forgive me for raising this, but I take the performance of the ad hoc tribunal as a very important precedent for the performance of the ICC because they really were the test runs, if you will, and I mentioned this morning the fact that ICTR, the Rwanda tribunal, never did try any Tutsi cases gives pause to people who suppose the courts can take purely a political stance.

Second, this is a lawyer's question: On complementarity, you are supposed to be unwilling or unable to handle that case yourself; not that you would rather not.<sup>115</sup> So I am wondering what you think. I am wondering is some defense lawyer going to have an argument that "rather not" is not a satisfaction of complementarity, would be objectively unwilling or unable but not to be preferred and push it off for political reasons perhaps because it is easier to have The Hague decide it than...

HON. RICHARD GOLDSTONE: Well, Uganda is a good example.

PROFESSOR RUTH WEDGWOOD: And final one, answer as you see fit. I am straying a little bit here, but shouldn't perhaps the principle of complementarity also apply to political bodies? For example, the Human Rights

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<sup>114</sup> See *Office of the Prosecutor*, INT'L CRIM. COURT, <http://www.icc-cpi.int/menus/icc/structure+of+the+court/office+of+the+prosecutor/biographies/the+pros+ecutor.htm> (last visited Jan. 19, 2012) (becoming the first ICC Prosecutor when he was unanimously elected on April 21, 2003); see also *Situations and Cases*, INT'L CRIM. COURT, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited Mar. 8, 2012) (listing fifteen cases arising out of seven situations that have been brought before the ICC by the Prosecutor); see, e.g., *The Office of the Prosecutor of the International Criminal Court Opens its First Investigation*, INT'L CRIM. COURT, <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation?lan=en-GB> (last visited Jan. 19, 2012) (announcing Ocampo's first investigation will be the alleged crimes committed on the territory of the Democratic Republic of Congo).

<sup>115</sup> See Rome Statute of the International Criminal Court, *supra* note 90, art. 17 (structuring the court as a court of last resort).

Council is now deciding whether to take up Sri Lanka,<sup>116</sup> and they may or may not have done an adequate job, but shouldn't national states first be given the prerogative of investigating their own war crimes before or in the future political bodies take the sort of quasi-investigative role?

HON. RICHARD GOLDSTONE: Well, thanks. But those two questions would really require more than a few minutes for response. So let me give a telegraphic response to both.

On the Rwanda situation, just by way of explanation, the issue is that there is critical evidence that emerged over the years that the army of Kagame, the present president of Rwanda<sup>117</sup> and the military genius who put an end to the genocide committed very serious war crimes involving many thousands of victims.<sup>118</sup>

And I can speak about it openly because this is an issue that didn't emerge during my watch, I am happy to say, that but arose during the watch of people who succeeded me as chief prosecutor of that tribunal.

By any standards, the violations committed by the RPF Army of Kagame should have been investigated. They fell within the jurisdiction of the court.<sup>119</sup> The prosecutors didn't do it—there can be no question—because they were aware, and it was said publicly by the government of Rwanda, "Prosecutor: If you investigate crimes committed by our Army, that's the end of our cooperation with you. We will break off all cooperation,"<sup>120</sup> and that would have been the end of the tribunal.

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<sup>116</sup> See Iqbal Athas, *Sri Lanka State of Emergency to end September 14*, CNN (Aug. 25, 2011), [http://articles.cnn.com/2011-08-25/world/sri.lanka.end.emergency\\_1\\_tamil-tiger-rebels-president-rajapaksa-foreign-minister-lakshman-kadargamar?\\_s=PM:WORLD](http://articles.cnn.com/2011-08-25/world/sri.lanka.end.emergency_1_tamil-tiger-rebels-president-rajapaksa-foreign-minister-lakshman-kadargamar?_s=PM:WORLD) (reporting on President Rajapaksa's decision not to sign a proclamation renewing the state of emergency).

<sup>117</sup> *Personal Profile*, OFFICE OF THE PRESIDENT, <http://www.presidency.gov.rw/presidents-profile> (noting that the Rwandan, Paul Kagame, took office Apr. 22, 2000).

<sup>118</sup> See Lars Waldorf, "*A Mere Pretense of Justice*": *Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal*, 33 *FORDHAM INT'L L.J.* 1221, 1225 (describing the ICTR prosecutor's decision to allow Rwandan investigation of Kagame's army's alleged war crimes).

<sup>119</sup> *CTR: Rwanda Tribunal Creates Rich Legal Precedent*, HUM. RTS. WATCH (Jan. 15, 2010), <http://www.commondreams.org/newswire/2010/01/15-3> ("The Rwanda tribunal's prosecutor failed to bring charges against members of the Rwandan Patriotic Front.").

<sup>120</sup> See Christopher Rudolph, *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals*, 55 *INT'L ORG.* 655, 665–71 (2001) (describing the shortcomings of the ICTR, including reasons the Rwandan government refused to cooperate with the tribunal).



The witnesses had to come from Rwanda. So a prosecutor is faced with a terrible choice. Do I do the honorable thing and prosecute across the board, or do I ignore these revenge attacks?

Let me make that clear that the attacks made by the RPF Army were of a very different caliber to the genocide committed by the previous government of Rwanda; eight hundred thousand people killed in a genocide over less than a hundred days.<sup>121</sup> These were revenge attacks by the Army of the victims.<sup>122</sup>

And the prosecutors, I believe, unfortunately, simply swept this under the rug. They didn't deal with it. They just didn't investigate, and the tribunal was able to continue to its conclusion.<sup>123</sup> I think what Yugoslavia tribunal was faced with a similar decision when Russia complained about NATO crimes in the bombing of Kosovo.<sup>124</sup> I think on a scale of 1 to 10 with 10 as the most serious, the Yugoslavian tribunal and the Rwanda I would have done—and I am speaking with hindsight—and I don't say it in any criticism of them at all, I think they were in a very difficult position. What I think should have been said is: our job, we were set up to investigate the genocide, eight hundred thousand people. We weren't set up to investigate revenge attacks. We could investigate them, but I am not going to jeopardize the major purpose of this tribunal, which is the genocide and the future of the people of Rwanda. I am not going to jeopardize this by being holier than thou and going against people who didn't commit genocide.

I think, incidentally, the tribunal were investigating genocide of 9's and 10's. I think the revenge attacks maybe were at 4, 5, and 6's. The NATO crimes were at 1's and 2's. They were not committed with intent. That there might have been negligence is another matter.

So I think I would have advised a pragmatic solution, and I would have had to live with it.

PROFESSOR SCHARF: And you will have to answer parts 2 and 3 afterwards, but everybody, please, again, join me in applause.

[Applause.]

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<sup>121</sup> Ingvar Carlsson, *The UN Inadequacies*, 3 J. INT'L CRIM. JUST. 837, 841 (2005).

<sup>122</sup> See GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 306 (1994).

<sup>123</sup> See generally JENNIFER TRAHAN, HUMAN RIGHTS WATCH, *GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: A DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* (2010) (full summary of the jurisprudence of the ICTR).

<sup>124</sup> *Russian Duma Condemns NATO*, BBC NEWS (Mar. 27, 1999), <http://news.bbc.co.uk/2/hi/europe/305762.stm>.

### **III. AMERICAN BRANCH COMMITTEES**

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## **American Branch of the International Law Association**

### **Statement of Policies and Disclaimers Concerning Committee Reports**

Reports of American Branch, International Law Association Committees are posted at [http://www.ila-americanbranch.org/ Branch\\_Comm.aspx](http://www.ila-americanbranch.org/Branch_Comm.aspx) and are published in these biennial *Proceedings*, which are sent to Branch members every other year.

**A Branch Committee report or other work product does not represent the official position of the American Branch. Although a Branch Committee may take a position on policies, events, or interpretations of international law, such a position represents solely the views of the Branch Committee.**

If an International Committee approved by the Executive Council of the International Law Association in London is working in the same area as a Branch Committee, the ABILA Committee may monitor or elaborate on the work of the International Committee, or it may work in another area entirely. If a Branch Committee takes a position on any matter being considered by an International Committee, such a position represents solely the views of the Branch Committee.

The position of a Branch Committee may not represent the views of all members of the Committee. In that case, a Committee may note that fact. A written statement of dissenting views may also accompany a Committee report.

Additional disclaimers or explanations may be attached to individual Branch Committee reports.

## **Procedures Governing the Adoption of Committee Positions and Related Matters (adopted by the Executive Committee, March 31, 2012)**

### **Membership of Committees**

All Branch committee members are required to be dues-paying members of the AB-ILA. Those who want to participate actively in committee work should be encouraged to join the AB-ILA. This requirement by no means prevents consultation with non-committee members about any particular project. The committee member who is managing the project should tell committee members and the Director of Studies, once the final product is submitted for review, about any such consultations so they are all aware of the input and its source.

Once per year the chairperson of each Branch committee should send an email to his or her committee members reminding them of the need to renew, ideally at approximately the same time that AB-ILA dues notices are distributed. Also once per year, generally a few months after membership renewals are due, the chairperson of each committee should consult with the person in charge of maintaining the membership roster to ensure that he or she has an up-to-date list of members, and update his or her emailing list accordingly. In the interim it is the responsibility of the chairperson to update his or her membership list should new members indicate a desire to join the committee.

### **Conflicts of interest**

At the outset of any program of work, the Chairperson of a committee should assess whether he himself, or she herself, has a conflict of interest and should inquire of the committee whether anyone has a conflict of interest and invite recusal on those grounds. Proponents of any particular committee action should indicate whether the proponent has any professional or financial interest or relationship, direct or indirect, in any procedure, including but not limited to litigation, regulatory action, or a lobbying campaign, when they propose the committee action. Many members will have some knowledge about or expertise in a particular area or even about a particular issue; that alone is not enough to amount to a conflict of interest, which requires an immediate, direct interest in a particular set of issues such that the perception of his or her involvement in any committee report or other action involving those issues would compromise the integrity of the process. Examples of such direct interest include involvement in litigation or other dispute resolution process, in a regulatory proceeding, or in a

lobbying campaign that directly relates to the subject matter on which the committee is proposing to act. Persons who want to participate in committee work in a “private” capacity notwithstanding professional affiliations should add a disclaimer clarifying that their work is done for themselves, and not on behalf of an otherwise interested organization. The work product should ordinarily identify anyone who has a conflict of interest and specify that the person did not participate in the project. If for some reason the person prefers not to be named, the committee Chair should keep internal records reflecting the conflict.

Any concerns or dispute over whether a person has a conflict of interest should be referred in the first instance to the Director of Studies for consultation about avoiding or managing the conflict. Should those consultations be insufficient to resolve any concerns, recourse may be had to the Executive Committee. Potential conflicts should be addressed earlier rather than later. In the event that a committee work product is found to be tainted by a conflict of interest its issuance could be precluded if different remedies would be unavailing to resolve any concerns raised by the particular conflict. Again this decision would be made in the first instance by the Director of Studies, with final recourse to the Executive Committee.

### **Committee Work Product**

Committees are expected and encouraged to engage in a wide variety of projects, including writing letters to decision-makers, issuing reports, writing books, drafting *amicus curiae* briefs, and the like. A Branch Committee report or other work product does not represent the position of the American Branch. Although a Branch Committee may take a position on policies, events, or interpretations of international law, such a position represents solely the views of the Branch Committee. All such work product must be identified as a product of the Branch Committee, rather than of the American Branch as a whole or of the ILA. Thus, all such communications should be distributed on Branch Committee letterhead, rather than on AB-ILA letterhead, to avoid the suggestion that the Branch places its imprimatur on a particular report or other action item.

Branch Committee communications should to the extent possible be products of the Committee as a whole. The Chairperson, or other proponent of the project, should involve the Committee membership as early as possible to participate in the drafting of the work product, and should where appropriate solicit responses during the drafting of any report. Once the project is finalized, the Chairperson should solicit approval of the product from all Committee members. This approval may be solicited by “negative clearance” – an email or

other communication asking for a response and specifying that the absence of a response will be deemed approval. Requiring affirmative approval from every Committee member would be cumbersome and would very likely inhibit or even stop Committee activity; hence the negative clearance option. The Chairperson, or other person soliciting approval, should give a reasonable amount of time for committee members to respond; ordinarily that would be at least one week. In emergency situations (e.g., proposed acts responding to imminent crises) the period might be reduced in consultation with the Director of Studies or, if the Director is not available, with the President and Vice-Presidents of AB-ILA.

A proposed Committee product that generated no opposition would be deemed “clean.” It should be prepared in accordance with the provisions below regarding signing and the designation of any conflicts and would be sent to the Director of Studies in accordance with the procedures listed below.

A proposed Committee product that generates opposition from among the members would be subject to further review. The committee Chair or other responsible person should attempt to take into account the concerns expressed and to accommodate them if possible without undermining the product itself. If that is not possible, the next step would be an assessment of the extent of the opposition and the extent of the support. The Chairperson or other responsible person should consult with the Director of Studies about the nature and extent of the opposition. Generally speaking, a few dissenters opposed by multiple proponents should not be allowed to derail a committee project. Those dissatisfied with a decision that a project can move forward can seek relief from the Executive Committee. In the event the project moves forward, but it does not win the unanimous support of the committee, the product should note that fact. Those members who wish their opposition to be noted by name should have that wish honored.

More elaborate procedures should govern work product that generates significant opposition. Such products should be reassessed in light of that opposition and referred to the Director of Studies, who will attempt to work with the committee to come to a resolution. Options to resolve such impasses include but are not limited to polling the committee membership to ascertain the positions of all willing to opine, revising the work product to take into account the opposition’s concerns, permitting the inclusion of dissents or concurrences, seeking outside opinions about the merits of each side, making minor editorial changes to alleviate concerns, and preventing the publication of the product altogether. Those dissatisfied with the decisions made by the Director of Studies can seek relief from the Executive Committee.

Committee communications are committee products. As such they will ordinarily go out under the name of the Chairperson of the committee and, as



described above, on committee letterhead. When an individual other than the Chair or group of individuals has been closely concerned with drafting the project, their names might be listed on the product so long as they agree explicitly to have their names included, and provided that the Chairperson and the AB-ILA Director of Studies agree that the designation would be appropriate.

All communications should contain the following disclaimer making clear that the communication reflects the views of the committee and not the views of the Branch:

“This communication reflects the views of the XXX Committee of the American Branch of the International Law Association, but does not represent the official position of the American Branch as a whole.”

The communication should ordinarily identify any individual whose conflict of interest prevented participation and indicate clearly that the person took no part in the preparation of the communication. If the person does not wish to be named publicly then the Chair should keep records indicating the steps that were taken to avoid the conflict of interest.

### **Director of Studies Review and Executive Committee Recourse**

The Director of Studies must review any work product that presents the committee's conclusions or recommendations outside the committee. The Director of Studies will have 10 days to review and comment on any “clean” work product. Those products that have attracted substantial opposition, as described above, might take longer than 10 days to resolve, but shall be dealt with as expeditiously as possible. As noted above, any concerns with the resolutions proposed by the Director of Studies can be referred to the Executive Committee for final decision.

The review of the Director of Studies is procedural only; the primary responsibility of the Director of Studies is to ensure that the committee has complied with the procedures described above. The Director of Studies does not review the substance of the product for the purposes of agreeing or disagreeing with it on the merits. The Director of Studies does, however, have the responsibility of assessing whether the work product would cast disrepute on the Branch and is otherwise in accordance with Branch policies and guidelines. In such a situation he or she can express the relevant concerns to the committee. In the event they cannot be resolved the committee or the Director of Studies can refer the matter to the Executive Committee.

## **Mandate for the *Ad Hoc* Committee on Nominations to International Courts and Tribunals**

- I. Recommendations on Nominations and Voting. The ad hoc Committee on Nominations to International Courts and Tribunals (the “ad hoc Committee”) is responsible for formulating and conveying ABILA’s recommendations to the relevant US government agency, representative or appointee regarding: (i) the nomination of candidates by the United States, or an entity or person(s) directly or indirectly appointed by the United States, for election to international courts and tribunals; and (ii) how the United States, or an entity or person(s) directly or indirectly appointed by the United States, should exercise its vote with regard to candidates nominated for election to international courts and tribunals by other countries.
  - A. *International courts and tribunals.* International courts and tribunals are permanent or temporary courts and tribunals of general or specialized jurisdiction created under international law and charged with applying international law to resolve disputes to which at least one party is a state including, but not limited to, the International Court of Justice, the International Tribunal for the Law of the Sea and ad hoc international criminal tribunals such as the International Criminal Tribunals for Rwanda and Yugoslavia.
  - B. *Scope of Mandate.* An international court or tribunal falls within the mandate of the ad hoc Committee where the United States, or an entity or person(s) directly or indirectly appointed by the United States, is entitled to nominate candidates for election to that court or tribunal and / or vote for candidates nominated for election to that court or tribunal.
  - C. *Criteria.* The ad hoc Committee bases its recommendations on the following list of criteria:
    1. Experience and familiarity with international law and the relevant court’s jurisprudence.

2. Ability to effectively interact with a small group consisting of individuals from different legal, political and cultural backgrounds.
3. Personal and professional integrity.
4. Any other criteria specified in the relevant court or tribunal's constitutive documents.

The ad hoc Committee shall also consider the representation of historically underrepresented groups on the international court or tribunal in question, as well as geographical diversity and representation of different legal cultures, when formulating its proposed recommendations.

- II. Periodic Reviews of Current Rules, Practices, Conventions. The ad hoc Committee is also responsible for undertaking periodic reviews of the rules, conventions and practices applicable to nomination and election procedures for the international courts and tribunals falling within its mandate, and formulating and conveying to the relevant US government agency and/or international organization ABILA's recommendations on the maintenance or revision of such rules, conventions and practices.
- III. Power to Review Mandate and Procedures. The ad hoc Committee may review and submit proposed revisions to its own mandate and procedures to the Executive Committee for consideration and approval.
- IV. Structure. The ad hoc Committee consists of a Chair, a Secretary and three other committee members. Each member shall have one vote, and all decisions will be taken based on a majority vote. The Chair shall employ all reasonable measures to ensure that decisions are made by consensus. Where a committee member has a serious objection to a decision of the ad hoc Committee the Chair may, in his discretion, note that objection in the ad hoc Committee's recommendations and/or provide that committee member with an opportunity to append a dissent thereto.

## **Procedures for the *Ad Hoc* Committee on Nominations to International Courts and Tribunals**

- I. Introduction. The procedures outlined herein contemplate two categories of activities falling within the mandate of the ad hoc Committee: (i) where the ad hoc Committee acts either sua sponte or pursuant to a request from the Legal Adviser to the US Department of State, or another agency, representative or appointee of the US government to make recommendations with respect to a position on an international court or tribunal; and/or (ii) where the ad hoc Committee acts with respect to its periodic review of the rules, conventions and practices applicable to nomination and election procedures for the international courts and tribunals falling within its mandate.
- II. Recommendations.
  - A. **Regular Procedure**
  - B. The Chair of the ad hoc Committee shall keep apprised of the status of positions on international courts and tribunals with regard to which the United States may be called to nominate candidates for election or vote for nominees. Where ABILA receives a request from the Legal Adviser to the US Department of State, or another agency, representative or appointee of the US government related to such nomination of candidates ("Request"), such Request shall be transmitted to the Chair of the ad hoc Committee.
  - C. Upon either (i) learning that the United States will be required to, or will have the opportunity to, nominate candidate(s) for election to an international court or tribunal, or vote for nominees, or (ii) receiving a Request, the Chair of the ad hoc Committee shall convene a meeting of the ad hoc Committee to solicit views. Following the meeting, the Secretary shall prepare a written proposal of the ad hoc Committee's recommendations and/or views regarding potential candidates for nomination or slated nominees ("Proposal"). Quorum will be reached if three members of the ad hoc Committee can participate in a meeting.

1. In recognition of, and consistent with, the general practice of the National Groups of the five permanent members of the United Nations Security Council to not openly oppose one another's nominations to the International Court of Justice, the ad hoc Committee will refrain from offering views with respect to the candidates nominated by the National Groups of the four permanent members other than the United States.
2. The Chair shall give notice of the Proposal by email to the members of the Executive Committee and Honorary Vice-Presidents and solicit further recommendations and/or views regarding potential candidates for nomination or slated nominees.
  - a. The Chair shall set a reasonable period (the "solicitation period") for the members of the Executive Committee and Honorary Vice-Presidents to provide such recommendations/views. In setting the length of the solicitation period, the Chair shall take account of the required timing of the nomination, but in no event should the solicitation period be less than ten business days.
3. After the close of the solicitation period and upon full consideration of the further views of the Executive Committee and/or Honorary Vice-Presidents, the ad hoc Committee shall vote upon and finalize the Proposal. The Chair shall then convey the Proposal, as revised, to the relevant agency, representative or appointee of the US government no later than ten business days prior to the date on which the United States must make its nomination(s) or exercise its vote.

#### **D. Expedited Procedure**

1. The “Regular Procedure” should be followed unless it would prevent the ad hoc Committee from conveying to the relevant US government agency, representative or appointee ABILA’s recommendations prior to any relevant deadlines, such as the date by which the United States must submit its nomination(s) or vote for its preferred nominees. In that event, the following expedited procedure shall be adopted:
2. As soon as practicable after the Proposal is prepared by the ad hoc Committee pursuant to the steps set forth above, the Chair shall give notice of the Proposal by email to the members of the Executive Committee and Honorary Vice-Presidents and solicit immediate further recommendations and/or views regarding potential candidates for nomination or slated nominees. The length of the solicitation period is left to the reasonable discretion of the Chair, and there shall be no minimum length under the expedited procedure.
3. After the close of the solicitation period and upon full consideration of the further views of the Executive Committee and/or Honorary Vice-Presidents, the ad hoc Committee shall immediately vote upon and finalize the Proposal. The Chair shall then immediately convey the Proposal, as revised, to the relevant agency, representative or appointee of the US government.

**III. Periodic Reviews of Current Rules, Practices, Conventions.** If, after reviewing the rules, conventions and practices applicable to nomination and election procedures for the international courts and tribunals falling within its mandate, the ad hoc Committee decides to formulate recommendations on the maintenance or revision of such rules, conventions and practices:

- A. The ad hoc Committee will submit its proposed recommendations in writing to the members of the Executive Committee at least ten business days prior to an Executive Committee meeting.
- B. If the Executive Committee decides to adopt the proposed recommendations of the ad hoc Committee, the Chair of the ad hoc Committee shall finalize the recommendations (incorporating any comments or amendments from the Executive Committee) and convey them to the relevant agency of the US government and/or international organization

**INTERNATIONAL CRIMINAL COURT COMMITTEE**

**THE CRIME OF AGGRESSION:  
THE NEW AMENDMENT EXPLAINED  
QUESTIONS & ANSWERS**



January 2011

## THE CRIME OF AGGRESSION: THE NEW AMENDMENT EXPLAINED QUESTIONS & ANSWERS

### WHAT OCCURRED THIS PAST JUNE AT THE ICC REVIEW CONFERENCE AS TO THE CRIME OF AGGRESSION?

In Kampala, Uganda, from May 31-June 11, 2010, at the first Review Conference on the International Criminal Court (the “ICC”), States Parties to the ICC (“States Parties”) forged an historic agreement, adopting an amendment to the Rome Statute defining the crime of aggression and agreeing on conditions for the ICC’s exercise of jurisdiction over it.<sup>1</sup>

### DID THE U.S. VOTE FOR THE AMENDMENT?

No, but the U.S. did not oppose it. The U.S. delegation was present at the negotiations as a Non-State Party observer. While the U.S. delegation voiced initial concerns about the definition in particular,<sup>2</sup> it was able to add four “understandings” to the definition, and actively participated in the remainder of the negotiations particularly concerning the conditions for the exercise of jurisdiction. By the end of the conference, the U.S. (which, as a Non-State Party, was not eligible to vote) was, however, not opposed to the amendment (*i.e.*, the U.S. did not lobby other States Parties to oppose the amendment), which passed by “consensus”—that is, general agreement of all States Parties present.

### WILL THE AMENDMENT TAKE EFFECT NOW?

No. It first requires a vote by States Parties to the Rome Statute (either 2/3<sup>rds</sup> of all States Parties or “consensus”) to occur after January 1, 2017, ratification of

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<sup>1</sup> At the Review Conference, there were also sessions devoted to a “stocktaking” of the field of international justice, and two other Rome Statute amendment proposals, one of which was adopted (the so-called “Belgian” war crimes amendment), and the other of which was deferred for later consideration (whether to delete Rome Statute article 124).

<sup>2</sup> Statement by Harold Hongju Koh, Legal Adviser U.S. Department of State, Review Conference of the International Criminal Court, Kampala, Uganda, 4 June 2010, available at <[www.state.gov/s/l/releases/remarks/142665.htm](http://www.state.gov/s/l/releases/remarks/142665.htm)> [last visited 22 September 2010]; *see also* Statement by Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes, Review Conference of the International Criminal Court Kampala, Uganda, 1 June 2010, available at <[www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Statements/ICC-RC-gendeba-USA-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-USA-ENG.pdf)> [last visited 22 September 2010].

the amendment by 30 States Parties, and the passage of 1 year after the 30<sup>th</sup> ratification.<sup>3</sup> Thus, if 30 States Parties ratify the amendment by January 1, 2016, and a positive vote occurs on **January 2, 2017, that is the earliest date ICC jurisdiction over the crime of aggression could commence.**

## **WILL ICC JURISDICTION AS TO AGGRESSION COVER U.S. NATIONALS?**

**No.** Many could argue that the rule of law should apply to all states on an equal footing, and this principle should apply particularly where one is reinforcing a core foundational norm of the U.N. Charter, Article 2(4)'s prohibition on the aggressive use of force.

The Rome Statute, however, operates on a consent-based regime, where whether a state has ratified the Rome Statute is extremely significant in determining whether the ICC possesses jurisdiction.<sup>4</sup> The aggression amendment continues with a consent-based approach vis-à-vis the crime of aggression.

The jurisdictional regime ultimately agreed upon provides:

5. In respect of a State that is not a party to this Statute, **the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.**<sup>5</sup>

The U.S. is not a party to the Rome Statute. Thus—regardless of one's views as to whether the U.S. should need to exempt itself from such jurisdiction (an exemption which the U.S. hopefully will not need to utilize)—it is clear that even after jurisdiction commences, aggression committed by U.S. nationals or on U.S. territory would be excluded from the ICC's jurisdiction.<sup>6</sup>

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<sup>3</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, available at <www.icc-cpi.int/iccdocs/asp\_docs/Resolutions/RC-Res.6-ENG.pdf> [last visited 22 September 2010], Annex I, Art. 15*bis*, paras. 2-3, Art. 15*ter*, paras. 2-3.

<sup>4</sup> Ratification of the Rome Statute creates ICC jurisdiction vis-à-vis crimes committed in the territory of, or by a national of, a State Party. Rome Statute, art. 12. The only other way that jurisdiction can exist is following a Security Council referral. Rome Statute, art. 13.

<sup>5</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 15*bis*, para 5.

<sup>6</sup> The theoretical possibility of a U.N. Security Council referral would exist—again, only after 1/1/17 at the earliest—but with the U.S. as a permanent member of the Security Council, it would be in a position to veto such a referral. If, one day, the U.S. were to

This exemption for Non-States Parties vis-à-vis the crime of aggression is broader than the current exemption for Non-States Parties in the Rome Statute. It would exclude the crime of aggression committed by a Non-State Party national on the territory of a State Party, and the crime of aggression committed by a State Party national on the territory of a Non-State Party. Neither of these situations is true for ICC jurisdiction as to genocide, war crimes and crimes against humanity, where jurisdiction applies to crimes committed on the territory of States Parties (regardless of the perpetrator's nationality), and to the nationals of States Parties (even on the territory of a Non-State Party).

### **WOULD THE CRIME COVER ACTS BY ORDINARY SOLDIERS?**

**No.** Under the definition agreed upon (set forth in Appendix A hereto), the crime of aggression is committed “by a person in a position effectively to exercise control over or to direct the political or military action of a State.”<sup>7</sup> Thus, the crime is solely a “leadership crime.” Ordinary soldiers would never be covered by the definition. This understanding is further confirmed by the amendment to Rome Statute Article 25, also agreed on at the Review Conference, which would insert into the article on individual criminal responsibility a new paragraph 3*bis* stating: “In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.”<sup>8</sup>

### **IS IT A NEW IDEA TO PROSECUTE THE CRIME OF AGGRESSION?**

**No.** Both the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East (Tokyo) prosecuted the crime of aggression,<sup>9</sup> the U.S. having playing a leading role in the work of both

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become a party to the Rome Statute, the U.S. would still be in a position to veto the referral of an aggression case involving the U.S. If the U.S. were to ratify or accept the aggression amendment, it could also avoid ICC jurisdiction as to the crime of aggression by filing an “opt out” declaration (discussed below). Many States Parties view the ability to avoid aggression jurisdiction as too extensive.

<sup>7</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 8*bis*, para. 1.

<sup>8</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, para 5.

<sup>9</sup> The Nuremberg (London) Charter defines “crimes against peace” as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.” Charter of the International Military Tribunal, Art. 6(a). *See also* Charter of the International Military Tribunal for

Tribunals. The Judgment of the International Military Tribunal at Nuremberg describes aggression as “the supreme international crime”:

The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world.

To initiate a war of aggression, therefore, is not only an international crime; it is *the supreme international crime* differing only from other war crimes in that it contains within itself the accumulated evil of the whole.<sup>10</sup>

While aggressive use of force is prohibited under Article 2(4) of the U.N. Charter,<sup>11</sup> that prohibition has not fully prevented recourse to such force. Prosecuting the crime of aggression is intended to reinforce this prohibition.

#### **WHAT DOES THE DEFINITION CONTAIN? THAT IS, WHAT INDIVIDUAL BEHAVIOR CONSTITUTES THE CRIME OF AGGRESSION?**

The definition of the crime of aggression ultimately adopted at the Review Conference, which will be located in a new Article *8bis* to the Rome Statute, provides:

1. For the purpose of this Statute, “crime of aggression” means **the planning, preparation, initiation or execution**, by a person in a position effectively to exercise control over or to direct the political or military action of a State, **of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter** of the United Nations.<sup>12</sup>

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the Far East (Tokyo), Art. 5(a) (similar, adding that the war could be declared or undeclared); *see also* Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55 (1946), art. II (1)(a).

<sup>10</sup> Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 October 1945 - 1 October 1946 (1947-1949), Vol. XXII International Military Tribunal 427 (1948), at [www.loc.gov/rr/frd/Military\\_Law/NT\\_major-war-criminals.html](http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html) (emphasis added).

<sup>11</sup> U.N. Charter, art. 2(4).

<sup>12</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, *8bis*, para. 1 (emphasis added).

## WHY IS A “MANIFEST VIOLATION” OF THE U.N. CHARTER REQUIRED?

The crime of aggression will only apply when a state act of aggression by “its character, gravity and scale, constitutes a *manifest violation* of the Charter of the United Nations.”<sup>13</sup> Thus, to determine what is a “manifest” violation, one must assess the state act’s “character, gravity and scale.”<sup>14</sup> This requirement is intended to exclude “borderline cases”<sup>15</sup> or those “falling within a grey area.”<sup>16</sup>

## WOULD SMALL-SCALE INCURSIONS OR HUMANITARIAN INTERVENTION BE COVERED?

**No.** As noted above, the definition excludes “borderline cases” or those “falling within a grey area.” By excluding factually “borderline cases,” it would exclude any minimal border incursions that do not meet the required “gravity” or “scale” to constitute a “manifest” Charter violation.<sup>17</sup> It would also exclude legal “borderline cases” (that is, debatable cases, where a state’s act due to its “character” does not constitute a “manifest” Charter violation). The latter means that humanitarian intervention is not covered.<sup>18</sup> Additionally, Security Council

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<sup>13</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 8*bis*, para. 1 (emphasis added).

<sup>14</sup> An understanding, proposed by the U.S. at the Review Conference, and adopted, makes clear that all three factors would need to be considered. See Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex III, para. 7 (“It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a ‘manifest’ determination. No one component can be significant enough to satisfy the manifest standard by itself.”).

<sup>15</sup> February 2009 SWGCA Meeting, in *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003-2009*, edited by Stefan Barriga, Wolfgang Danspeckgruber and Christian Wenaweser (hereinafter, “*The Princeton Process*”), p. 51, para. 13.

<sup>16</sup> June 2008 SWGCA Meeting, in *The Princeton Process*, p. 87, para. 68.

<sup>17</sup> Thus, for example, “the requirement that the character, gravity and scale of an act of aggression amount to a manifest violation of the Charter would ensure that a minor border skirmish would not be a matter for the Court to take up.” Stefan Barriga, in *The Princeton Process*, p. 8.

<sup>18</sup> Excluding legally debatable cases means that humanitarian intervention is not covered. See Claus Kreß (German delegation), ‘Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus,’ 20 *Eur. J. of Int’l L.* 1129, p. 1140. See also Elizabeth Wilmschurst (UK delegation), in R. Cryer, H. Friman, D. Robinson, and E. Wilmschurst (eds.) *An Introduction to International Criminal*

authorized humanitarian intervention would always be clearly excluded, as would humanitarian intervention that fits under Article 51's authorization of collective self-defence. The exclusion of "grey area" cases is very much in line with the Rome Statute's preamble, which makes clear that the ICC is intended to prosecute only the most serious crimes.<sup>19</sup>

### **CAN THE CRIME OF AGGRESSION OCCUR ABSENT A STATE ACT OF AGGRESSION?**

**No.** The next paragraph of the definition (*see* Appendix A hereto) defines the state's "act of aggression," which is also a necessary requirement. Unlike other ICC crimes, it is impossible for an individual acting alone, absent state action, to commit the crime of aggression.<sup>20</sup>

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*Law and Procedure* (2<sup>nd</sup> ed., 2010), pp. 326, 327 ("humanitarian intervention" is a grey area). Additional provisions in the Rome Statute that protect against bringing legally borderline cases include: (i) Article 31(3)'s exclusion of criminal responsibility if conduct is permissible under applicable law; (ii) Article 21's inclusion of principles and rules of international law; (iii) the requirement of proof beyond a reasonable doubt, and (iv) the principle *in dubio pro reo* (a defendant may not be convicted when doubts about guilt remain). *See* Jennifer Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference,' *International Criminal Law Rev.* 11 (2011) 49–104, n. 43.

<sup>19</sup> *See* Rome Statute, preamble ("[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished . . .").

<sup>20</sup> While it is possible to imagine an individual acting alone might engage in "planning," "preparation" or "initiation" of an act of aggression, the Amendments to the Elements of Crimes suggest that an act of aggression—that is, the act by the state—must also occur. *See* Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex II, element 3 ("The act of aggression . . . was committed."). Given that "attempt" is contained in Rome Statute Article 25, and will apply to the crime of aggression, one way to reconcile having "attempt" as a form of individual criminal responsibility, with the need for an act of aggression is as follows: "attempts" at "planning," "preparation," "initiation" or "execution" would be covered, but there would still need to be a state act of aggression for purposes of article 8bis. Indeed, if an individual engaged in planning, preparation, initiation or execution, but no state act of aggression resulted, that would seem unlikely to meet the gravity threshold necessary for Rome Statute crimes. *See* Rome Statute, preamble ("[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished . . .").

**IS ONLY A WAR OF AGGRESSION COVERED BY THE DEFINITION?**

**No.** Criminalizing only a full-scale “war” had been previously debated and rejected; states wanted to cover uses of force that fell short of full-scale war.<sup>21</sup> Thus, the definition defines a state “act of aggression” as follows:

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
  - a) The **invasion** or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
  - b) **Bombardment** by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
  - c) The **blockade** of the ports or coasts of a State by the armed forces of another State;
  - d) An **attack by the armed forces** of a State on the land, sea or air forces, or marine and air fleets of another State;
  - e) The **use of armed forces** of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
  - f) The action of a State in **allowing its territory**, which it has placed at the disposal of another State, **to be**

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<sup>21</sup> See June 2006 SWGCA Meeting, paras. 21-24, in *The Princeton Process*, p. 144 (reflecting the issue being debated).

- used** by that other State **for perpetrating an act of aggression** against a third State;
- g) The **sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries**, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.<sup>22</sup>

## **WOULD ALL LISTED ACTS CONSTITUTE THE “CRIME OF AGGRESSION?”**

**No.** The definition of the “act of aggression” (quoted above) includes a list of acts from General Assembly resolution 3314, each of which qualify as an “act of aggression.” To constitute the “crime of aggression,” the act must still by “its character, gravity and scale, [need to] constitute[] a manifest violation of the Charter of the United Nations.” So, as defined, not every blockade, bombardment or attack listed would necessarily constitute *the crime of aggression*, but only the most egregious situations. This concept is also consistent with the Rome Statute’s preamble, which makes clear that the ICC is intended to prosecute only the most serious crimes,<sup>23</sup> and with one of the “understandings”—proposed by the U.S.—also adopted at the Review Conference.<sup>24</sup>

## **WILL THE DEFINITION IMPACT SECURITY COUNCIL DETERMINATIONS AS TO AGGRESSION?**

**No.** Article 39 of the U.N. Charter states that “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or *act of aggression* . . .”<sup>25</sup> for purposes of determining whether to authorize action under Chapter VII. States Parties to the Rome Statute do not have the competence to tell the Security Council how to apply these provisions. The Security Council’s power emanates from the U.N. Charter, and is unaffected by Rome Statute amendments.

<sup>22</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 8*bis*, para. 2 (emphasis added).

<sup>23</sup> See Rome Statute, preamble (“[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished . . .”).

<sup>24</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex III, para. 6 (“aggression is the most serious and dangerous form of the illegal use of force . . .”). For discussion of the U.S. proposal, and the understanding ultimately adopted at the Review Conference, see Trahan, *supra* note 18, Part 2.4.

<sup>25</sup> U.N. Charter, Art. 39 (emphasis added).



### IS THE LIST OF ACTS OF AGGRESSION A COMPLETE LIST?

Pursuant to paragraph 2, “[a]ny of the following acts . . . shall, in accordance with United Nations General Assembly resolution 3314 . . . qualify as an act of aggression.”<sup>26</sup> That language arguably leaves open the possibility that other acts might be covered, thereby potentially allowing for new forms of aggressive state action (although they too would need to meet the qualifier of a “manifest” violation of the Charter to constitute the crime of aggression).<sup>27</sup> There was much debate in negotiations held prior to Kampala as to whether the list of acts from resolution 3314 should be a “closed” or “open” list. Ultimately, it was resolved to consider it a “semi-open” or “semi-closed” list<sup>28</sup> in that the list is not closed, but any other act would need to meet the other qualifiers in the definition, which effectively “closes” the list.

### WILL THE SECURITY COUNCIL BE ABLE TO REFER AGGRESSION CASES TO THE ICC OR DEFER PENDING CASES?

**Yes.** The jurisdictional regime adopted in Kampala (reflected in new Articles 15*bis* and 15*ter*—set forth in Appendixes B-C hereto),<sup>29</sup> permits the Security Council, pursuant to Article 15*ter*, to refer situations, including cases of suspected aggression, to the ICC. That is also the case with respect to the other Rome Statute crimes (genocide, war crimes and crimes against humanity).<sup>30</sup> The Security Council will also be able to defer aggression cases if necessary, using its authority under Chapter VII of the U.N. Charter, as is also the case with the other Rome Statute crimes.<sup>31</sup>

### COULD AGGRESSION CASES START IN ANY WAY OTHER THAN SECURITY COUNCIL REFERRAL?

**Yes.** Under the definition agreed upon, the other way that aggression cases could commence, pursuant to Article 15*bis*, would be as follows. If there is a

<sup>26</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 8*bis*, para. 2.

<sup>27</sup> See Roger S. Clark, ‘Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court, Kampala, 31 May – 11 June 2010,’ 2 *Göttingen J of Int’l L* 689, 696 (2010) (“The list of ‘acts’ in Article 8*bis* (2), taken verbatim from Resolution 3314, may be open-ended to the extent that it does not say that no *other* acts can amount to aggression [but additional acts would need to be interpreted narrowly and satisfy the threshold clause].”).

<sup>28</sup> Stefan Barriga, in *The Princeton Process*, p. 11.

<sup>29</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 15*bis* & 15*ter*.

<sup>30</sup> See Rome Statute, art. 13.

<sup>31</sup> See Rome Statute, art. 16.

State Party referral or the Prosecutor acts *proprio motu* (on his own motion) and the Prosecutor concludes there is a reasonable basis to proceed, he or she would first ascertain whether the Security Council has made a determination of an act of aggression.<sup>32</sup> If the Security Council has made such a determination, the Prosecutor could proceed (*see* above). But, if, six months after notification, the Security Council has made no such determination, then **the Pre-Trial Division could authorize the commencement of an investigation**, assuming there otherwise is appropriate jurisdiction (*see* below).<sup>33</sup> The ICC's Pre-Trial Division would consist of an expanded Pre-Trial Chamber of not less than six judges.

### **WHY ARE THERE TWO DIFFERENT “FILTER” MECHANISMS BY WHICH INVESTIGATIONS COULD COMMENCE—EITHER THE SECURITY COUNCIL OR THE ICC PRE-TRIAL DIVISION?**

At the Review Conference, and in negotiations long before, stark differences of opinion emerged as to how jurisdiction should be exercised as to the crime of aggression.

Some states argued that only the Security Council should be able to refer aggression cases, relying upon Article 39 of the U.N. Charter which states that “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or *act of aggression* . . . ,”<sup>34</sup> as well as Article 5(2) of Rome Statute, which states that any provision defining the crime of aggression and setting out conditions under which the Court shall exercise jurisdiction “shall be consistent with the relevant provisions of the Charter of the United Nations.”<sup>35</sup>

Other states that maintained that the Security Council should not have such a role, or not such an exclusive role, generally argued that Article 24 speaks of a primary but not exclusive role of the Security Council and/or that Article 39 is used for the Security Council to determine whether Chapter VII actions should be undertaken, not for purposes of applying international criminal law. These states argued that to give a political body such control over the Court would undermine its independence as a judicial institution and could make aggression prosecutions look politically, and not judicially, motivated. Moreover, there was a concern that the historical reluctance of the Security Council to determine when acts of aggression have occurred could paralyze the Court and undermine

<sup>32</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 15*bis*, para. 6.

<sup>33</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 15*bis*, para. 8.

<sup>34</sup> U.N. Charter, Art. 39 (emphasis added).

<sup>35</sup> Rome Statute, Art. 5(2).

its effectiveness. States that supported not giving the Security Council a role, or not an exclusive role, saw another possibility to be the ICC authorizing cases itself (an “internal filter”).

The agreement reached at the Review Conference utilizes both methods. This represents a compromise designed to at least partially satisfy both sides in the debate. The role of the Security Council is preserved, as it will be given first option to act, for an initial six month period.<sup>36</sup> Yet, thereafter, the ICC will also be able to act, independently, if authorized by the Pre-Trial Division (acting as a “filter”) after State Party or *proprio motu* referral (which would be the “trigger”), assuming jurisdiction also exists.<sup>37</sup>

### **WILL DETERMINATIONS BY THE GENERAL ASSEMBLY OR INTERNATIONAL COURT OF JUSTICE OF ACTS OF AGGRESSION PLAY A ROLE?**

**Not directly.** During earlier negotiations, it had been proposed that alternatives to having the Security Council make a determination of an act of aggression, or the ICC act as its own judicial “filter,” would be to involve the General Assembly or International Court of Justice (“ICJ”). Neither such method was ultimately adopted; hence, the determination of an act of aggression by either body has not become an alternative jurisdictional condition. (The ICJ might, in the course of an advisory or contentious case, make a determination of an act of aggression, as might the General Assembly in a resolution, but neither such determination would authorize commencement of an ICC investigation.)<sup>38</sup>

### **COULD A STATE PARTY THAT HAS RATIFIED THE AGGRESSION AMENDMENT OPT OUT OF ICC JURISDICTION AS TO THE CRIME OF AGGRESSION?**

**Yes.** Under the jurisdictional regime agreed upon, States Parties would be able to “opt out” of aggression jurisdiction by lodging a declaration with the ICC Registrar. The text of Article 15*bis* states:

4. **The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept**

<sup>36</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 15*bis*, para. 8.

<sup>37</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 15*bis*.

<sup>38</sup> An ICC investigation could follow in either situation, but it would first require either Security Council referral, or State Party referral or *proprio motu* action followed by Pre-Trial Division authorization.

**such jurisdiction by lodging a declaration with the Registrar.** The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.<sup>39</sup>

## **WHAT AMENDMENT PROCEDURE WAS AGREED ON TO ACCOMPLISH THE AMENDMENT?**

The amendment was “adopted” at the Review Conference. There were two possible methods that could have been utilized for the amendment to enter into force—Rome Statute Article 121(4) or Article 121(5). Under Article 121(4), once seven-eighths of States Parties ratify an amendment, the amendment enters into force one year thereafter for all States Parties to the Rome Statute<sup>40</sup>—including the one-eighths not ratifying. Under **Article 121(5)—which was utilized**<sup>41</sup>—the amendment only enters into force for those States Parties that accept or ratify it, one year after their acceptance or ratification.<sup>42</sup> However, in this case, exercise of jurisdiction for the aggression amendment will be delayed—requiring a further vote and 30 ratifications (*see* above); thus, as to the first 29 states that ratify or accept the aggression amendment, that will only cause the amendment to enter into force for those states, but jurisdiction will not yet be able to commence.

## **COULD THE ICC EXERCISE JURISDICTION OVER A STATE PARTY THAT HAS NOT RATIFIED THE AGGRESSION AMENDMENT?**

**Potentially.** Rome Statute Article 5(2) mandated States Parties to determine the conditions for the exercise of jurisdiction vis-à-vis the crime of aggression,<sup>43</sup> which occurred at the Review Conference. At the Review Conference, an “opt out” methodology was adopted, whereby States parties could “opt out” of aggression jurisdiction (*see* above). In the Review Conference Resolution, Rome Statute Article 12(1) was also invoked, which provides that States Parties have already accepted jurisdiction over the crime of aggression.<sup>44</sup> The implication of this is that after the first 30 ratifications and the activation vote are achieved, all Rome Statute States Parties could be covered by jurisdiction (for cases triggered by State Party referral or *proprio motu* initiation) unless the

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<sup>39</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I, 15*bis*, para. 4 (emphasis added).

<sup>40</sup> Rome Statute, Art. 121(4).

<sup>41</sup> *See* Resolution RC/Res.6, advance version, 28 June 2010, 18:00, para. 1.

<sup>42</sup> Rome Statute, Art. 121(5).

<sup>43</sup> *See* Rome Statute, Art. 5(2).

<sup>44</sup> *See* Rome Statute, Art. 12.

State Party exercises an opt out declaration. (Any state, of course, could be covered if there is a Security Council referral.) Alternative formulations have been suggested that at least the victim State Party must have ratified the amendment; others suggest that neither the aggressor nor victim State Party would have to have ratified the amendment.

Another construction, however, is also being offered, although it does not appear to have been what was agreed upon at the Review Conference. The second sentence of Rome Statute Article 121(5) states: “In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.”<sup>45</sup> Thus, under this argument, the plain meaning of this language is that the ICC may only exercise jurisdiction—once jurisdiction commences—over a State Party that has ratified or accepted the amendment (that is, at least if it is the “aggressor” state).<sup>46</sup>

This alternative construction, however, does not consider that Article 121(5)’s second sentence covers the exercise of jurisdiction. Pursuant to Article 5(2), States Parties at the Review Conference were authorized to establish conditions for the exercise of jurisdiction over the crime of aggression, which meant that they could adopt a construction that did not endorse a literal reading of 121(5)’s second sentence and instead took full account of article 12(1). This appears to have been what was done.

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<sup>45</sup> Rome Statute, Art. 121(5).

<sup>46</sup> A strict reading would also suggest that the victim state should have ratified as well. States Parties, however, had focused much more discussion on whether the aggressor state would need to consent. See Trahan, *supra* note 18, Part 1.3.1 (discussing voting at the Resumed Eighth Session of the Assembly of States Parties, where States Parties were asked to vote for certain options, with two alternatives being whether the aggressor state or victim state would have to have accepted the amendment; there was no vote taken whether *both* would have to do so).

**DID THE U.S. TAKE PART IN THE YEARS OF NEGOTIATIONS ON THE CRIME OF AGGRESSION PRECEEDING THE REVIEW CONFERENCE?**

**No.** Prior to the Review Conference, there were approximately 10 years of negotiations regarding the crime of aggression, almost none of which the U.S. attended. From 1999-2002, there were various “Preparatory Commission” meetings covering the crime of aggression.<sup>47</sup> Thereafter, the Assembly of States Parties (“ASP”) created a Special Working Group on the Crime of Aggression (“the Special Working Group”), which met from 2003-2009.<sup>48</sup> The United States did not attend the meetings of the Special Working Group, although they were open to Non-States Parties. With the change to the administration of President Obama, the U.S. began to attend the negotiations, commencing with the Eighth Assembly of States Parties meeting in November 2009.

**WERE THERE ADVERSE CONSEQUENCES OF THE U.S. NOT ATTENDING THE EARLIER NEGOTIATIONS?**

**Yes.** One adverse consequence of entering the negotiations late was that agreement on the definition and elements of the crime (also adopted at the Review Conference)<sup>49</sup> were basically already concluded when the U.S. joined the negotiations. Thus, the U.S. had limited ability to weigh in on those issues. By contrast, the issues of the conditions for the exercise of jurisdiction and the amendment procedure were much more undecided when the U.S. joined negotiations; consequently, the U.S. was much more able to participate in those negotiations.

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<sup>47</sup> The Preparatory Commission was charged with various work, including “proposals for a provision on aggression.” See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, done at Rome on 17 July 1998, U.N. Doc. A/CONF.183/10, Annex I, Resolution F.

<sup>48</sup> The work of the Special Working Group has been extensively chronicled in the recent book *The Princeton Process*, note 15 *supra*.

<sup>49</sup> See Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex II. (The elements of the crime of aggression are set forth in Appendix D hereto.)

**DOES THE CONCLUSION OF A CRIME OF AGGRESSION MEAN THE U.S. HAS REASON TO REVERSE ITS CONSTRUCTIVE ENGAGEMENT WITH THE ICC?**

**No, not at all.** The U.S. delegation clearly went to the Review Conference not wanting any definition of aggression agreed upon. While they did not achieve that, the delegation did obtain something of tremendous value, as perceived by the U.S. negotiating team: a robust exemption for the nationals of Non-States Parties from aggression prosecution. (*See* above.) Regardless of one's views as to whether the U.S. should need such an exemption and the optics of having insisted upon it, the outcome of the Review Conference provides no reason for the U.S. to turn its back on the ICC. The U.S. stands well-poised to continue on its course of positive and constructive engagement with the Court.<sup>50</sup>

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<sup>50</sup> *See, e.g.*, "U.S. Engagement With The International Criminal Court and The Outcome Of The Recently Concluded Review Conference," Special Press Briefing by Harold H. Kohn and Stephen J. Rapp, Washington D.C., June 15, 2010, at [www.state.gov/s/wci/us\\_releases/remarks/143178.htm](http://www.state.gov/s/wci/us_releases/remarks/143178.htm) [last viewed 11/28/10] (characterizing the change in relationship of the US vis-à-vis the ICC from one of "hostility" under the past administration to a current one of "positive engagement").

## APPENDIX A

The definition of the crime of aggression agreed upon at the Review Conference is as follows:

### **Article 8 bis**

#### **Crime of aggression**

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- h) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- i) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- j) The blockade of the ports or coasts of a State by the armed forces of another State;
- k) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;



- l) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- m) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- n) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.<sup>51</sup>

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<sup>51</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I.

## APPENDIX B

The following provision covering exercise of jurisdiction based on State Party referral or *proprio motu* action was also agreed upon:

### **Article 15 *bis***

#### **Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute;
4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.
5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether

the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.

9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.<sup>52</sup>

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<sup>52</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I.

## APPENDIX C

The following provision covering exercise of jurisdiction based on a Security Council referral was also agreed upon:

### **Article 15 *ter***

#### **Exercise of jurisdiction over the crime of aggression (Security Council referral)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute;
4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.<sup>53</sup>

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<sup>53</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex I.

## APPENDIX D

The following elements of the crime of aggression were also agreed upon:

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.\*
3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.<sup>54</sup>

\* “With respect to an act of aggression, more than one person may be in a position that meets these criteria.”

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<sup>54</sup> Resolution RC/Res.6, advance version, 28 June 2010, 18:00, Annex II.

**INTERNATIONAL CRIMINAL COURT COMMITTEE**

**LIBYA & THE INTERNATIONAL CRIMINAL COURT  
QUESTIONS & ANSWERS  
ABOUT THE ARREST WARRANTS AGAINST  
SAIF AL-ISLAM GADDAFI AND ABDULLAH AL-SENUSSI**

December 12, 2011\*\*

**LIBYA & THE INTERNATIONAL CRIMINAL COURT  
QUESTIONS & ANSWERS  
ABOUT THE ARREST WARRANTS AGAINST  
SAIF AL-ISLAM GADDAFI AND ABDULLAH AL-SENUSSI**

**HAS THE INTERNATIONAL CRIMINAL COURT ISSUED  
WARRANTS FOR CRIMES COMMITTED IN LIBYA?**

Yes, the International Criminal Court (“ICC”) issued warrants on June 27, 2011 covering three persons: Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi. The warrant against Muammar Gaddafi was terminated on November 22, 2011, after his death on October 20, 2011. The warrants allege that Saif Al-Islam Gaddafi exercised control over crucial parts of the state apparatus, including finances and logistics and had the powers of a *de facto* Prime Minister, while Abdullah Al-Senussi served as a Colonel in the Libyan Armed Forces and head of Military Intelligence.<sup>1</sup> The crimes alleged in the warrants are crimes against humanity, including murder and persecution of civilians across Libya committed through the state apparatus and security forces from February 15, 2011 until at least February 28, 2011.<sup>2</sup>

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\* Links to websites cited in this document were active at the time the article was originally written and distributed.

\* This document is primarily the work of the Drafting Subcommittee, consisting of Jennifer Trahan, Megan Mattimoe and Linda Keller, assisted by Matthew Charity, Kalina Lovell, Lauren Maccarone, Spencer Pittman, Rachel A. Smith and Katie Walter. One member of the ABILA ICC Committee has chosen not to be associated with this document.

<sup>1</sup> Warrant of Arrest, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11 at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/>.

<sup>2</sup> *Id.* See also Jurist, Legal News and Research, “ICC issues arrest warrants for Libya leader Gaddafi, his son, head of intelligence,” June 27, 2011, at <http://jurist.org/paperchase/2011/06/icc-issues-arrest-warrants-for-libya-leader-gaddafi,-his-son-head-of-intelligence.php>.

## **WHY DOES THE INTERNATIONAL CRIMINAL COURT HAVE JURISDICTION OVER CRIMES IN LIBYA?**

On February 26, 2011, the United Nations (“U.N.”) Security Council decided unanimously to refer the situation in Libya, for events occurring after February 15, 2011, to the ICC, thereby creating ICC jurisdiction over the situation.<sup>3</sup> Ratification or accession to the Rome Statute by a state also creates ICC jurisdiction over genocide, war crimes and crimes against humanity committed by individuals within that state’s territory and by its nationals;<sup>4</sup> Libya, however, has not ratified or acceded to the Rome Statute. Alternatively, the ICC may also exercise jurisdiction when a state lodges a declaration under article 12(3) of the Rome Statute, accepting jurisdiction with respect to a particular crime in question,<sup>5</sup> which Libya also has not done.

## **WOULD ICC JURISDICTION COVER CRIMES COMMITTED BY BOTH SIDES TO THE CONFLICT?**

Yes. When the U.N. Security Council made its referral to the ICC, pursuant to Rome Statute article 13(b), it necessarily referred the “situation” as a whole to the court,<sup>6</sup> giving the Office of the Prosecutor the ability to look at crimes committed by both sides to the conflict.

## **WOULD ICC JURISDICTION COVER CRIMES (IF ANY) BY U.S. FORCES IN LIBYA?**

This is unlikely. U.N. Security Council Resolution 1970 excludes ICC jurisdiction over nationals from a state outside Libya that is not a party to the Rome Statute related to that state’s operations within Libya as authorized by the U.N. Security Council.<sup>7</sup> Thus, the ICC most likely does not have jurisdiction over the conduct of U.S. nationals in Libya as part of the UN-authorized operations because the U.S. is not a party to the Rome Statute.<sup>8</sup> However, the ICC would have jurisdiction over the conduct of other troop contributing countries that are Rome Statute State Parties.

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<sup>3</sup> S/RES/1970 (2011).

<sup>4</sup> See Rome Statute of the International Criminal Court, available at <http://untreaty.un.org/cod/icc/statute/rome.htm>, art. 12((2)(a)-(b).

<sup>5</sup> See Rome Statute, art. 12(3).

<sup>6</sup> *Id.* at art. 13(b).

<sup>7</sup> See U.N. Security Council res. 1970.

<sup>8</sup> Some might question whether the Security Council had the power to make the exclusion given that the Security Council only has competence over UN Members States. See U.N. Charter, art. 25.



## **COULD THE ICC EXPAND ITS WARRANTS TO COVER ADDITIONAL CRIMES AND/OR PERPETRATORS?**

Yes. The ICC could issue additional warrants for additional crimes and/or perpetrators, such as crimes committed by pro-Gaddafi forces after February 28, 2011 or crimes committed by opposition (anti-Gaddafi) forces.

## **IN WHICH ADDITIONAL CRIMES ARE GADDAFI FORCES POTENTIALLY IMPLICATED?**

Reports suggest that pro-Gaddafi forces may have committed additional war crimes, but these have not yet been charged. For example, there are reports of mass rapes by pro-Gaddafi forces that both allegedly directly participated in rapes, and paid or forced young men to rape women.<sup>9</sup> If such allegations are substantiated, this could be grounds for additional charges of crimes against humanity under Rome Statute article 7(1)(g) and/or new war crimes charges under Rome Statute article 8(2)(b)(xxii) or 8(e)(vi).

On June 1, 2011, the U.N. Human Rights Council issued a report by the International Commission of Inquiry on the situation in Libya.<sup>10</sup> The UNHRC Report found evidence that pro-Gaddafi forces have committed both crimes against humanity and war crimes.<sup>11</sup> As regards potential crimes against humanity, the UNHRC Report specifically enumerated several new allegations including: imprisonment or other severe deprivations of physical liberty, torture, and enforced disappearances. It also found evidence of murder and persecutions (already charged), and suggested that the crimes were both widespread or systematic, and implicated government officials.<sup>12</sup>

With regard to potential war crimes charges, the UNHRC Report identified allegations against pro-Gaddafi forces including: violence to life and person, outrages against personal dignity, and intentionally directing attacks against

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<sup>9</sup> U.S. Institute for Peace, “Libyan Forces Use Rape as Weapon of War, Experts Say,” June 9, 2011, at <http://www.usip.org/publications/libyan-forces-use-rape-weapon-war>; BBC Africa News, “Libya: ‘forced to rape in Misrata,’” May 23, 2011, at <http://www.bbc.co.uk/news/world-africa-13502715>.

<sup>10</sup> United Nations Human Rights Council, *Report of International Commission of Inquiry to Investigate all the alleged violations of International human rights law in Libyan Arab Jamahiriya*, A/HRC/17/44, 1 June 2011, at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44\\_AUV.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf) (hereafter, “UNHRC Report”).

<sup>11</sup> *Id.* at 81, ¶ 256.

<sup>12</sup> *Id.* at 81, ¶ 257.

protected persons and targets.<sup>13</sup> The UNHRC Report also stated that although pro-Gaddafi forces reportedly indiscriminately attacked civilians and civilian targets, such allegations required further investigation to ascertain whether the attacks were intentional and rose to the level of war crimes.<sup>14</sup> There have also been allegations that pro-Gaddafi forces conscripted children for use as soldiers.<sup>15</sup>

### **IN WHICH CRIMES ARE OPPOSITION (ANTI-GADDAFI) FORCES POTENTIALLY IMPLICATED?**

Both an Amnesty International Report<sup>16</sup> and the UNHRC Report<sup>17</sup> indicate that opposition forces may be implicated in war crimes. Opposition forces are reportedly involved in torture, illegal detention, and outrages against personal dignity allegedly committed against detained Gaddafi forces, suspected mercenaries, and migrant workers.<sup>18</sup> The UNHRC Report also noted allegations that opposition forces committed rape<sup>19</sup> and conscripted child soldiers,<sup>20</sup> both of which allegations required further investigation. Neither the UNHRC Report nor the Amnesty International report indicated whether the crimes committed by opposition forces were part of a widespread or systematic attack that would rise to the level of crimes against humanity.<sup>21</sup>

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<sup>13</sup> *Id.* at 81, ¶ 258.

<sup>14</sup> *Id.* at 81-82, ¶ 259.

<sup>15</sup> *Id.* at 6; *id.* at 75, ¶¶ 223-24; *id.* at 81-82, ¶ 259.

<sup>16</sup> *The Battle for Libya: Killings, Disappearances and Torture*, Amnesty International, September 12, 2011, <http://www.amnesty.org/en/library/asset/MDE19/025/2011/en/8f2e1c49-8f43-46d3-917d-383c17d36377/mde190252011en.pdf>.

<sup>17</sup> UNHRC Report, *supra* note 9, at 82, ¶ 261.

<sup>18</sup> *The Battle for Libya: Killings, Disappearances and Torture*, *supra* note 15, at 70.

<sup>19</sup> UNHRC Report, *supra* note 9, at 7; *id.* at 71, ¶ 212; *id.* at 73, ¶¶ 217-18.

<sup>20</sup> *Id.* at 74, ¶ 220; *id.* at 80, ¶ 249. See also *Rebels-in-waiting: The Children as young as SEVEN being trained to fight on the front lines against Gaddafi*, by Daily Mail Reporter, July 13 2011, at <http://www.dailymail.co.uk/news/article-2014236/Libya-Children-young-7-trained-fight-Gaddafi.html>.

<sup>21</sup> *The Battle for Libya Killings, Disappearances and Torture*, *supra* note 15, at 70; UNHRC Report, *supra* note 9, at 82, ¶ 262.

## **CAN LIBYA AVOID HAVING ITS NATIONALS PROSECUTED BEFORE THE ICC?**

Yes. A state can always avoid ICC prosecutions of its nationals by investigating and/or prosecuting the crimes in good faith and in accordance with the standards set forth in Article 17 of the Rome Statute.<sup>22</sup>

## **WHAT IS THE RELATIONSHIP BETWEEN THE ICC AND LIBYAN NATIONAL COURTS?**

It is a relationship of “complementarity,” whereby if crimes are investigated and/or prosecuted by the Libyan national authorities, in good faith and in accordance with the standards set forth in Article 17 of the Rome Statute, then charges based on those crimes are considered inadmissible before the ICC.<sup>23</sup> However, if the Libyan national authorities are “unwilling” or “unable” to investigate and/or prosecute, then the ICC retains jurisdiction and may prosecute those crimes.

In this context, “unwilling” refers to whether the courts will act diligently and in good faith, while “unable” refers to their capacity to act.<sup>24</sup> As defined in Article 17 of the Rome Statute, a state is deemed “unwilling” to investigate or prosecute when the national courts or prosecutions are “shielding the person” from justice, when there is “unjustified delay” in prosecution, or when the proceedings lack independence or impartiality such that there is no intent to bring the person to justice.<sup>25</sup> A state is considered “unable” to investigate or prosecute when there is a “total or substantial collapse or unavailability” of national courts, when the state is unable to obtain the accused or necessary evidence, or when the national courts are otherwise unable to carry out the proceedings.<sup>26</sup>

## **WHAT IS THE STATE OF COURTS IN LIBYA?**

According to Amnesty International, there is “no functioning police or judicial system”<sup>27</sup> in Libya and the “independence of Libya’s judiciary has been undermined by persistent political interference over decades.”<sup>28</sup> Although

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<sup>22</sup> See Rome Statute, art. 17.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at art. 17(2).

<sup>26</sup> *Id.* at art. 17(3).

<sup>27</sup> *The Battle for Libya: Killings, Disappearances and Torture*, *supra* note 15, at 73.

<sup>28</sup> Amnesty International, *Libya: Pursuing al-Gaddafi – the Legal Questions Answered*, Aug. 25, 2011, <http://www.amnesty.org/en/news-and-updates/libya-pursuing-al-gaddafi-%E2%80%93-legal-questions-answered-2011-08-25>.

officials in the National Transitional Council (“NTC”) recognize the need to reform the justice system,<sup>29</sup> Human Rights Watch has found that the NTC has “comprehensively failed to start setting up a justice system” and militia brigades from Misrata have been “operating outside of any official military and civilian command since Tripoli fell . . . .”<sup>30</sup>

While Libya’s transitional justice minister, Mohammed al-Alagi, did approve a measure in September to abolish the state security prosecution, trial, and appeals courts, which had been used to prosecute, sentence, and imprison opponents of the Gaddafi regime,<sup>31</sup> the measure still needs to be approved by the NTC.<sup>32</sup> Jamal Bennour, a Libyan judge who is part of a team drafting the rules for a truth and reconciliation commission, said that although “[v]ictims can also demand trials, . . . Libya’s justice system will first have to be built from scratch.”<sup>33</sup>

### **COULD THE LIBYAN COURTS INVESTIGATE OR PROSECUTE SAIF AL-ISLAM GADDAFI AND ABDULLAH AL-SENUSSI FOR CRIMES OUTSIDE THOSE LISTED IN THE ICC WARRANTS?**

Yes. The Libyan courts could prosecute the accused for crimes outside those covered in the ICC warrants. In this scenario, there is no conflict between ICC prosecutions and those in Libya. However, if as a result of the Libyan prosecutions, the death penalty were to be applied, then, as a practical matter, ICC prosecutions would not occur.<sup>34</sup> The ICC also has no mechanism by which

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<sup>29</sup> Adam Nossiter, *On Road to Reconciliation, Libya Meets Trail of Anguish*, Nov. 3, 2011, *The New York Times*, <http://www.nytimes.com/2011/11/04/world/africa/libyas-new-leaders-to-investigate-qaddafi-and-crimes-of-the-past.html?pagewanted=all>.

<sup>30</sup> Daniel Williams, *The Murder Brigades of Misrata*, October 28, 2011, republished at <http://www.hrw.org/news/2011/10/28/murder-brigades-misrata>.

<sup>31</sup> Associated Press, *Libya Orders State Security Courts Abolished*, Sept. 26, 2011, available at <http://www.guardian.co.uk/world/feedarticle/9866256>; William Maclean, Reuters Africa, *Libya plans to abolish state security courts*, Sept. 26, 2011, *available at* <http://af.reuters.com/article/libyaNews/idAFL5E7KQ3X620110926>.

<sup>32</sup> Associated Press, *Libya Orders State Security Courts Abolished*, Sept. 26, 2011, available at <http://www.guardian.co.uk/world/feedarticle/9866256>.

<sup>33</sup> Karin Laub, Associated Press, *New Libya faces mountain of grievances*, Nov. 8, 2011, available at <http://news.yahoo.com/libya-faces-mountain-grievances-202027579.html>.

<sup>34</sup> Over two-thirds of states no longer have the death penalty. See Amnesty International, *Death Penalty and Human Rights Standards*, <http://www.amnestyusa.org/our-work/issues/death-penalty/international-death-penalty/death-penalty-and-human-rights-standards>. It is not in use at any of the U.N.-sponsored international or hybrid tribunals.

to request the Libyan authorities to suspend execution of the sentence of a Libyan domestic court during an ICC trial.

### **COULD THE LIBYAN COURTS AND THE ICC INVESTIGATE AND/OR PROSECUTE SAIF AL-ISLAM GADDAFI AND ABDULLAH AL-SENUSSI FOR THE SAME CONDUCT?**

No. A defendant may not be prosecuted twice for the same conduct by two different courts.<sup>35</sup> In this scenario, if the Libyan national authorities were proven willing and able to investigate and/or prosecute in good faith, then the cases would be inadmissible for prosecution before the ICC.<sup>36</sup> If, however, the Libyan courts were deemed “unwilling” or “unable” to investigate and/or prosecute in good faith, then ICC prosecutions could proceed.<sup>37</sup> In evaluating willingness and ability, the ICC would likely consider the extent to which Libya has shown its willingness and ability to hold fair trials.

### **WHAT STANDARDS DOES THE ICC CONSIDER WHEN DETERMINING WHETHER A STATE IS WILLING AND ABLE TO HOLD A FAIR TRIAL?**

There is a generally accepted list of fair trial standards set forth in Article 14 of the International Covenant on Civil and Political Rights, to which Libya is a party.<sup>38</sup> These are analogous to the fair trial standards set forth in the Rome Statute. The Rome Statute contains all the due process protections provided in the U.S. Bill of Rights, except for trial by jury. These standards include the right to remain silent or to not be forced to testify against oneself,<sup>39</sup> the right against self-incrimination,<sup>40</sup> the right to cross-examine witnesses,<sup>41</sup> the right to

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<sup>35</sup> See Rome Statute, art 20 (*ne bis in idem*). An exception exists where the national court prosecutions were for the purpose of “shielding the person concerned from criminal responsibility” or otherwise “were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner . . . inconsistent with an intent to bring the person concerned to justice,” in which case national court prosecutions would not preclude ICC prosecutions. *Id.* at art. 20(2)(a)-(b).

<sup>36</sup> Rome Statute, art. 17.

<sup>37</sup> *Id.*

<sup>38</sup> Libyan Arab Jamahiriya acceded to the ICCPR on May 15, 1970, Multilateral Treaties Deposited with the Secretary General, at Chapter IV(4), [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en).

<sup>39</sup> Rome Statute, art. 67(1)(g).

<sup>40</sup> *Id.* at art. 55(1)(a), 67(1)(g).

<sup>41</sup> *Id.* at art. 67(1)(e).

be tried without undue delay,<sup>42</sup> the protection against double jeopardy,<sup>43</sup> the right to be present during trial,<sup>44</sup> the presumption of innocence,<sup>45</sup> the right to representation by counsel,<sup>46</sup> the right to a written statement of charges against the accused,<sup>47</sup> the right to have compulsory process to obtain witnesses,<sup>48</sup> the prohibition against prosecution for crimes *ex post facto*,<sup>49</sup> freedom from warrantless arrest and search,<sup>50</sup> and the ability to exclude illegally obtained evidence.<sup>51</sup> It is not necessarily the case that Libyan courts would need to satisfy all of these fair trial standards in order to be deemed “willing” and “able” to investigate and/or prosecute under article 17 of the Rome Statute.<sup>52</sup>

### **WHO DETERMINES WHETHER LIBYAN AUTHORITIES ARE WILLING AND ABLE TO HOLD A FAIR TRIAL?**

If a challenge to admissibility of an ICC case were brought, the ICC Pre-Trial Chamber judges have the exclusive competence to decide whether Libyan courts have satisfied the standards set forth in Article 17 of the Rome Statute.

### **WOULD LIBYAN AUTHORITIES BE REQUIRED TO COMPLY WITH AN ICC RULING?**

Yes. Although Libya is not a state party to the Rome Statute, which is recognized by U.N. Security Council Resolution 1970, paragraph five

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<sup>42</sup> *Id.* at art. 67(1)(c) (speedy and public trials).

<sup>43</sup> *Id.* at art. 20.

<sup>44</sup> *Id.* at art. 63, art. 67(1)-67(1)(c).

<sup>45</sup> *Id.* at art. 66.

<sup>46</sup> *Id.* at art. 67(1) (b),(d).

<sup>47</sup> *Id.* at art. 61(3).

<sup>48</sup> *Id.* at art. 67 (1)(e).

<sup>49</sup> *Id.* at art. 22.

<sup>50</sup> *Id.* at arts. 57 (3), 58.

<sup>51</sup> *Id.* at art. 69(7). The above-listed fair trial rights compilation is found in AMICC, “Safeguards in the Rome Statute Against Abuse of the Court to Harass American Servicemembers and Civilian Officials,” at 7, at <http://www.amicc.org/docs/Safeguards.pdf>.

<sup>52</sup> *But see* Kevin John Heller, “The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process,” 10 Criminal Law Forum (2006) (discussing that article 17 covers courts that are “shielding” the accused from justice (*i.e.*, “unwilling” to prosecute), and courts that are “unable” to prosecute, but questioning whether article 17 would address national courts that are willing and able to prosecute, but not necessarily with due process). Put another way, if an ICC case becomes inadmissible when national courts are “unwilling” or “unable” to prosecute, what happens when the national court is “all too willing” to prosecute?

specifically directs Libyan national authorities to cooperate fully with the ICC.<sup>53</sup> As a U.N. Member State, Libya has an obligation to comply with Resolution 1970 under Article 25 of the U.N. Charter,<sup>54</sup> irrespective of Libya's status as a non-state party to the Rome Statute.

In terms of priority of prosecutions, Libya has a current, ongoing obligation to comply with the current ICC warrants on Gaddafi and Al-Senussi. Should the Libyan authorities wish to prosecute the accused domestically for factual conduct covered by the charges in the current ICC warrants, the proper procedure is to bring an "admissibility" challenge<sup>55</sup> before the ICC. In its admissibility challenge, Libya would argue that the Libyan domestic courts (or, for example, a newly established hybrid tribunal)<sup>56</sup> have proven themselves "willing" and "able" to conduct the prosecutions.

If the ICC finds that Libya is "willing" and "able" to investigate and prosecute the crimes, then Libya would conduct the prosecutions. If the ICC finds Libya "unwilling" or "unable" to investigate or prosecute, then the cases would remain admissible before the ICC. While the ICC does not have any direct means to compel Libya to comply with the ICC's warrants, Libya is already under a Security Council obligation to do so, and the U.N. Security Council could also further direct Libya to comply pursuant to its obligations as a U.N. member state should the Libyan authorities refuse to comply with ICC rulings or arrest warrants.

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<sup>53</sup> See S/RES/1970 (2011).

<sup>54</sup> See U.N. Charter, art. 25.

<sup>55</sup> See Rome Statute, art. 19.

<sup>56</sup> A hybrid tribunal, for example, established by agreement between the Libyan authorities and the UN could be created to sit in Libya. One model for creating such a tribunal would be the State Court in Bosnia insofar as it started as a hybrid tribunal, but is in the process of reverting to a national tribunal, thereby leaving an ongoing, functioning court when international staff is phased out. Alternatively, another model would be the Special Court for Sierra Leone, also a hybrid, but one that is terminating its work entirely after its ninth trial (the Charles Taylor trial) concludes.

**INTERNATIONAL CRIMINAL COURT COMMITTEE**

**POTENTIAL RAMIFICATIONS OF PALESTINIAN  
STATEHOOD  
ON INTERNATIONAL CRIMINAL COURT  
PROSECUTION OF CRIMES IN GAZA**



December 12, 2011\*<sup>\*</sup>

**POTENTIAL RAMIFICATIONS OF PALESTINIAN  
STATEHOOD  
ON INTERNATIONAL CRIMINAL COURT  
PROSECUTION OF CRIMES IN GAZA**

**QUESTIONS & ANSWERS**

**HAVE THE PALESTINIAN AUTHORITIES ATTEMPTED TO LODGE  
A DECLARATION ACCEPTING THE INTERNATIONAL CRIMINAL  
COURT'S JURISDICTION?**

Yes, on January 21, 2009, the Palestinian National Authority ("PNA") purported to recognize the jurisdiction of the Rome Statute and invoke the jurisdiction of the International Criminal Court ("ICC").<sup>1</sup> The primary purpose of accepting jurisdiction was stated to be to "identify, prosecute, and [judge] the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002."<sup>2</sup>

**HAS THE INTERNATIONAL CRIMINAL COURT'S PROSECUTOR  
ACTED ON THAT REQUEST?**

No. By letter dated January 12, 2010, the Director of the ICC's Jurisdiction, Complementarity and Cooperation Division wrote to the Deputy High Commissioner for Human Rights that the Office of the Prosecutor "is analyzing the Court's jurisdiction over alleged crimes committed by different parties during the conflict in Gaza in December 2008 and January 2009."<sup>3</sup>

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\* Links to websites cited in this document were active at the time the article was originally written and distributed.

\* This document is primarily the work of the Drafting Subcommittee, consisting of Jennifer Trahan, Megan Mattimoe and Linda Keller, assisted by Matthew Charity, Kalina Lovell, Lauren Maccarone, Spencer Pittman, Rachel A. Smith and Katie Walter. Four members of the ABILA ICC Committee have chosen not to be associated with this document.

<sup>1</sup> Palestinian National Authority. Declaration recognizing the Jurisdiction of the International Criminal Court, dated January 21, 2009, *available at* [www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf](http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> Letter from Béatrice Le Fraper du Hellen to Kyung-Wha Kang, Deputy High Commissioner for Human Rights, dated January 12, 2010, at <http://www.icc->

It is unclear whether the PNA could accept the ICC's jurisdiction, since only states may ratify, accept, approve or accede to the Rome Statute,<sup>4</sup> or lodge a declaration accepting the court's jurisdiction.<sup>5</sup> Absent such actions by a state, or referral by the U.N. Security Council, the ICC would not have jurisdiction over events in the Palestinian territories, including events in the Gaza strip from January 2008-December 2009.<sup>6</sup> Neither the Prosecutor nor the ICC, however, has expressly rejected the PNA's attempt to invoke ICC jurisdiction by lodging its declaration.

### **IF PALESTINE WERE RECOGNIZED AS A STATE, WOULD IT BE ABLE TO ACCEDE TO THE ROME STATUTE?**

Yes, a new, or more universally recognized, Palestinian state could accede to the Rome Statute. Under the Rome Statute, instruments of accession must be deposited with the U.N. Secretary General.<sup>7</sup> The Secretary-General would then be in the position to determine whether to accept or reject the instrument of accession.<sup>8</sup>

### **IF A STATE RATIFIES OR ACCEDES TO THE ROME STATUTE, AS OF WHAT DATE WOULD THE ICC'S JURISDICTION COMMENCE?**

Under Rome Statute article 126(1), the general rule is that jurisdiction (entry into force) starts on the first day of the month after the 60<sup>th</sup> day following deposit of the instrument of ratification or accession.<sup>9</sup> Additionally, article 12(3) of the Rome Statute provides that a state may lodge a declaration accepting the ICC's jurisdiction with respect to a crime in question.<sup>10</sup> It is possible that such an article 12(3) declaration could apply retroactively. For example, the ICC

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[cpil.int/NR/rdonlyres/FF55CC8D-3E63-4D3F-B502-IDB2BC4D45FF/281439/Letterto%20UNHC1.pdf](http://cpil.int/NR/rdonlyres/FF55CC8D-3E63-4D3F-B502-IDB2BC4D45FF/281439/Letterto%20UNHC1.pdf).

<sup>4</sup> Rome Statute of the International Criminal Court, *available at* <http://untreaty.un.org/cod/icc/statute/rome.htm>, art. 125(2)-(3).

<sup>5</sup> *Id.* at art. 12(3).

<sup>6</sup> The Rome Statute permits the Security Council to refer a "situation." *See id.* at art. 13(b). It is unclear whether it could refer only a situation in the "Palestinian Territories." But such a referral is unlikely in any event.

<sup>7</sup> *Id.* at art. 125(2) ("Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations").

<sup>8</sup> Possibly, an ICC defendant, might, at a later date, question the existence of ICC jurisdiction, and the ICC judges would then opine on the validity of the ICC's exercise of jurisdiction.

<sup>9</sup> Rome Statute, art. 126(2).

<sup>10</sup> *Id.* at art. 12(3).

could take jurisdiction over crimes committed after July 1, 2002, when the Rome Statute entered into force.<sup>11</sup>

**COULD A NEW, OR MORE UNIVERSALLY RECOGNIZED, PALESTINIAN STATE THAT ACCEDES TO THE ROME STATUTE ISSUE A DECLARATION TAKING ICC JURISDICTION BACK RETROACTIVELY TO EITHER JULY 1, 2002 OR TO COVER THE EVENTS IN GAZA IN DECEMBER 2008-JANUARY 2009?**

This is quite unclear. While article 12(3) allows a state to lodge a declaration accepting the ICC's jurisdiction with respect to a crime in question, it is unclear whether an entity that *becomes* recognized as a state could lodge a declaration accepting the ICC's jurisdiction *for a time before that entity was fully recognized as a state*. Ratification creates jurisdiction over war crimes, genocide and crimes against humanity committed by individuals on the territory of a state and by its nationals.<sup>12</sup> It is unclear that a new, or more universally recognized, Palestinian state could accept ICC jurisdiction retroactively to a time when (a) there was no clearly internationally recognized Palestinian state territory, and (b) there were no clearly internationally recognized nationals of a Palestinian state. Thus, it is quite possible that even after Palestinian statehood and accession to the Rome Statute (or recognition of the earlier declaration as triggering jurisdiction), the ICC may not have jurisdiction for example, over the events in Gaza from December 2008-January 2009, or any date prior to accession (or recognition of the earlier declaration) activating jurisdiction.<sup>13</sup>

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<sup>11</sup> See discussion of article 12(3), ICL Database and Commentary – Rome Statute, article 12(3), n. 136, available at [http://www.iclklamberg.com/Statute.htm#\\_ftn136](http://www.iclklamberg.com/Statute.htm#_ftn136).

<sup>12</sup> Rome Statute, art. 12(2)(a)-(b).

<sup>13</sup> As noted above, accession would activate jurisdiction on the first day of the month after the 60<sup>th</sup> day following deposit of the instrument of accession. See *id.* at art. 126(2). The declaration attempting to activate jurisdiction is dated January 21, 2009, see Palestinian National Authority Declaration, *supra* note 1, although it is possible that only in the future will that declaration come to be seen as effective. While there might be retroactive jurisdiction based on a U.N. Security Council referral, as noted above, such a referral is extremely unlikely given the United States' veto power.

## **WHAT WOULD PALESTINIAN RATIFICATION COVER IF THE ACCESSION DID NOT APPLY RETROACTIVELY?**

A state that ratifies or accedes to the Rome Statute accepts ICC jurisdiction over crimes committed in its territory and by its nationals.<sup>14</sup> Thus, accession by a new, or more universally recognized, Palestinian state (or recognition of the effectiveness of its earlier declaration), would create jurisdiction over crimes in the territory of the Palestinian state and by its nationals.<sup>15</sup> The three crimes over which the ICC may currently exercise jurisdiction are genocide, war crimes and crimes against humanity.<sup>16</sup> Commencing possibly as early as 2017, the ICC will have jurisdiction to prosecute the crime of aggression if certain procedural hurdles are met.<sup>17</sup> There is, however, a complete exclusion from ICC jurisdiction for the crime of aggression for non-States Parties.<sup>18</sup> Thus, neither Palestinian accession to the Rome Statute nor Palestinian ratification of the crime of aggression amendment would create ICC jurisdiction (once ICC crime of aggression jurisdiction is activated) over alleged aggression by a non-State Party.

## **DOES ICC JURISDICTION NECESSARILY COVER CRIMES COMMITTED BY BOTH SIDES?**

Yes, a State Party cannot simply refer its adversaries to the ICC, but necessarily refers the “situation.”<sup>19</sup> Therefore, any Palestinian referral to the ICC regarding crimes allegedly committed by Israeli nationals on Palestinian territory (assuming Palestinian ICC accession or that its earlier declaration is recognized

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<sup>14</sup> Rome Statute, art. 12(2)(a)-(b).

<sup>15</sup> Jurisdiction would commence on the first day of the month after the 60<sup>th</sup> day following the deposit of the instrument of accession. *See id.* at art. 126(2)

<sup>16</sup> *Id.* at art. 5(2)-(2).

<sup>17</sup> *See id.* at arts. 8*bis*, 16*bis*, 16*ter*. Before ICC crime of aggression jurisdiction can be activated, 30 States Parties must ratify the crime of aggression amendment, there must be one more vote by the Assembly of States Parties to the Rome Statute, and one year must pass after the 30<sup>th</sup> ratification. *See id.* at arts. 16*bis*, ¶¶ 2-3, 16*ter*, ¶¶ 2-3. For a background on the crime of aggression, see American Branch of the International Law Association International Criminal Court Committee, “The Crime of Aggression: The New Amendment Explained Questions & Answers,” revised January 2011, at <http://www2.americanbar.org/calendar/section-of-international-law-2011-spring-meeting/Documents/Friday/Crimes%20Against%20Peace/THE%20CRIME%20OF%20AGGRESSION.pdf>.

<sup>18</sup> *See* Rome Statute, art. 16*bis*, para. 5 (“In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.”).

<sup>19</sup> *Id.* at art. 14(1)

as effective) would necessarily also permit inquiry into crimes, if any, by Palestinians/Palestinian nationals.

### **CAN A STATE'S OWN INVESTIGATION AND/OR PROSECUTION OF CRIMES RENDER CASES INADMISSIBLE BEFORE THE ICC?**

Yes, under the “complementarity” provisions in article 17 of the Rome Statute, a good faith national “investigation” or “prosecution” will render a case inadmissible before the ICC.<sup>20</sup> This would only apply to cases actually investigated or prosecuted in good faith, so anything not investigated or prosecuted, or not pursued in good faith, could be subject to an ICC investigation or prosecution.

### **COULD THE THREAT OF ICC INVESTIGATIONS OR PROSECUTIONS CAUSE A STATE TO CONDUCT MORE VIGOROUS INVESTIGATIONS OR PROSECUTIONS?**

Yes, if a state wants to avoid the possibility of ICC prosecution, it could conduct (or conduct additional) investigations and/or prosecutions in order to satisfy the complementarity provisions of article 17. If the ICC were to attempt to proceed with such a case, the ICC would then need to determine whether the case had become “inadmissible” because article 17’s standards had been satisfied. Under article 17, a case becomes “inadmissible” before the ICC if national courts are “willing” and “able” to genuinely investigate and/or prosecute the crimes.<sup>21</sup>

### **IF THERE IS A NEW PALESTINIAN ACCESSION TO THE ROME STATUTE, WOULD THE PALESTINIAN AUTHORITIES HAVE AN OBLIGATION TO COOPERATE WITH AN ICC INVESTIGATION AND/OR PROSECUTION?**

Yes. Once it accedes to the Rome Statute a new, or more universally recognized, Palestinian state would be obligated to cooperate with any ICC investigations, warrants, and rulings. If the earlier Palestinian declaration were accepted as valid, that would also create an obligation by the Palestinian authorities to cooperate with the ICC.<sup>22</sup> In fact, the Palestinian authorities already pledged to “cooperate with the Court” in their earlier declaration.<sup>23</sup>

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<sup>20</sup> *Id.* at art. 17(1)(a)-(c).

<sup>21</sup> See *id.* at art. 17(2) (definition of “unwillingness”); *id.* at art. 17(3) (definition of “inability”).

<sup>22</sup> See *id.* at art. 12(3) (if an article 12(3) declaration is lodged, “[t]he accepting State shall cooperate with the Court without any delay or exception . . .”).

<sup>23</sup> Palestinian National Authority. Declaration, *supra* note 1.

**WOULD ISRAEL HAVE SIMILAR OBLIGATIONS TO COOPERATE WITH ICC INVESTIGATIONS AND/OR PROSECUTIONS?**

No. Israel is not a party to the Rome Statute. Although Israel signed (but did not ratify) the Statute on December 31, 2000, it later sent a letter stating it did not intend to become a party.<sup>24</sup> Signing, however, creates only a weak obligation to not do anything contrary to the object and purpose of the Statute, which no longer exists if the state announces an intention not to become a party,<sup>25</sup> as Israel has done. While all states should cooperate with the ICC and respect its arrest warrants, Israel would not have the same legal obligations towards the ICC that a new, or more universally recognized, Palestinian state would if its accession is accepted as valid.

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<sup>24</sup> "Israel: International Treaties Adherence, "Rule of Law in Armed Conflicts Project, <[http://www.adh-geneva.ch/RULAC/international\\_treaties.php?id\\_state=113](http://www.adh-geneva.ch/RULAC/international_treaties.php?id_state=113)>.

<sup>25</sup> Vienna Convention on the Law of Treaties, Art. 18(a). While the U.S. is not a party to the Vienna Convention on the Law of Treaties, it has long recognized the convention as declaratory of customary international law. S. Exec. Doc. L. 92-1 at I (1971) (letter from Secretary of State Rogers to President Nixon).

**INTERNATIONAL CRIMINAL COURT COMMITTEE**

United States Deployment of Military Advisers to Apprehend  
Members of The Lord's Resistance Army:  
Questions & Answers

December 12, 2011\*\*

**UNITED STATES DEPLOYMENT OF MILITARY  
ADVISERS TO APPREHEND MEMBERS OF THE LORD'S  
RESISTANCE ARMY:  
QUESTIONS & ANSWERS**

**WHO ARE THE LORD'S RESISTANCE ARMY?**

The Lord's Resistance Army ("LRA") originated as a rebel force in Uganda in the 1980s.<sup>1</sup> Once active, the LRA, led by Joseph Kony, became an almost universally feared armed group that operated primarily in northern Uganda.<sup>2</sup> Kony is "a self-proclaimed prophet known for ordering village massacres, recruiting prepubescent soldiers, keeping harems of child brides, and mutilating opponents."<sup>3</sup> In the past ten years the group has extended its reach into the remote border regions between southern Sudan, the Democratic Republic of Congo ("DRC"), and since 2008 into the Central African Republic ("CAR").<sup>4</sup> During its history, the LRA has allegedly perpetrated a number of crimes including "massacres, summary executions, torture, rape, pillage, and forced labor."<sup>5</sup> Additionally, the LRA regularly abducts and uses children in a number

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• Links to websites cited in this document were active at the time the article was originally written and distributed.

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<sup>1</sup> Shanker, Thom, "Armed U.S. Advisers to Help Fight African Renegade Group," New York Times, October 14, 2011, found at <http://www.nytimes.com/2011/10/15/world/africa/barack-obama-sending-100-armed-advisers-to-africa-to-help-fight-lords-resistance-army.html>.

<sup>2</sup> *Id.*

<sup>3</sup> Report of the Secretary-General on the Lord's Resistance Army-affected areas pursuant to Security Council press statement, S/2011/693, November 4, 2011, at 3; Shanker, *supra* note 1.

<sup>4</sup> Report of the Secretary-General on the Lord's Resistance Army-affected areas pursuant to Security Council press statement, S/2011/693, November 4, 2011, at 3; Shanker, *supra* note 1.

<sup>5</sup> Shanker, *supra* note 1.



of roles, including “forcible training and use of children in combat operations,” forced labor, and sexual servitude.<sup>6</sup> Typically, the LRA compels children to comply through violence, threats of violence, and “mind control.”<sup>7</sup>

### **WHY IS THE UNITED STATES SENDING 100 MILITARY ADVISORS TO ASSIST IN APPREHENDING MEMBERS OF THE LORD’S RESISTANCE ARMY? WHAT IS THE OPERATION’S PURPOSE AND DURATION?**

The United States (“U.S.”) Secretary of State has placed the LRA on the Terrorist Exclusion list and Joseph Kony is “designated as a ‘specially designated global terrorist’ pursuant to Executive Order 13224.”<sup>8</sup> Additionally, the US has “supported regional operations led by the Ugandan military to capture or kill LRA leaders” since 2008.<sup>9</sup> After several unsuccessful regional and multilateral attempts to disarm and neutralize the LRA, policy-makers in the international community, and in the U.S., as well as several domestic and international non-governmental organizations (“NGOs”), have called for an increased U.S. effort to disarm and eliminate the LRA.<sup>10</sup>

In May 2010, the U.S. Congress enacted the *Lord’s Resistance Army Disarmament and Northern Uganda Recovery Act of 2009*, (“LRA Act”). The LRA Act’s purpose is “to support stabilization and lasting peace in northern Uganda and areas affected by the Lord’s Resistance Army through development of a regional strategy to support multilateral efforts to successfully protect civilians and eliminate the threat posed by the LRA and to authorize funds for humanitarian relief and reconstruction, reconciliation, and transitional justice, and for other purposes.”<sup>11</sup> Specifically, the LRA Act authorizes and mandates the President to develop a strategy to support “viable multilateral efforts to

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<sup>6</sup> *Id.*; Report of the Secretary-General on the Lord’s Resistance Army, *supra* note 3, at 11-12.

<sup>7</sup> Human Rights Watch, Report: “Trail of Death,” March 28, 2010; Report of the Secretary-General on the Lord’s Resistance Army, *supra* note 3, at 11-12.

<sup>8</sup> *Lord’s Resistance Army Disarmament and Northern Uganda Recovery Act of 2009*, 111th Cong., 2nd sess. Cong. S.1067. Washington, D.C.: U.S. G.P.O., 2010, Sec. 2(3).

<sup>9</sup> Arieff, Alexis and Ploch, Lauren, “The Lord’s Resistance Army: The U.S. Response,” Congressional Research Service, R42094, November 21, 2011, summary; *see also* Report of the Secretary-General on the Lord’s Resistance Army, *supra* note 3, at 9.

<sup>10</sup> Arieff & Ploch, *supra* note 9, at 1.

<sup>11</sup> *Lord’s Resistance Army Disarmament and Northern Uganda Recovery Act*, *supra* note 8, preamble.

mitigate and eliminate the threat to civilians and regional stability posed by the [LRA].”<sup>12</sup>

In response to international concerns, and as part of its obligation under the LRA Act, the Administration decided to take further steps to disarm and apprehend LRA members. Specifically, President Barack Obama deployed 100 special operations forces as military advisors to Uganda in order to assist regional forces to disarm and neutralize the LRA and to apprehend fugitive LRA members.<sup>13</sup> On October 25, 2011, while testifying before the House Foreign Affairs Committee, the U.S. State Department’s Principal Deputy Assistant Secretary of the Bureau of African Affairs, Don Yamamoto, explained the following regarding the Administration’s implementation of the LRA Act’s mandate:

For over two decades, the Lord’s Resistance Army has terrorized innocent people across central Africa. The LRA has filled its ranks by abducting tens of thousands of children and forcing them to become child soldiers and sex slaves. In 2005 and 2006, the LRA moved from Uganda into the remote border region of the CAR, the DRC, and what is now the Republic of South Sudan. In that region, the LRA has continued to commit atrocities. The United Nations (“UN”) estimates that over 385,000 people are currently displaced across the region as a result of LRA activity. According to the UN, there have been over 250 attacks attributed to the LRA in this year alone.

...

As reported to Congress in November 2010, [the U.S.’s] comprehensive strategy outlines four strategic objectives for ongoing U.S. support: (1) the increased protection of civilians, (2) the apprehension or removal of Joseph Kony and senior LRA commanders from the battlefield, (3) the promotion of defections from the LRA and support of disarmament, demobilization, and reintegration (“DDR”) of remaining LRA fighters, and (4) the provision of continued humanitarian relief to affected communities.<sup>14</sup>

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<sup>12</sup> *Id.* at Sec. 4(a).

<sup>13</sup> “U.S. sends special operation forces to Uganda,” Digital Journal, Oct. 15, 2011, at <http://digitaljournal.com/article/312830>.

<sup>14</sup> Don Yamamoto, Principal Deputy Assistant Secretary, Bureau of African Affairs, US Department of State, Testimony Before the House Foreign Affairs Committee,

According to another unnamed administration official, “[t]he 100 U.S. personnel whose deployment the president announced today are going to regional capitals and other areas to work with governments, their militaries, and the peacekeeping missions in order for these forces to counter the LRA threat and protect civilians . . . .”<sup>15</sup> “This includes both military and non-military personnel, he added, stressing that these U.S. troops will be working to advise and assist regional efforts, not acting independently.”<sup>16</sup>

U.S. efforts also complement recent UN action, which has supported regional and international action against the LRA. On July 21, 2011, the UN Security Council condemned continued LRA attacks in the region and commended efforts by the CAR military and other regional militaries.<sup>17</sup> The UN Security Council “also requested the UN Regional Office for Central Africa (‘UNOCA’) to engage with the AU [African Union] on issues related to countering the threat posed by the LRA.”<sup>18</sup> On August 18, 2011, Abou Moussa, the Secretary-General’s Special Representative and head of UNOCA, briefed the Security Council on situations involving the LRA and presented the Secretary General’s report on the LRA on November 14, 2011.<sup>19</sup> Following the UNOCA briefing, “the Council issued a presidential statement strongly condemning the LRA whilst commending the efforts undertaken by the CAR military in addressing this issue.”<sup>20</sup> Additionally, on September 29-30, 2011, the Defense Chiefs of the affected states met with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”) and the United States African Command (“AFRICOM”) in Kinshasa.<sup>21</sup> At that meeting the parties recommended “close cooperation and coordination among the national security

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Washington, DC, October 25, 2011, found at <http://www.state.gov/p/af/rls/rm/2011/176160.htm>.

<sup>15</sup> Pellerin, Cheryl, “Obama Sends U.S. Forces to Help African Troops Confront Lord’s Resistance Army,”

American Forces Press Service, found at U.S. Africa Command, <http://www.africom.mil/getArticle.asp?art=7334&lang=0>.

<sup>16</sup> *Id.*

<sup>17</sup> Security Council Report, Monthly Forecast, December 2011, found at [www.securitycouncilreport.org](http://www.securitycouncilreport.org), at 12, citing UN Security Council Press Release, July 21, 2011.

<sup>18</sup> Security Council Report, Monthly Forecast, *supra* note 17, at 12.

<sup>19</sup> *Id.* at 3, 12.

<sup>20</sup> *Id.* at 12.

<sup>21</sup> Report of the Secretary-General on the Lord’s Resistance Army, *supra* note 3, at 24.

forces within a regional framework” and that the AU should assist in expediting this strategy.<sup>22</sup> The Secretary-General is to submit a report on the status of the LRA and UNOCA by May 31, 2012.<sup>23</sup>

### **HAVE OTHER U.S. ADMINISTRATIONS MADE EFFORTS TO COMBAT THE LRA?**

Yes. The Bush Administration, in December 2008, sent military personnel to assist the Ugandan military.<sup>24</sup> However, the mission was unsuccessful for several reasons, including various alleged miscommunications and failures by the Ugandan army, and that Kony may have been alerted to the attack prior to its launch and fled the area.<sup>25</sup> The attack, which has been described as a “disaster of epic proportions,” may have pushed the LRA to “spread even farther from Uganda and the [DRC], moving into the lawless frontiers of the [CAR] and back into Sudan.”<sup>26</sup>

### **WHAT ARE THE EXPERIENCES OF LRA-ABDUCTED CHILDREN LIKE?**

One 16-year-old girl testified to the cruelties she endured when a boy tried to escape:

One boy tried to escape, but he was caught. They made him eat a mouthful of red pepper, and five people were beating him. His hands were tied, and then they made us, the other new captives, kill him with a stick. I felt sick. I knew this boy from before. We were from the same village. I refused to kill him, and they told me they would shoot me. They pointed a gun at me, so I had to do it. The boy was asking me, “Why are you doing this?” I said I had no choice. After we killed him, they made us smear blood on our arms. I felt dizzy. They said we had to do this so we would not fear death, and so we would not try to escape.

-Susan, 16<sup>27</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> Security Council Report, Monthly Forecast, *supra* note 17, at 3.

<sup>24</sup> Bavier, Joe, “Obama’s Other War,” Dec. 24, 2010, <http://pulitzercenter.org/articles/obamas-other-war-can-barack-obama-really-defeat-central-africas-worst-guerrilla-warlord>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> “The Scars of Death: Children Abducted by the Lord’s Resistance Army in Uganda,” Human Rights Watch Report, 1997.

In December 2009, the LRA abducted Eveline with three other children from her village.<sup>28</sup> She explained:

When we got to the chief's camp, I was given to be the wife of an LRA named Nyogo. I was his servant and wife. He was very mean and aggressive, especially on days when he had to kill people. When they brought people to the camp, they wouldn't free the adults because they were afraid they might show the camp to the soldiers. That's why they made us kill them. I can't remember how many people I killed in total - one day four people, another day three people. They tied the victims' hands behind their backs and also tied a cord around their legs and sometimes around their neck. They would force the person to lie on the ground, with their face to the ground. Then if the LRA wanted us to kill them, they would give us a piece of wood and tell us to hit them on the head.<sup>29</sup>

- Eveline, a 12-year-old girl from Botolegi village (Bas Uele District, northern Congo):

A more recent 2010 report by Human Rights Watch documents several other testimonies of former LRA child soldiers. For example, an 11-year-old boy described his experiences:

After they captured me, they told me they wanted me to be a soldier. When I protested and told them that I was too young, they stabbed me under my eyes with a bayonet. Then they took me to their camp. While I was there, they gave military training to all the children. We were in teams, and each team had to come in at certain times for training, and to kill people. They treated their victims like animals and told us, 'When you kill someone, it's like killing an animal.'<sup>30</sup>

### **IN WHAT TYPES OF CRIMES ARE THE LRA IMPLICATED?**

Members of the LRA are implicated in numerous war crimes and crimes against humanity. In 2010, the U.S. Congress found that "[f]or over [two] decades, the

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<sup>28</sup> The names of victims have been changed.

<sup>29</sup> "Congo/Central African Republic: LRA Victims Appeal to Obama," Human Rights Watch, Nov. 11, 2010.

<sup>30</sup> Lee, Briana, "U.S. Support Against the LRA Spotlights Group's Brutal History," <http://www.pbs.org/wnet/need-to-know/uncategorized/u-s-support-against-the-lra-spotlights-groups-brutal-history/12070/>.

Government of Uganda engaged in an armed conflict with the [LRA] in northern Uganda that led to the internal displacement of more than 2,000,000 Ugandans from their homes.”<sup>31</sup> In addition, Congress found that “[t]he members of the [LRA] used brutal tactics in northern Uganda, including mutilating, abducting and forcing individuals into sexual servitude and forcing a large number of children and youth in Uganda, estimated by the Survey for War Affected Youth to be over 66,000, to fight as part of the rebel force.”<sup>32</sup> As recently as 2006, each night over 40,000 children sought refuge from “LRA raids by commuting from their rural homes to urban centers, where they sleep on streets or in bus parks, church grounds, and local factories.”<sup>33</sup>

However, it is the LRA’s treatment and use of children once abducted that is particularly grievous. “Aside from receiving military training, children are abused and often used as laborers, sex slaves, or human shields in combat. They are forced to take part in atrocities against their own communities or in the killings of other disobedient children, further isolating the survivors from society and binding them to the LRA.”<sup>34</sup>

Overall, more than two million people “almost ninety percent of the population of Uganda’s three main Acholi provinces, have abandoned their homes in exchange for shelter in crowded camps for internally displaced persons. These ‘protected villages,’ which often lack food, clean water, sanitation, and medicine, are safeguarded by local militias or the Ugandan national army (the United People’s Defense Forces, or ‘UPDF’).”<sup>35</sup> However, there is little protection for civilians in these displacement camps and the LRA continues to murder, rape, and abduct civilians.<sup>36</sup> Still worse, while seeking protection and shelter in the displacement camps, undisciplined UPDF soldiers have reportedly mistreated civilians as well.<sup>37</sup>

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<sup>31</sup> *Lord’s Resistance Army Disarmament and Northern Uganda Recovery Act*, *supra* note 8, Sec. 2(1).

<sup>32</sup> *Id.* at Sec. 2(2).

<sup>33</sup> Moy, H. Abigail, *The International Criminal Court’s Arrest Warrants and Uganda’s Lord’s Resistance Army: Renewing the Debate Over Amnesty and Complementarity*, 19 HARVARD HUMAN RIGHTS J. 267, 268 (2006), available at, <http://www.law.harvard.edu/students/orgs/hrj/iss19/moy.shtml>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

**HAS THE ICC ISSUED WARRANTS AGAINST HIGH LEVEL LRA MEMBERS?**

Yes, on October 13, 2005, the ICC Pre-Trial Chamber II unsealed arrest warrants against five senior leaders of the LRA: Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya, for crimes against humanity and war crimes committed in Uganda since July 2002.<sup>38</sup> The ICC warrants cover the following crimes:

Joseph Kony:

- 12 counts of crimes against humanity for murder, enslavement, sexual enslavement, rape, and inhumane acts of inflicting serious bodily injury and suffering;
- 21 counts of war crimes for murder, cruel treatment of civilians, intentionally directing an attack against a civilian population, pillage, rape, and forced enlisting of children.

Vincent Otti:

- 11 counts of crimes against humanity for murder, sexual enslavement, and inhumane acts of inflicting serious bodily injury and suffering;
- 21 counts of war crimes for rape, intentionally directing an attack against a civilian population, forced enlisting of children, cruel treatment of civilians, pillaging, and murder.

Okot Odhiambo:

- 2 counts of crimes against humanity for murder and enslavement;
- 8 counts of war crimes for murder, intentionally directing an attack against a civilian population, pillage, and forced enlisting of children.

Dominic Ongwen:

- 3 counts of crimes against humanity for murder, enslavement, and inhumane acts of inflicting serious bodily injury and suffering;
- 4 counts of war crimes for murder, cruel treatment of civilians, intentionally directing an attack against a civilian population, and pillage.<sup>39</sup>

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<sup>38</sup> Warrant of Arrest Unsealed Against Five LRA Commanders, International Criminal Court, Press Release, ICC-CPI-20051014-110.

<sup>39</sup> *Id.*

These warrants have been outstanding for over six years. The ICC originally issued sealed warrants on July 8, 2005 and amended those warrants on September 27, 2005.<sup>40</sup> It then unsealed the warrants on October 13, 2005. On July 11, 2007, the ICC withdrew the arrest warrant against rebel commander Raska Lukwiya after he was killed in August 2006.<sup>41</sup> Vincent Otti is also reportedly deceased; however, the ICC has not withdrawn the warrant against him.<sup>42</sup> Kony, Odhiambo, and Ongwen remain at large.

### **HAVE THE LRA CONTINUED TO COMMIT CRIMES AFTER THE ICC ISSUED ITS WARRANTS?**

Yes. The LRA has continued to attack civilians and commit atrocities across the border regions of the CAR, the DRC, and Southern Sudan as early as 2005.<sup>43</sup> During 2008, LRA forces outside Uganda are “believed to have abducted hundreds of people, including children, and to have committed a number of other human rights abuses, including unlawful killings, in the [DRC], Southern Sudan and the [CAR].”<sup>44</sup> “The UN estimates that over 385,000 people are currently displaced across the region as a result of LRA activity.”<sup>45</sup> And, as noted above, “according to the UN, there have been over 250 attacks attributed to the LRA in [2011] alone.”<sup>46</sup>

From May 16–27, 2011, a UN interdepartmental evaluation mission visited the CAR, the DRC, Southern Sudan and Uganda to evaluate the current situation regarding the LRA.<sup>47</sup> The Mission determined that the LRA has splintered into several smaller, autonomous, yet “highly mobile” groups that continue to attack civilians with impunity.<sup>48</sup> While not posing a serious threat to individual states’ national security, these groups are a serious threat transnationally in the Central

<sup>40</sup> Report of the Secretary-General on the Lord’s Resistance Army, *supra* note 3, at 4.

<sup>41</sup> Pre-Trial Chamber II, No. ICC-02/04-01 /05-248 of 11 July 2007; Report of the Secretary-General on the Lord’s Resistance Army, *supra* note 3, at 4.

<sup>42</sup> Mwakugu, Noel “Obituary: LRA Deputy Vincent Otti,” BBC News, Jan. 23, 2008, <http://news.bbc.co.uk/2/hi/africa/7083311.stm>; Report of the Secretary-General on the Lord’s Resistance Army, *supra* note 3, at 4.

<sup>43</sup> Yamamoto, *supra* note 14.

<sup>44</sup> Uganda: Amnesty International Annual Report 2009, found at <http://www.amnesty.org/en/region/uganda/report-2009>.

<sup>45</sup> Yamamoto, *supra* note 14.

<sup>46</sup> Yamamoto, *supra* note 14.

<sup>47</sup> Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, S/2011/616, October 24, 2011, at 22.

<sup>48</sup> *Id.* at 22; Report of the Secretary-General on the Lord’s Resistance Army, *supra* note 3, at 7.



African region and continue to wreak havoc and incur high humanitarian costs that could potentially lead to destabilization, particularly considering the limited military capacities of the affected states.<sup>49</sup> The Mission also noted “a proliferation of ‘copycat’ attacks by unknown armed groups or criminals,” and a “discrepancy in the assessment by the LRA-affected countries of the threat posed by this armed group, which suggests a lack of coordination among those countries.”<sup>50</sup>

**WOULD THE U.S. NEED TO TAKE CUSTODY OF, OR TRANSFER, ANY LRA MEMBERS AGAINST WHOM ICC WARRANTS HAVE BEEN ISSUED TO THE HAGUE?**

No. U.S. military advisors are working in conjunction with regional armed forces from the DRC, the CAR, and Uganda, which are all States Parties to the Rome Statute. U.S. military advisors are not directed to engage with the LRA directly and are deployed only to provide support and training to the States Parties’ armed forces that are participating in the effort.<sup>51</sup> However, in the event that U.S. military advisors do take custody of LRA members against whom ICC warrants have been issued, they could turn those LRA members over to a participating State Party’s military, who in turn would be obligated to transfer custody to the ICC.<sup>52</sup>

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<sup>49</sup> Report of the Secretary-General on the United Nations Organization Stabilization Mission, *supra* note 47, at 22; Report of the Secretary-General on the Lord’s Resistance Army, *supra* note 3, at 9, 60.

<sup>50</sup> Report of the Secretary-General on the United Nations Organization Stabilization Mission, *supra* note 47, at 22; Report of the Secretary-General on the Lord’s Resistance Army, *supra* note 3, at 13.

<sup>51</sup> Letter From the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate Regarding the Lord’s Resistance Army, October 14, 2011, found at All Africa, <http://allafrica.com/stories/201110150150.html>.

<sup>52</sup> Rome Statute of the International Criminal Court (“Rome Statute”), *available at* <http://untreaty.un.org/cod/icc/statute/rome.htm>, art. 59.

**COULD UGANDA DOMESTICALLY PROSECUTE LRA MEMBERS AGAINST WHOM THERE ARE NO ICC WARRANTS FOR WAR CRIMES AND/OR CRIMES AGAINST HUMANITY?**

Yes, in theory. Uganda set up the International Crimes Division of the High Court of Uganda in 2009 as part of an effort “to implement the 2008 Juba peace agreements between the Ugandan government and the LRA.”<sup>53</sup> The International Crimes Division has jurisdiction over “genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy and any other international crime defined in Uganda’s Penal Code Act, the 1964 Geneva Conventions Act, the 2010 International Criminal Court Act (‘ICCA’), or any other [Ugandan] criminal law.”<sup>54</sup> The ICCA defines war crimes and crimes against humanity and codifies them into Uganda’s domestic law, allowing Uganda to prosecute such crimes outside of their ordinary criminal code.<sup>55</sup> However, there is a question as to whether the ICCA would apply retroactively to crimes committed before its enactment in 2010 because ICCA lacks a specific provision to that effect.<sup>56</sup> Uganda’s Directorate of Public Prosecutions (“DPP”) suggested there would not be retroactive application, which would “severely restrict” prosecuting crimes “committed during most of the conflict in northern Uganda.”<sup>57</sup>

Another possible obstacle to domestic prosecution is the Ugandan Amnesty Act (“the UAA”). The UAA, passed in 2000, “effectively guarantees that any individual who either escaped or was captured and subsequently renounced rebellion can be granted reprieve from any prosecution.”<sup>58</sup> In 2011, Uganda attempted to try its first former LRA member for crimes committed during the insurgency.<sup>59</sup> Former senior LRA commander Col. Thomas Kwoyelo, against whom there was no ICC warrant, was brought before Uganda’s International

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<sup>53</sup> “Update on the trial of Thomas Kwoyelo, former LRA combatant,” Human Rights Watch, July 12, 2011, found at <http://www.hrw.org/news/2011/07/12/update-trial-thomas-kwoyelo-former-lra-combatant>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Kersten, Mark, “Conflicting Impulses: The Debate on Amnesties in the Case of Uganda’s Thomas Kwoyelo and Beyond,” *Opinio Juris*, September 27, 2011, at <http://opiniojuris.org/2011/09/27/conflicting-impulses-the-debate-on-amnesties-in-the-case-of-ugandas-thomas-kwoyelo-and-beyond/>.

<sup>59</sup> “Update on the trial of Thomas Kwoyelo, former LRA combatant,” *supra* note 53.

Crimes Division.<sup>60</sup> However, Col. Kwoyelo's attorneys claimed that he had renounced the LRA and thus should be given a reprieve from prosecution as other former LRA members have been granted.<sup>61</sup> Citing the UAA, his attorneys raised preliminary objections before trial arguing that Col. Kwoyelo had both applied for amnesty and renounced the LRA, as required by the UAA.<sup>62</sup>

Pursuant to Col. Kwoyelo's preliminary objections, the matter was referred to Uganda's Constitutional Court and the court upheld application of the UAA to Col. Thomas Kwoyelo.<sup>63</sup> The court ruled that the DPP's refusal to grant amnesty to Kwoyelo violated his right to equal treatment before the law.<sup>64</sup> Moreover, the Constitutional Court saw no conflict in granting amnesty under the UAA and Uganda's international obligations to the ICC. Specifically, the court noted that neither it nor the DPP had found "any uniform international standards or practices which prohibit[ed] states from granting amnesty" to persons pursuant to properly enacted legislation.<sup>65</sup> It ordered the case returned to the Ugandan High Court's International Crimes Division and dismissed.<sup>66</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*; Report of the Secretary-General on the Lord's Resistance Army, *supra* note 3, at 27.

<sup>62</sup> Kersten, Mark, *supra* note 58. See also Mallinder, Louise, "Uganda at a Crossroads: Narrowing the Amnesty?," Working Paper No. 1, from *Beyond Legalism: Amnesties, Transition, and Conflict Transformation*, Institute of Criminology and Criminal Justice, Queen's University, Belfast (2009) at 24 (under a 2006 amendment of the UAA, the Minister of Internal Affairs has the authority to declare individuals ineligible for amnesty under the UAA; however, the Minister has not declared any individuals ineligible).

<sup>63</sup> Ugandan LRA Rebel Thomas Kwoyelo Granted Amnesty, BBC, September 22, 2011 found at <http://www.bbc.co.uk/news/world-africa-15019883>; Report of the Secretary-General on the Lord's Resistance Army, *supra* note 3, at 26.

<sup>64</sup> Uganda Law Society Newsletter, Issue 6, September 2011; Report of the Secretary-General on the Lord's Resistance Army, *supra* note 3, at 26.

<sup>65</sup> *Thomas Kwoyelo alias Latoni V Uganda* (Const. Pet.No. 036 Of 2011(reference)), [2011] UGCC 10 (22 September 2011), The Republic of Uganda, In the Constitutional Court of Uganda, Holden at Kampala, found at <http://www.ulii.org/ug/cases/UGCC/2011/10.html>.

<sup>66</sup> *Id.*

There is, however, ample authority that at least certain war crimes should not be amnestied, particularly if there exists a state obligation to prosecute them.<sup>67</sup> While there is debate as to whether there is an international law prohibition against amnesties, with some scholars arguing that an express, customary, prohibition has not yet crystallized, the law is certainly moving in that direction.<sup>68</sup> Additionally, the UN Secretary-General has urged Uganda to amend the UAA to bring it in line with international standards.<sup>69</sup> Even if Uganda does recognize such amnesties, it is possible that the ICC could issue warrants against additional individuals purportedly covered by the amnesty, where the individuals' crimes rise to sufficient levels of gravity. A state's domestic law does not bind the ICC and only the ICC may decide whether a case is admissible before it.<sup>70</sup> Thus, the ICC could issue additional warrants, and the cases would

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<sup>67</sup> Legal scholars have divergent opinions on whether states may grant amnesty domestically to alleged perpetrators of war crimes, and certainly question the wisdom of doing so. See, e.g., Kersten, *supra* note 58 (discussing the contested nature of granting amnesty for certain international crimes); see also U.N. Secretary General, Guidance Note of the Secretary General: United Nations Approach to the Transitional Justice, 10 (March 2010), available at [www.unrol.org/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf) (stating that the UN will not endorse peace agreements with provisions that provide amnesties for genocide, war crimes, crimes against humanity, and gross violations of human rights and further suggesting that the UN should insist that all future peace agreements do not contain amnesty provisions); Coalition for the International Criminal Court, Uganda: Latest Statements, News, and Reports, October 10, 2011, found at <http://www.iccnw.org/?mod=newsdetail&news=4828> (compiling members' reports on the Kwoyelo trial and Constitutional court ruling); "Uganda: Court's decision a setback for accountability for crimes committed in northern Uganda conflict," Amnesty International, Public Statement, AI Index: AFR 59/015/2011, September 23, 2011, found at <http://www.amnesty.org/en/library/asset/AFR59/015/2011/en/93159d77-dbec-4950-a239-8dcfcd19c98a/af590152011en.html> (arguing that the "Ugandan government should revoke any amnesty applicable to crimes under international law and not impose amnesties, immunities, statutes of limitations and pardons for crimes under international law").

<sup>68</sup> Kate Allan, *Prosecution and Peace: A Role for Amnesty Before the ICC?*, 39 DENV. J. INT'L L. & POL'Y 239, (Spring 2011) (citing John Dugard, *Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?*, 12 LEIDEN J. INT'L L. 1001, 1003 (1999) and Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 1018 (2006).

<sup>69</sup> Report of the Secretary-General on the Lord's Resistance Army, *supra* note 3, at 69.

<sup>70</sup> Holmes Pitner, Barrett, "Uganda: Future of War Crimes Trials in Question: Granting of amnesty for alleged rebel commander may jeopardise other cases," ACR Issue 304, October 11, 2011, found at <http://iwpr.net/report-news/uganda-future-war-crimes-trials->

remain admissible before the ICC, if the ICC were to find, pursuant to the Rome Statute article 17, that Uganda was either unwilling or unable to prosecute them.<sup>71</sup>

-- Jennifer Trahan  
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question.

<sup>71</sup> Rome Statute, art. 17; Holmes Pitner, Barrett, "Uganda: Future of War Crimes Trials in Question, *supra* note 70.

## **INTERNATIONAL CRIMINAL COURT COMMITTEE**

Letter to the U.N. Security Council re: Security Council Referral of  
Syria to the International Criminal Court

March 13, 2012

To the Members of the  
United Nations Security Council  
760 United Nations Plaza  
New York, NY 10017

Re: Security Council Referral of Syria to the International Criminal  
Court

Your Excellencies:

The International Criminal Court Committee of the American Branch of the International Law Association<sup>1</sup> writes to urge that the U.N. Security Council refer the situation in Syria to the Prosecutor of the International Criminal Court.

The International Criminal Court has jurisdiction under Rome Statute article 5(1) over “the most serious crimes of concern to the international community as a whole.” Syria, however, is not a party to the International Criminal Court’s Rome Statute. Accordingly, for the International Criminal Court to have jurisdiction over crimes being committed in Syria, the Security Council, acting under Chapter VII of the U.N. Charter, must refer the situation to the Court.

It is estimated that more than 7,500 civilians have been killed by Syrian forces over the last year, and there are credible reports that over 100 civilians continue to be killed each day.<sup>2</sup> The Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/19/69, published on February 22, 2012, as well as the High Commissioner for Human Rights herself, have both characterized the crimes that are occurring as “crimes against humanity.” Underlying crimes are thought to include rape, murder and torture. To the extent that the fighting rises to the level of armed conflict, civilian deaths as well as rape and torture could potentially constitute war crimes as well.

Prompt action by the Security Council is needed to stop the appalling atrocities being committed. While two permanent members of the Council have made it clear that they are unprepared to endorse robust action, at minimum, all Security

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<sup>1</sup> Two members of the ABILA ICC Committee have chosen not to be associated with this letter.

<sup>2</sup> “Syria Unrest: ‘Humanitarian’ Vote Pressed at UN,” BBC News, February 29, 2012.

Council members should refer the situation to the International Criminal Court's Prosecutor for investigation, and possible prosecutions, if warranted. Such a referral does not supplant the need for additional measures, but nor does it require or constitute the type of stronger measures to which those members have objected.

Referring the Syrian situation to the ICC is not tantamount to taking any side in the conflict. Such a referral operates in a neutral way, requiring the Prosecutor to investigate crimes in the situation country. Nor would a referral increase the possibility of escalating the conflict. It would simply ensure that justice for the most responsible perpetrators of the gravest crimes is eventually achieved.

The Security Council has previously referred two situations to the International Criminal Court: (1) the situation in Darfur (UNSC Resolution 1593) and (2) the situation in Libya (UNSC Resolution 1970). At the time of the Libya referral, far fewer fatalities were known to have occurred than have been documented in Syria. Thus, the referral is urgently needed both for the sake of the people of Syria and the Security Council's credibility. A referral may possibly create additional deterrence with respect to crimes not yet committed, thereby saving lives.

Violators of the most horrific crimes must be held accountable, and U.N. Security Council Member States should uphold their responsibility to protect the Syrian people and the people of Syria by referring the situation to the ICC.

Thank you for your consideration.

Respectfully,

Jennifer Trahan

Chair, American Branch of the  
International Law Association,  
International Criminal Court  
Committee

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**UNITED NATIONS LAW COMMITTEE**

Sub-committee on Non-State Actors to the ABILA UN  
Committee: Report on Meeting of the  
ILA Committee on Non-State Actors

## Report on Meeting of the ILA Committee on Non-State Actors

By Dr. Barbara K. Woodward

The International Law Association (ILA) Committee on Non-State Actors (NSAs) held a working meeting on February 24, 2011, at the Leuven Centre for Global Governance Studies at Leuven University, Leuven, Belgium, to discuss and propose amendments to the Committee's second draft report. Participating Committee members agreed to take various actions, including three main changes. The first was to add an outline of the methodology, distinguishing between NSAs' influence on international lawmaking and their participation rights. Also, to improve the analytical approach, formal methods of NSA participation in intergovernmental organizations (IGOs) and institutional regimes were to be classified into four categories.<sup>1</sup> Finally, judicial and quasi-judicial fora were to be grouped by their international substantive and regional jurisdictions.<sup>2</sup> Based on these discussions, Committee members contributed to produce a revised draft report which was circulated to all Committee members for comments. Dr. Cedric Ryngaert (Rapporteur of the Committee) then prepared the final draft report and submitted it to the ILA for presentation at its 75<sup>th</sup> Conference held in Sofia, Bulgaria on 26-30 August 2012.

The Committee's Second Draft Report, Non-State Actors in International Law: Lawmaking and Participation Rights, maps the practice of NSAs in terms of their capacity for international lawmaking and their rights to participate in various international legal arrangements. It addresses legal issues concerning NSA activity relating to norm-creation or lawmaking, which is one of three functional categories of global governance.<sup>3</sup> This responds to the Committee's first question of determining *what* the actual practice of NSAs is in

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<sup>1</sup> The four categories are: (1) consultation and co-option; (2) delegation of State functions to private NSAs; (3) joint decision-making (co-regulation); and (4) private self-regulation with public oversight. See T. Börzel and T. Risse, 'Public-Private Partnerships: Effective and Legitimate Tools of International Governance', in E. Grande and L.W. Pauly (eds), *Complex Sovereignty: On the Reconstitution of Political Authority in the 21st Century*, University of Toronto Press, 2005, a version of which is available at <userpage.fu-berlin.de/~atasp/texte/021015\_ppp\_risse\_boerzel.pdf>.

<sup>2</sup> *I.e.*, General, criminal, human rights, environmental, economic and regional.

<sup>3</sup> The other two, based on analogies to domestic governance, are monitoring compliance (execution, administration or law application) and enforcement (dispute settlement or adjudication of norms of responsibility). ILA Committee on Non-State Actors, Hague Conference Report 2012, at 5.

terms of their rights and the effects of their practice on the functioning of the international system.<sup>4</sup> The report also aims to answer the objective, definitional and descriptive question presented of “to what extent has the law already responded to the challenges of NSAs in international law?”<sup>5</sup>

The first part of the Report examines lawmaking by NSAs, or their lawmaking capacity. It inquires whether NSAs, like States or IGOs, can directly contribute to the creation of international law by entering into treaties, making binding unilateral commitments, or providing practice and/or *opinio juris* for the purpose of identifying norms of customary international law. Part two studies NSA participation rights in and influence on institutional legal arrangements dominated by States and IGOs in two categories: IGOs and other institutional regimes (UN and non-UN) and international dispute-settlement mechanisms (judicial, quasi-judicial and transnational private regulatory systems). As noted above, formal participation in international institutional arrangements was further classified into one of four types of relationships between States and NSAs in mixed public-private policy networks that characterize global governance. Also, the report divides potentially norm-creating participation of NSAs in dispute settlement bodies, as *amicus curiae* or otherwise, into substantive jurisdictional groups. Finally, the report does not distinguish between decision-making processes that lead to the adoption of hard or ‘soft’ law. It emphasizes NSA rights of participation in deliberative processes, regardless of the outcome of such processes.

At the Sofia Conference, Dr. Ryngaert presented the Report at the Open Working Session, and it was well received. At the Closed Session, attending Committee members discussed the work remaining on NSA responsibilities, including empirical findings and theoretical considerations. The Committee intends to address these in a third report for presentation at the ILA conference in Washington, D.C. in April 2014. At their meeting with Christine Chinkin and Marcel Brus (present and incoming Director of Studies of the ILA), Professor Chinkin informed Professor Math Noortmann (Chairman of the Committee) and Dr. Ryngaert that she would propose an extension of the mandate for another four years, and this was granted. This will enable the Committee to draft a final report and a substantial resolution for the 2016 ILA Conference in Durban.

The Committee will hold its next meeting on theoretical and empirical

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<sup>4</sup> *Id.*, at 3-4.

<sup>5</sup> *Id.*, at p. 9.

issues relating to the responsibilities of NSAs at The Institute for Transborder Studies at Kwantlen Polytechnic University, in Vancouver (Canada) on June 28-29, 2013. The Committee members would be grateful for any contributions to the research for this project, particularly information on any developments regarding international responsibilities of NSAs. This could involve NSA primary international obligations under international law, secondary rules of responsibility of NSAs (e.g., attribution, shared responsibility), monitoring of NSA compliance with international law and private regulatory initiatives, NSA involvement in international compliance-monitoring mechanisms, private complaints mechanisms or privileges and immunities of NSAs. Any ABILA members interested in participating and contributing to this project or simply in offering information that may be of use to the Committee in its work are encouraged to contact Dr. Barbara K. Woodward at [barbarakwoodward@aol.com](mailto:barbarakwoodward@aol.com).

## **IV. CONSTITUTIONS AND BY-LAWS**

**INTERNATIONAL LAW ASSOCIATION  
CONSTITUTION OF THE ASSOCIATION**  
(adopted at the 75th Conference, 2012)

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## **1 Definitions**

In this Constitution the following words and expressions shall have the following meanings:

“Branch”	a branch of the Association established in accordance with Article 8 below;
“Conference”	a conference held in accordance with Article 10 below;
“the Executive Council”	the executive council of the Association described in Article 6 below;
“the Full Council”	the full council of the Association described in Article 7 below;
“A Council”	either the Executive Council or the full Council as defined herein;
“Headquarters Member”	those members elected by the Executive Council in accordance with Article 4.1.4 below.

## **2 Name**

The name of the Association is “The International Law Association” (“the Association”). Its seat is in London.

### **3 Objects and Powers**

3.1 The objectives of the Association are the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law.

3.2 In furtherance of such objects but not otherwise the Association may:

3.2.1 employ any person or persons to supervise, organise and carry on the work of the Association and make all reasonable and necessary provision for the payment of pensions and superannuation to or on behalf of employees and their surviving spouses and other dependants;

3.2.2 bring together in conference individuals as well as representatives of voluntary organisations, Government departments, statutory authorities and international organisations;

3.2.3 promote and carry out or assist in promoting and carrying out research, surveys and investigations and publish the useful results of such research, surveys and investigations;

3.2.4 arrange and provide for, or join in arranging and providing for, the holding of exhibitions, meetings, lectures, classes, seminars and training courses;

3.2.5 collect and disseminate information on all matters affecting such objects and exchange such information with other bodies having similar objects whether in this country or overseas;

3.2.6 undertake, execute, manage or assist any charitable trusts which may lawfully be undertaken, executed, managed or assisted by the Association;

3.2.7 procure to be written and print, publish, issue and circulate gratuitously or otherwise such papers, books, periodicals, pamphlets or other documents or films or recorded tapes as shall further such objects;

3.2.8 purchase, take on lease or licence or in exchange, hire or otherwise acquire any property and any rights and privileges necessary for the promotion

of such objects and construct, maintain and alter any buildings or erections necessary for the work of the Association;

3.2.9 make regulations for any property which may be so acquired;

3.2.10 sell, let, mortgage, dispose of or turn to account all or any of the property or assets of the Association;

3.2.11 accept gifts and borrow or raise money for such objects on such terms and on such security as shall be thought fit;

3.2.12 procure contributions to the Association by personal or written appeals, public meetings or otherwise;

3.2.13 invest the money of the Association not immediately required for such objects in or on such investments, securities or property as may be thought fit, subject nevertheless to such conditions (if any) as may for the time being be imposed or required by law;

3.2.14 enter into contracts;

3.2.15 do all such other lawful things as are necessary or desirable for the attainment of such objects.

## **4 Members**

4.1 The members of the Association shall be:

4.1.1 honorary members elected by a Council;

4.1.2 individuals elected by a Branch;

4.1.3 organisations, whether corporate or unincorporated, elected by a Branch or the Executive Council; and

4.1.4 persons or organisations whether corporate or unincorporated elected by the Executive Council (to be known as "Headquarters Members").

4.1.5 a Branch, if it is a corporate body, but only on the basis stated in paragraphs 4.5, 8.7 and 10.2 below.



4.2 Each member organisation, elected as aforesaid, may appoint two individuals (the "Appointed Representatives") being members of that organisation to represent it.

4.3 Each member organisation may appoint a deputy to replace either of its Appointed Representatives if either of the Appointed Representatives is unable to attend any particular meeting of the Association.

4.4 Individual members who are engaged in full time study at a school, university, college or other education establishment may be designated student members while they continue their studies.

4.5 Members of the Association have the right to attend conferences and to vote on the affairs of the Association in accordance with and to the extent stated in paragraphs 8.7 and 10.2 only, and not otherwise.

## **5 Officers and Assistants**

5.1 At each Conference, the Association shall elect a president ("the President"), who shall hold office until the commencement of the next Conference, and shall, on vacating office become ex officio a vice-president of the Association ("the Vice-President" and if more than one "the Vice-Presidents").

5.2 The Executive Council shall elect the following additional Officers and such other Officers and Assistants as the Executive Council shall from time to time decide (together "the Officers") provided, subject to Article 5(3), that 3 months' notice of the proposal to make an election at a meeting of the Executive Council shall have been given in writing by the Secretary General to the presidents of branches and to members of the Executive Council. Nominations for such election may be made by branches and by members of the Executive Council not later than one month prior to such meeting of the Executive Council and shall be circulated by the Secretary General to the presidents of branches and members of the Executive Council as soon as reasonably possible:

5.2.1 a chair of the Executive Council ("the Chair");

5.2.2 such number (not exceeding 4) of vice-chairs of the Executive Council as the Executive Council may from time to time elect (“the Vice-Chairs”);

5.2.3 a treasurer (“the Treasurer”);

5.2.4 a director of studies (“the Director of Studies”); and

5.2.5 a secretary-general (“the Secretary-General”).

5.3 The Officers shall hold office for a term of four years subject to the right of the Executive Council to terminate that period of office at any time by a two-thirds majority of those present and entitled to vote at a meeting of the Executive Council. Upon the expiration of a term of office any Officer shall be eligible for re-election provided that no person shall be elected to serve more than a maximum of three full four-year terms in that office. All Officers shall serve until their successors have taken office. In the event of a vacancy occurring before the termination of an existing Officer’s mandate, the Executive Council may fill that vacancy until the end of the period of the previous holder’s mandate without complying with the requirements of Article 5.2.

5.4 The Chair, the Vice-Chairs, the Treasurer, the Director of Studies and the Secretary General shall constitute the Trustees of the Association for the purposes of the Charities Acts 1992 and 1993.

## **6 The Executive Council**

6.1 The powers of the Association shall be vested in the Executive Council in the intervals between Conferences.

6.2 The members of the Executive Council shall be:

6.2.1 the President, Vice-Presidents and Patrons;

6.2.2 the Officers;

6.2.3 the ex-Chairs and ex-Vice-Chairs of the Executive Council;

6.2.4 one to three Branch members elected by each Branch in accordance with the following formula: one member for a fully paid Branch membership of

fewer than 100, two members for a fully paid Branch membership between 101 and 250, and three members for a fully paid Branch membership above 250; and

6.2.5 individuals co-opted by the Executive Council.

6.3 Members appointed in accordance with Articles 6.2.4 and 6.2.5 above shall be Members for a period not exceeding four years and shall be eligible for re-election or co-option again.

6.4 The Chair shall preside at any meeting of the Executive Council. In the absence of the Chair the Vice-Chair with the longest period in office shall preside.

6.5 If a Member appointed in accordance with Article 6.2.4 cannot attend a meeting of the Executive Council, then the president of the electing Branch may appoint a substitute to attend that meeting only.

6.6 A vacancy in the Executive Council may be filled by election by the electing Branch, if the former member was appointed in accordance with Article 6.2.4, or by co-option, if the former member was appointed in accordance with Article 6.2.5. For the purposes of this Article 6.6 a vacancy shall occur by reason of resignation, death or election of that member as an Officer or President.

6.7 Eight members of the Executive Council shall constitute a quorum.

6.8 The Executive Council may appoint a Finance and Policy Committee and other special or standing committees, and it shall determine their terms of reference, powers, duration and composition.

6.9 The Executive Council shall have regard to any general direction of the Full Council.

6.10 The Executive Council shall, subject to the provisions of this Constitution, have power to settle, adopt and issue standing orders and/or rules for the Association, including standing orders or rules for the conduct of Conferences.

6.11 The Executive Council shall have power to delegate to such person or persons being members of the Association, such powers as it may resolve from

time to time and for such period and on such conditions as it may resolve, in furtherance of the objectives of the Association and the conduct of its business.

## **7 The Full Council**

7.1 The members of the Full Council shall be:

7.1.1 the members of the Executive Council; and

7.1.2 the presidents and secretaries of all Branches.

7.2 The Full Council shall meet at least once during each Conference.

7.3 Twenty members of the Full Council shall constitute a quorum.

## **8 Branches**

8.1 Regional Branches consisting of at least ten members of the Association may be formed with the consent of the Executive Council.

8.2 The Executive Council may dissolve any Branch, or in the case of a Branch which is a corporate body may terminate its membership of the Association, where the membership of the Branch has become less than ten or if contributions are more than three years in arrears. Any Branch which has been dissolved or whose membership has terminated in this or any other way shall cease to operate or hold itself out as a Branch of or associated with the Association, and shall if necessary change its name to make clear that it is no longer a Branch of or associated with the Association.

8.3 Branches are regional. They may be composed of countries within a geographical area, a single country or a geographical area within a country. The members of a Branch may be nationals of the country or countries in their respective region, whether residing or not in such country or countries, and other persons ordinarily resident there and any organisation member which has sufficient interests or presence there.

8.4 A Branch may expel any of its members from the Branch in accordance with the procedure set out in its constitution and such member shall cease to be a member of the Association without prejudice to the position of Headquarters

Members. Any expulsion by a Branch shall be reported to the Executive Council as soon as possible.

8.5 The constitutions of the Branches and any amendments thereto must be approved by the Executive Council.

8.6 Each Branch shall appoint a president and secretary and such other officers as are authorised by the constitution of the Branch.

8.7 Individual Members of Branches may attend Conferences and speak and vote there as individuals, each having one vote. The Association does not recognise delegates or delegations as such. A Branch which is a corporate body has as such no right to attend or vote at a conference.

8.8 Branches are not authorised to enter into contracts on behalf of the Association and the Association shall not be bound by any contract entered into by a Branch. The Association shall not be liable for the contracts, debts, torts, civil wrongs or any other acts or omissions of a Branch whether in connection with a Conference organised by a Branch or otherwise.

## **9 Patrons**

The Executive Council may appoint persons who have rendered distinguished service to the Association as Patrons who shall be ex-officio members of the Executive Council.

## **10 Conferences**

10.1 Conferences of the Association shall be held at such times and places, and on such bases as shall be decided by the Executive Council in consultation with the Branch organising the Conference. Conference agendas shall be examined and settled in consultation between the Branch organising the Conference and the Executive Council prior to the Conference.

In addition to individual Members of Branches (paragraph 8.7 above), individual Headquarters Members, Honorary Members and Appointed Representatives (or deputies of Appointed Representatives) of member organisations may attend, speak and vote at Conferences, each having one vote.

10.2 There shall be paid to the Branch of the Association organising the Conference, by every individual Member and every Appointed Representative or his or her deputy attending that Conference as well as by any non-Member who may be permitted to attend and for each person accompanying such Member, Appointed Representative, deputy or non-Member, such fee as shall be determined by the Branch organising the Conference in consultation with the Executive Council ("the Conference Fee").

10.3 A report of each Conference shall be published as soon as possible after the Conference in accordance with guidelines laid down from time to time by the Executive Council.

## **11 Contributions**

11.1 Each Branch member shall pay a subscription to the Branch of such amount as the Branch shall from time to time determine.

11.2 Each Branch shall pay to the Treasurer an annual subscription of such amount as the Executive Council shall determine in respect of each Branch member.

11.3 The Executive Council may set reduced subscription fees for new Branches or for Branches situated in the less developed countries, and may waive or reduce the fees payable to the Treasurer in respect of student members, on such conditions as it decides.

11.4 Headquarters Members shall pay such annual subscription as the Executive Council shall determine.

11.5 Only Members who have paid their Conference Fees shall be entitled to attend a Conference as Members. Members who are in arrears with their subscriptions may not vote on any resolutions put before that Conference.

## **12 Official Languages**

The official languages of the Association shall be English and French. Each Member may write or speak at any Conference or Meeting of the Association or any of its Committees in either of the official languages.

### **13 Expenditure**

No expenditure shall be made, and no liability incurred, in excess of the available funds of the Association.

### **14 Amendment of the Constitution**

The Constitution of the Association may be amended at any Conference by a vote of two-thirds of the members present, three months' previous notice having been given in writing to the Executive Council of the motion to amend the terms, provided that no alteration shall be made which would have the effect of causing the Association to cease to have the status of a charity at law.

**CONSTITUTION OF THE AMERICAN BRANCH  
OF THE INTERNATIONAL LAW ASSOCIATION**

**(CURRENT AS OF SEPTEMBER 2011)**

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*NAME*

1. The name of the Association shall be: "The American Branch of the International Law Association."

*OBJECTS*

2. The objects of the American Branch shall be to cooperate with the International Law Association (founded in 1873) in the study and discussion of international law, public and private, and in the support of measures for its advancement.

*MEMBERS*

3. The American Branch shall consist:

(a) Of all members of the International Law Association who reside within the United States and who have made application to be enrolled in the American Branch;

(b) Of all persons, institutions, firms, associations or corporations admitted upon application, by vote of the American Branch or its Executive Committee, provided they are otherwise eligible to membership in the International Law Association.

4. Members of the American Branch become thereby also members of the International Law Association without further payment of dues and are entitled to receive all its current publications and reports.



### *DUES*

5. Each member of the American Branch shall pay to the Treasurer an annual sum as determined by the Executive Committee from time to time. The Executive Committee may determine classes of membership with corresponding appropriate dues. Of such dues the American Branch shall pay over to the International Law Association such proportion in settlement of the dues to the parent organization as shall be fixed by the rules of that organization.

6. Any member in arrears for dues for more than one year may be dropped from the roll of membership by vote of the executive committee after notice mailed to his last known address.

### *OFFICERS*

7. The officers of the American Branch shall consist of a President, not less than two or more than five Vice-Presidents, an Honorary Treasurer, and an Honorary Secretary, and shall include a President-Elect (as provided below). The officers shall be elected for a two-year term at the annual meeting following the biennial conference of the international law association, and shall be eligible for reelection. The President, however, shall be eligible to serve a maximum of four years in that office. If the President is elected to serve a second two-year term, there shall also be elected a President-Elect who shall serve during the President's second two-year term and assume the office of President at its end. The Executive Committee may also elect an Honorary President and such number of Honorary Vice-Presidents as it may decide, to serve until the next election.

### *EXECUTIVE COMMITTEE*

8. The American Branch shall be managed by an Executive Committee consisting of the retiring President of the Branch, who shall serve as chairman of the Executive Committee for the duration of the term(s) of the retiring President's successor, the officers for the time being (except Honorary President or Honorary Vice-Presidents), and not less than ten nor more than twenty additional members elected at the annual meeting following the biennial conference of the International Law Association. Vacancies among the officers or members of the Executive Committee shall be filled up by a majority vote of the remaining members of the Executive Committee until the next annual general meeting. Votes of the Executive Committee may be taken either at a

meeting thereof at which a quorum of four shall be present or in writing, in which event a majority of the Executive Committee shall be necessary to constitute a vote. Five days' notice of meetings of the Executive Committee shall be given to each member thereof, in person or by mail sent to his last known address.

### *ANNUAL MEETING*

9. The annual general meeting of the American Branch shall take place at such time and place as may be fixed by the Executive Committee and at least twenty days notice thereof shall be sent to each member of the American Branch by mail to his last known address.

Special meetings may be called at such times and places, and on such notice to the members, as the Executive Committee may determine.

10. The Executive Committee is authorized to make, and from time to time to revise and amend, such rules and regulations, not inconsistent with this constitution, as may be deemed proper, for the conduct of the meetings and the business and affairs of the Branch and of such Committee.

Such rules and regulations from and after their adoption by such Committee shall have the force and effect of By-laws.

### *EXPENDITURES*

11. All expenditures of the American Branch shall be met by the dues of members and from such other funds as it may acquire by donation or otherwise. No debt or other financial obligation shall be made or incurred beyond the amount of the funds in the hands of the treasurer.

### *AMENDMENT OF CONSTITUTION*

12. The constitution may be amended at any regularly called meeting of the American Branch by a vote of three-fourths of the members present, provided notice of the proposed amendment has been given in the notice of the meeting.

**BY-LAWS OF THE AMERICAN BRANCH  
OF THE INTERNATIONAL LAW ASSOCIATION**

(as adopted June 7, 1974, reflecting amendments through September, 2011)

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*I. NAME*

The name of the Association is "The American Branch of the International Law Association."

*II. PRINCIPAL OFFICE*

The principal office of the Association shall be located in the City, County, and State of New York.

*III. OBJECTS*

The objects of the Association are to cooperate with the International Law Association (founded in 1873) in the study and discussion of International Law, Public and Private, and in the support of measures for its advancement.

*IV. MEMBERS*

*Section 1.* The members of the Association shall consist of:

(a) all members of the International Law Association who reside within the United States and who have made application to be enrolled in the American Branch;

(b) all persons, institutions, firms, associations and corporations admitted upon application, by vote of the Association or its Executive Committee, provided that they are otherwise eligible to membership in the International Law Association.

*Section 2.* Members of the Association become thereby also members of the International Law Association without further payment of dues and are entitled to receive all of the current publications and reports.

*Section 3.* The following classes of membership are established at the annual dues indicated:

New Regular individual (first two years).....\$ 70.00  
Regular Individual .....\$100.00

Sustaining Individual .....	\$200.00
Institutional (Firm, Corporate or Non-Profit Organization).....	\$100.00

Each new regular individual, regular individual or sustaining individual member shall have one vote at each meeting of the Association. Each non-profit organization or firm shall also have one vote, to be cast by its designee. All members of all classes shall have the same rights and privileges, except as otherwise provided in the Constitution or these By-Laws.

### V. MEETINGS OF MEMBERS

*Section 1. Annual Meeting.* The annual general meeting of the Association shall take place at such time and place as may be fixed by the Executive Committee. At least twenty days' notice thereof shall be sent to each member of the Association by mail to the last known address of such member. Each annual general meeting shall be open for the transaction of any business within the powers of the Association without special notice of such business, except in such cases where such notice is required by law, by the Constitution of the Association, or by these By-Laws.

*Section 2. Special Meetings.* Special meetings of the members of the Association may be called at any time by the Executive Committee or by the President, or by any five members, and may be held at such time and place as may be specified in their notices or waivers of notice thereof.

*Section 3. Notice of Meetings.* Notice of each meeting of members of the Association shall be in writing; shall state the place, date and hour of the meeting; and unless it is an annual general meeting, shall state that it is being issued by or at the direction of the person or persons calling the meeting, and state the purpose or purposes for which the meeting is called. A copy of such notice shall be given, personally or by mail, not less than twenty nor more than fifty days before the date of the meeting to each member. If mailed, such notice shall be deemed to have been given when deposited in the United States mail, with postage thereon prepaid, directed to the member at the address of the member as it appears in the records of the Association, or, if a written request has been filed with the Secretary of the Association that notices to such member be mailed to some other address, then directed to such member at such other address. Notice of the time, place, or purpose of any meeting need not be given to any member who signs a waiver of notice of such meeting, either before or after the meeting, and the attendance of any member at a meeting without protesting prior to the conclusion of the meeting the lack of notice of such meeting shall constitute a waiver of notice by such member. Notice need not be given of any adjourned meeting, if the time and place to which the meeting is adjourned are announced at the meeting at which the adjournment is taken.

*Section 4. Voting and Quorum.* Each member shall be entitled to one vote on each matter submitted to a vote of members. Each member shall be entitled to vote in person or by proxy, but no proxy shall be voted on after six months from its date unless the proxy provides for a longer period. The presence at each meeting of ten members of the Association at the time of such meeting shall be necessary to constitute a quorum for the transaction of business thereat. At all meetings at which a quorum is present all matters shall, except as otherwise provided by law or by the Constitution or By-Laws of the Association, be determined by the affirmative vote of the majority of the members present. In the absence of a quorum, the members present may adjourn the meeting from time to time until a quorum shall be present.

*Section 5. Annual Reports.* At each annual general meeting of the Association, the Executive Committee shall present a report, verified by the President and the Treasurer or by a majority of the Executive Committee, or certified by a Certified Public Accountant or by a firm of such accountants selected by the Executive Committee, showing in detail the following

- (1) the assets and liabilities, including the trust funds, of the Association as of the end of the last twelve month fiscal period terminating prior to such meeting;
- (2) the principal changes in assets and liabilities, including trust funds, during the period from the end of the last twelve month fiscal period to a recent date prior to the date of the report;
- (3) the revenues or receipts of the Association, both unrestricted and restricted to particular purposes, and the expenses or disbursements of the Association, for both general and restricted purposes, for the last twelve month fiscal period terminating prior to such meeting and for the subsequent period ending on a recent date prior to the date of the report; and
- (4) the number of members of the Association as of the date of the report, together with a statement of increase or decrease in such number during the year immediately preceding the date of the report.

There shall also be presented at the annual general meeting such reports of officers and committees as may be requested by the Executive Committee or as may be submitted at the meeting by such officers or by representatives of such committees.

## VI. EXECUTIVE COMMITTEE

*Section 1. General Powers.* The property, affairs, business and powers of the Association shall be managed, controlled and exercised by the Executive Committee.

*Section 2. Members of the Executive Committee.* The membership of the Executive Committee shall consist of the retiring President of the Association, who shall serve for two years as Chairman of the Executive Committee for the duration of the term(s) of the retiring President's successor; of the officers for the time being of the Association (except an Honorary President or Honorary Vice Presidents); and of not less than ten or more than twenty additional members elected at the annual general meeting following the biennial Conference of the International Law Association.

*Section 3. Election of Members of the Executive Committee.* At the annual general meeting of the Association following each biennial Conference of the International Law Association, the members of the Executive Committee to be elected shall be chosen by a plurality of the votes cast at the election. Any member of the Executive Committee who shall have failed to attend any meeting of the Executive Committee since the last annual general meeting shall not be eligible for re-election unless such member shall have delivered to the Executive Committee a written explanation for such nonattendance.

*Section 4. Resignations.* Any member of the Executive Committee may resign at any time by giving written notice of such resignation to the Executive Committee, the Chairman of the Executive Committee, the President or the Secretary of the Association. Unless otherwise specified in such notice, such resignation shall take effect upon receipt thereof by the Executive Committee or by the officer to whom it has been submitted.

*Section 5. Removal.* Any member of the Executive Committee may be removed from office at any time, either for or without cause, by the affirmative vote of a majority of the members of the Association present in person or represented by proxy at an annual general meeting or at a special meeting called for the purpose, and the vacancy created by any such removal may be filled by the members present in person or represented at such meeting.

*Section 6. Vacancies.* If any vacancy shall occur in the Executive Committee by reason of death, resignation, removal, increase in the authorized number of members of the Executive Committee or other cause, the remaining members of the Executive Committee shall continue to act until the next annual general meeting and such vacancy may be filled by the affirmative vote of a majority of the remaining members of the Executive Committee, although less than a quorum.

*Section 7. Meetings of the Executive Committee.* Meetings of the Executive Committee may be called at any time by the Chairman of the Executive Committee, the President, the President-Elect, any Vice President or any five members of the Executive Committee and may be held at such time and place (which may be within or outside the State of New York) as may be specified in the respective notices or waivers of notice thereof.

*Section 8. Notice of Meetings.* Notice of each meeting of the Executive Committee shall be mailed to each member of such Committee addressed to him at his residence or his place of business at least ten days before the day on which the meeting is to be held or shall be sent to him at such place by telegram, radio or cable or telephone or delivered to him personally not later than five days before the day on which the meeting is to be held. Notice of any meeting need not be given to any member who submits a signed waiver of notice thereof whether before or after the meeting, or who attends such meeting without protesting, prior thereto or at its commencement, the lack of notice to him. No notice need be given of any adjourned meeting.

*Section 9. Quorum.* Except as otherwise expressly required by law or these By-Laws, the presence at any meeting of seven members of the Executive Committee shall be necessary and sufficient to constitute a quorum for transaction of business. In the absence of a quorum, a majority of the members present may adjourn such meeting from time to time until a quorum shall be present. At any such adjourned meeting any business may be transacted which might have been transacted at the meeting as originally called.

*Section 10. Voting.* At all meetings of the Executive Committee, a quorum being present, all matters shall, except as otherwise provided by law or these By-Laws, be decided by a vote of a majority of the members present. In the absence of a meeting of the Executive Committee, any matter may, except as otherwise provided by law or these By-Laws, be decided by a written instrument signed by a majority of the members of the Executive Committee, but no such decision shall be effective if any member of the Executive Committee who has not signed such instrument shall in writing, and within ten days of receipt of notice of such instrument, notify the President or the Honorary Secretary of his objection thereto.

## VII. OFFICERS

*Section 1. General Powers and Duties.* The officers of the Association shall have such powers and duties, except as modified by the Executive Committee, as pertain to their respective offices, as well as such powers and duties as may from time to time be provided in these By-Laws or determined by the Executive Committee.

*Section 2. Number and Qualifications.* The officers of the Association shall be a President, a President-Elect, not less than or more than five Vice Presidents, an Honorary Treasurer, and an Honorary Secretary. The officers of the Association shall be members of the Executive Committee. One person may hold any two of such offices except the offices of President, President-Elect, and Honorary Secretary. The Executive Committee may also elect an Honorary President and such number of Honorary Vice Presidents as it may decide, to serve until the next election of officers. Should there be no Chairman of the Executive Committee, or, if there be one, in his absence, the President, and in his absence or disability, the President-Elect shall act as Chairman of the Executive Committee. If no President-Elect has been chosen, the Vice President who shall have served as Vice President for the longest time shall serve in this capacity.

*Section 3. Election and Term of Office.* Each officer shall be elected at the annual general meeting of the Association following the biennial Conference of the International Law Association, except as provided otherwise in the Constitution for the President-Elect. Each officer shall hold office until the next annual general meeting following the biennial Conference of the International Law Association and until his successor shall have been elected and shall qualify or until his death, resignation or removal.

*Section 4. Chairman of the Executive Committee.* The Chairman of the Executive Committee shall preside at any meetings of the members and of the Executive Committee. He shall be a member of the Executive Committee. He shall have such other powers and perform such other duties as may be assigned to him from time to time by the Executive Committee.

*Section 5. The President.* The President shall be the chief executive officer of the Association. If there shall not be a Chairman of the Executive Committee, or in his absence, the President shall preside at all meetings of the members of the Association and of the Executive Committee. He shall be a member of the Executive Committee and an *ex officio* member of all other Committees. He may sign and countersign, in the name of the Association, contracts, certificates, agreements and other instruments duly authorized by the Executive Committee, except in cases where the signing and execution thereof shall be expressly delegated by the Executive Committee to some other officer or agent. He shall have such other powers and perform such other duties as may be incidental to



his office or as may be assigned to him from time to time by the Executive Committee.

*Section 6. The President-Elect.* At the request of the President, or in his absence or disability, the President-Elect shall perform the duties of the President and, when so acting, shall have all the powers of, and be subject to all the restrictions upon, the President. The President-Elect shall have such powers and perform such duties as may be assigned to him or her from time to time by the Executive Committee or the President. If no President-Elect has been chosen, the Vice President who shall have served as Vice President for the longest time shall serve in this capacity.

*Section 7. The Vice Presidents.* The Vice Presidents shall have such powers and perform such duties as may be assigned to them from time to time by the Executive Committee or the President.

*Section 8. The Honorary Secretary.* The Honorary Secretary shall keep the minutes of all meetings of members of the Association and of the Executive Committee. He shall keep all records required by law, the Constitution or these By-Laws, or which may be requested by the Executive Committee. He shall sign with the President, the President-Elect, or any Vice President, all instruments requiring the signature or attestation of the Secretary. He shall prepare for publication every two years the Proceedings of the Association, which shall include reports of Committees. He shall have such other powers and perform such other duties as may be incidental to the office of Secretary or as may be assigned to him from time to time by the President or the Executive Committee.

*Section 9. The Honorary Treasurer.* The Honorary Treasurer shall collect or cause to be collected, deposit or cause to be deposited, all funds of the Association. He shall keep or cause to be kept the accounts of the Association, and shall pay or cause to be paid, all bills, upon certification of their correctness by the President where the amount thereof exceeds \$1,000. He shall have such other powers and perform such other duties as may be incidental to the office of Treasurer or as may be assigned to him from time to time by the President or the Executive Committee.

*Section 10. Officers and Agents.* The Executive Committee may from time to time appoint such other officers or agents as it may deem advisable. Each of such other officers shall have such title, hold office for such period, have such authority and perform such duties as the Executive Committee may from time to time determine. The Executive Committee may delegate to any officer or agent the power to appoint agents and to prescribe their respective titles, authorities and duties.

*Section 11. Resignations.* Any officer may at any time resign by giving written notice of such resignation to the Executive Committee, the President or the Secretary of the Association. Unless otherwise specified in such written notice, such resignation shall take effect upon receipt thereof by the Executive Committee or by the officer to whom such written notice is given.

*Section 12. Removal.* Any officer or agent may at any time be removed, with or without cause, by the Executive Committee.

*Section 13. Vacancies.* A vacancy in any office because of death, resignation, disqualification, removal or other cause may be filled for the unexpired portion of the term in the same manner as is provided in this Article VII for election or appointment to such office.

#### VIII. WORKING COMMITTEES

The work of the Association in studying International Law, Public and Private, is carried out by Committees from time to time established by the President or the Executive Committee. Such Committees shall coordinate their activities with those of corresponding Committees of the International Law Association, where such corresponding Committees exist. In the absence of a corresponding Committee of the International Law Association, a Committee shall pursue such activities as may be suggested to it from time to time by the President or the Executive Committee. Each Committee established under this Article shall continue for such period or periods as may be designated by the President or the Executive Committee.

#### IX. CONTRACTS, BORROWING OF MONEY AND DEPOSIT OF FUNDS

*Section 1. Contracts.* Contracts may not be entered into on behalf of the association unless and except as authorized by the Executive Committee. Any such authorization may be general or confined to specific instances.

*Section 2. Loans.* Loans or advances shall not be contracted on behalf of the Association, and notes or other evidences of indebtedness shall not be issued in its name, unless and except as authorized by the Executive Committee. Any such authorization may be general or confined to specific instances and may include authorization to pledge, as security for the repayment of any and all loans or advances authorized as aforesaid, any and all securities and other personal property at any time held by the Association.

*Section 3. Deposit of Funds.* All funds of the Association not otherwise employed shall be deposited from time to time in such banks or trust companies or with such bankers or other depositories as the Executive Committee may

designate or as may be designated by any officer or agent authorized to do so by the Executive Committee.

*Section 4. Checks, Drafts, etc.* All checks, drafts, notes, acceptances, endorsements and evidences of indebtedness of the Association shall be signed by such officer or officers or by such agent or agents of the Association, and in such manner, as the Executive Committee may from time to time determine. Endorsements for deposit to the credit of the Association in any of its duly designated depositories shall be made in such manner as the Executive Committee may from time to time determine.

#### *X. SURETY BONDS*

In case the Executive Committee shall so determine, a director, officer, agent or employee of the Association who is authorized to sign checks, or to cash checks drawn to the order of the Association, or to handle or disburse funds of the Association, shall be required to give bond to the Association, with sufficient surety and in an amount satisfactory to the Executive Committee, for the faithful performance of his or her duties, including responsibility for negligence and for the accounting for all property, funds or securities of the Association which may come into his hands.

#### *XI. FISCAL YEAR*

The fiscal year of the Association shall begin on October 1 and shall end on the next succeeding September 30.

#### *XII. BOOKS AND RECORDS, INSPECTION*

The Association shall keep, at the office, complete books and records of accounts and minutes of proceedings of its members and of the Executive Committee and shall keep at such office a list or record containing the names and addresses of all members. Any of the foregoing books, minutes and records may be in written form or in any other form capable of being concerted into written form within a reasonable time.

The Executive Committee shall have the power to determine from time to time, subject to the laws of the State of New York, whether and to what extent and at what times and places and under what conditions and regulations the books and records of account, minutes, membership list or record, and other records and documents of the Association, or any of them, shall be open to inspection; and no member of the Executive Committee, creditor or other person shall have any right to inspect, copy or make extracts from the same, except as conferred by the laws of the State of New York or these By-Laws, unless and until authorized so

to do by Resolution of the Executive Committee.

### *XIII. AMENDMENTS TO BY-LAWS*

All By-Laws of the Association shall be subject to amendment, alteration or repeal, and new By-Laws may be made, by the Executive Committee: Provided that no such amendment, alteration, repeal, or new By-Law shall be inconsistent with the Constitution of the Association

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## **V. IN MEMORIAM**



### **CHARLES SIEGAL**

Charles Siegal, a former president of the American Branch of the International Law Association, passed away on Sunday, August 26, 2012. He was 66 years old.

Charles was born in Pittsburgh, received his A.B. and Ph.D. in physics from Carnegie Mellon University, and then attended Stanford Law School, receiving his J.D. in 1975. He clerked for Judge Shirley M. Hufstедler of the U.S. Court of Appeals for the 9th Circuit and then spent a year in the State Department's Office of the Legal Adviser before entering practice in Los Angeles.

During his long-time association with the Branch and with the worldwide International Law Association (ILA), Charles held almost every possible leadership position. In addition to serving as President, he at various times filled the numerous other roles with the American Branch: Chair and active member of the Human Rights Committee, Director of Studies, Chair of the Executive Committee, Honorary Vice President, and Patron. He was a founder of International Law Weekend-West, a successful effort on the part of the Branch to expand the International Law Weekend experience around the

country. Charles was particularly interested in human rights issues and served on the ILA's International Human Rights Law Committee. He also was a respected member of the Executive Council of the ILA. Most importantly, Charles was patient, wise, and humane, and in all his various roles he offered sage advice and leadership to the American Branch and to the ILA as a whole.

In his primary occupation, Charles was a litigation partner with the prominent Los Angeles firm of Munger Tolles & Olson, which he joined after his stint in the Legal Adviser's office. His practice focused on commercial litigation, including insurance disputes, electric industry regulation, and patent law.

As an aspect of his passion for human rights, Charles was especially interested in disability rights. He was a past president of the Disability Rights Legal Center of Los Angeles, which annually presents an award in his name to an individual, group, or organization that has made an outstanding contribution to the lives of people with disabilities. In 2009, Charles received the Award of Merit from the Legal Aid Association of California for his service on the Disability Rights Legal Center's board and his career-long dedication to the rights of people with disabilities. Charles also co-authored a major casebook in disability law, *Disability Civil Rights Law*, and a treatise on the same topic. The 2009 U.S. signature to the United Nations Convention on the Rights of Persons with Disabilities is another testament to the importance of his work.

Charles was active in many other professional and charitable organizations. He was a member of the Executive Council of the American Society of International Law. He was a trustee of the Los Angeles County Bar Association and chaired many of its committees. He also served on the boards of the East Los Angeles Association of Retarded Citizens and the Western Center on Law and Poverty. In addition, he taught environmental law at Stanford Law School.

Brilliant, dedicated, incisive, and unflappable, Charles carried out all of his leadership and professional responsibilities with aplomb. He was unfailingly gracious and generous to his colleagues and to others. Charles's passionate intellectual engagement in public and private international law was a central part of his life's work, and we are proud to have had him among our company.

Philip M. Moremen

## LOUIS HENKIN

The American Branch of the International Law Association was fortunate to have Louis Henkin among its leaders. It is appropriate, after his passing on October 14, 2010, to look back and reflect on his many contributions to international law and the Branch.

Louis Henkin was born on November 11, 1917, in present-day Belarus, and immigrated with his family to the United States in 1923. In 1937, he graduated *summa cum laude* from Yeshiva College, and then graduated *magna cum laude* from Harvard Law School in 1940, where he served as book review editor of the *Law Review*.

Henkin held positions with the U.S. government during his early career. After graduating from law school, he clerked for Judge Learned Hand on the U.S. Second Circuit. He then served for four years in the U.S. Army in World War II, where he saw combat with the First Field Artillery Observation Battalion and was awarded the Silver Star. After the War, he clerked for Justice Felix Frankfurter on the U.S. Supreme Court and then, from 1948-1956, worked for the U.S. State Department's Bureau of United Nations Affairs and Bureau of European Affairs. While at the State Department, Henkin served as U.S. representative to the conference drafting the 1951 Convention relating to the Status of Refugees, significantly influencing the treaty negotiations.

Henkin began his stellar academic career at Columbia University in 1956, directing a disarmament project. This work led to his first book, *Arms Control and Inspection in American Law* (1958). Henkin served on the faculty at the University of Pennsylvania from 1957-1962, but later returned to Columbia, as the Hamilton Fish Professor of Law and Diplomacy and the Harlan Stone Professor of Constitutional Law, until being named University Professor in 1981. Professor Henkin authored approximately 250 articles and book chapters and wrote or edited over 20 books. His books include *How Nations Behave* (1968; 2d ed. 1979), *Foreign Affairs and the Constitution* (1972; 2d ed. 1996), *The Rights of Man Today* (1978), *Constitutionalism, Democracy and Foreign Affairs* (1990), and *International Law: Politics and Values* (1995), along with widely-used casebooks on international law and human rights. Although best known for his efforts in the fields of human rights and U.S. foreign affairs law, Professor Henkin wrote insightfully about many other topics, including international law and politics, the law of the sea, the United Nations, the use of force, legal history, Judaism, and legal history.

Henkin engaged in a wide range of professional service activities. His position as chief reporter of the *Restatement (Third) of the Foreign Relations*



*Law of the United States* (1987) required diplomatic and negotiating expertise, as well as academic talent. At Columbia, Henkin co-founded the Institute for the Study of Human Rights in 1978, and the Human Rights Institute, in 1998. Professor Henkin held several governmental appointments while at Columbia. He was a U.S. member of the Permanent Court of Arbitration (1967-1969), the first U.S. appointee of the Human Rights Committee under the International Covenant on Civil and Political Rights, and a member of the Secretary of State's Advisory Committee on Public International Law (1967-1969, 1975-1980, and 1993-2010). He worked for non-governmental organizations as well, serving as a fellow of the American Academy of Arts and Sciences, a member of the Institut du Droit International, a founder and member of the Board of Directors of the Lawyers Committee on Human Rights (now Human Rights First), and President of the American Society of International Law (1994-1996).

Professor Henkin also devoted his time and talent to the American Branch of the International Law Association. He, along with John Hazard, represented the Branch from 1964-1974 on the ILA (London)'s Committee on Principles of International Security and Cooperation. Professor Henkin served as a Vice President of the American Branch from 1973-1986 and Honorary Vice President from 1986 until his death. In 1997, he delivered the annual International Law Weekend dinner address on the topic "International Law at the Millenium: Faith, Hope – and Schizophrenia" – an insightful overview of international law and politics since the Second World War, published in the 1997-1998 *Proceedings of the American Branch of the International Law Association*. He concluded his remarks, "somewhat sadly," with the following diagnosis: "acute, chronic schizophrenia, both within the international political system, for states big and small, and, notably, for the United States of America, where it is combined with some recurrent paranoia and with recurrent failure of national memory." His prescribed treatment? "The only treatment, the only hope of cure I know, is renewal of determined commitment and vigilant respect for the rule of law in international affairs – with Faith, and Hope." And the therapists? "You and I."

A list of Henkin's professional accomplishments, although vast, does not capture the essence of the man. Those who knew him well have commented on his inspiration and accessibility as a teacher, his work ethic, his intellectual honesty, and his clarity of thought. They have emphasized as well his humility and personal kindness. The world will sorely miss this man who loved the law and pursued the goals of peace and human rights.

Louis Henkin was survived by his wife Alice, whom he married in 1960, by their three sons, Joshua, David, and Daniel, and by five grandchildren.

Alice Henkin was Louis Henkin's partner not only in marriage, but also in the cause of human rights. One of six women in the Yale Law School class of 1957, she directed the Aspen Institute's Justice and Society Program for three decades. In December 2010, both Louis (posthumously) and Alice Henkin were awarded the Eleanor Roosevelt Human Rights Award, established by the U.S. Secretary of State in 1998.

John E. Noyes

## LOUIS B. SOHN

Louis B. Sohn was a giant in the field of international law and a leader of the American Branch of the International Law Association. He was born on March 1, 1914 in Lwow, Austria-Hungary (now Lviv, Ukraine), and died on June 6, 2006, survived by his wife of sixty-five years, Elizabeth Mayo (Betty) Sohn. As an academic, a government advisor, and a treaty negotiator, Louis Sohn helped to shape the law concerning international organizations, the international environment, the oceans, international dispute resolution, state responsibility, human rights, and arms control and disarmament.

In 1935, Louis Sohn received degrees in science and law from John Casimer University in Poland, where he subsequently worked as a researcher before immigrating to the United States shortly before the Nazis invaded Poland. He then accepted a research post at Harvard Law School, receiving an LL.M. from Harvard in 1940, and ultimately an S.J.D. in 1961. He began teaching at Harvard in 1941, joined the regular faculty in 1946, and became the Bemis Professor of Law in 1961, a position he held until 1981. In that year he accepted an appointment as the inaugural Woodruff Professor of International Law at the University of Georgia, a position he held until 1991. Louis Sohn finished his academic career as Distinguished Research Professor at The George Washington School of Law. He was a prolific scholar, writing innumerable articles and dozens of books, perhaps most notably, *World Peace Through World Law* (1958; 2d ed. 1960; 3d ed. 1966) (with Grenville Clark).

Sohn also had a distinguished record of public service. He was the first Counselor on International Law at the U.S. Department of State (1969-1971), a U.S. delegate to the Third United Nations Conference on the Law of the Sea (1974-1982), where he directly influenced the Law of the Sea Convention's dispute settlement provisions, U.S. counsel in two International Court of Justice cases, and an associate reporter of the *Restatement (Third) of the Foreign Relations Law of the United States* (1987). He counseled national governments, international organizations, and non-governmental organizations.

We cannot measure Louis Sohn's contributions solely by his academic writings and record of public service. He deeply inspired his students and many professional associates with whom he came in contact. Dan Magraw's summary is fitting: "Famously described as 'the Brain who walks like a Man[,] . . . Louis's vision, knowledge, flexibility, energy, persistence, humility, extraordinary attention to detail and dedication to the rule of law were legendary around the world.'" (Daniel Barstow Magraw, "Louis B. Sohn, Architect of the

Modern International Legal System,” 48 *Harvard International Law Journal* 1, 2 (2007))

Louis Sohn was both a visionary and a pragmatic lawyer. A law-centered world in which international organizations played central roles could, in his view, help promote essential values of peaceful resolution of disputes and human rights. Harold Koh wrote that Sohn helped shape international law when it “made its dramatic shift from a loose web of customary, do-no-harm, state-centric rules toward an ambitious positive law framework built around institutions . . . aspiring to organize proactive assaults on a vast array of global problems. In a dazzling range of areas . . . Louis helped draft global ‘constitutions’ that sought both to allocate institutional responsibilities and to declare workable rules of international law.” (Harold Hongju Koh, “Louis B. Sohn: Present at the Creation,” 48 *Harvard International Law Journal* 13, 14-15 (2007))

The International Law Association and its American Branch benefited greatly from Louis Sohn’s leadership. He joined the Branch’s Executive Committee in 1954, served as Vice President from 1959-1986, and was Honorary Vice President from 1987 until his death in 2006. He contributed as a member of numerous American Branch committees, including the Committees on Human Rights, Law of the Sea, Deep Sea Mineral Resources, Exclusive Economic Zone, Formation of Customary International Law (and its *Jus Cogens* Working Group), Peaceful Coexistence, Security and Cooperation, Disarmament, and Review of the Charter of the United Nations. The American Branch’s biennial *Proceedings* show Louis Sohn speaking on International Law Weekend panels and commenting frequently on matters of Branch business and the work of substantive Branch committees. He delivered the keynote address at the Branch’s 1988 International Law Weekend, on “The United States and International Law,” published in the 1989-1990 *Proceedings of the American Branch of the International Law Association* 26. At the international level, Louis Sohn served as Rapporteur of the International Law Association’s Committee on Review of the Charter of the United Nations, preparing three detailed reports: “The Gradual Extension of the Compulsory Jurisdiction of the International Court of Justice” for the ILA’s 51st Conference (Tokyo, 1964); “The Changing Role of Arbitration in the Settlement of International Disputes” for the 52nd Conference (Helsinki, 1966); and “Recent Developments in International Conciliation” for the 53rd Conference (Buenos Aires, 1968). The ILA adopted resolutions on each topic. Sohn was active with other professional international law organizations as well. He was the President of the American

Society of International Law from 1988-1990 and chaired the International Law Section of the American Bar Association from 1992-1993.

Reviewing Louis Sohn's contributions leads one to revisit most of the major developments in international law since the 1930s. More detailed accounts of his remarkable life, work, and thinking about international law appear in articles and tributes published in: Volume 48, Issue 1 of the *Harvard International Law Journal* (2007); Volume 39, Issue 3 of the *George Washington International Law Review* (2007); Volume 16, Issue 2 of the *Willamette Journal of International Law and Dispute Resolution* (2008); Jo M. Pasqualucci, Louis Sohn: Grandfather of International Human Rights Law in the United States, 20 *Human Rights Quarterly* 924 (1998); and *Contemporary Issues in International Law: Essays in Honor of Louis B. Sohn* (Thomas Buergenthal ed., 1984).

John E. Noyes