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OF THE
INTERNATIONAL LAW ASSOCIATION

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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, six 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. Most recently, the American Branch hosted the 76th conference in Washington, D.C., in 2014.

Among the Presidents of the Association have been 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. Ruth Wedgwood is the current President and 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); Phanor J. Eder (1937); Farnham P. Griffiths (1938); Arthur K. Kuhn (1939); 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); and John E. Noyes (2008-2010). The current 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

ILA COMMITTEES (AS OF APRIL 2014)

Baselines Under the International Law of the Sea

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Rapporteur: Donald Rothwell

U.S. Members: John Noyes
Michael Reed
J. Ashley Roach
George Walker
Coalter Lathrop (Alternate)

Complementarity in International Criminal Law

Chair: Mia Swart

Co-Rapporteurs: Morten Bergsmo

Cultural Heritage Law

Chair: James Nafziger

Rapporteur: Robert Paterson

U.S. Members: James Nafziger

Feminism and International Law

Chair: Patricia Conlan

Co- Rapporteurs: Nwamaka Okany
Judy Walsh

U.S. Members: Marjory Fields

Implementation of the Rights of Indigenous Peoples

Chair: Willem van Genugten

Rapporteur: Federico Lenzerini

Intellectual Property and Private International Law

Chair: Toshiyuki Kono

Co-Rapporteurs: Pedro A. De Miguel Asensio
Axel Metzger

U.S. Members: Rochelle C. Dreyfuss
Aaron Fellmeth
Jane C. Ginsburg
Marketa Trimble
Wendy J. Gordon (Alternate)
Sherri L. Burr (Alternate)

International Commercial Arbitration

Chair: Filip De Ly

Co-Rapporteurs: Luca G. Radicati di Brozolo
Mark Friedman

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Philip O'Neill
Louise Ellen Teitz
Ruth Wedgwood
Ved Nanda (Alternate)
Andrea Bjorklund (Alternate)
Paul Dubinsky (Alternate)

International Family Law

Chair: Barbara Stark

U.S. Members: Melissa Kucinski
Barbara Stark

International Human Rights Law

Chair: Christina Cerna

Co-Rapporteurs: Jernej Letnar Cernic
Stefan Kadelbach
Eva R. Rieter
Koji Teraya

U.S. Members: Christina Cerna
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Leila Sadat
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International Law and Sea Level Rise

Chair: Davor Vidas

Co-Rapporteurs: Jane McAdam
David Freestone

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International Monetary Law

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International Trade Law

Chair: E.U. Petersmann

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Islamic Law & International Law

Chair: Awn Al-Khasawneh

Co-Rapporteurs: Hossein Esmaeili
Irmgard Marboe
Javaid Rehman

Non-State Actors

Chair: Math Noortmann

Co-Rapporteurs: Jean d'Aspremont
Cedric Ryngaert

U.S. Members: Barbara Woodward

Nuclear Weapons, Non Proliferation & Contemporary International Law

Chair: Jonathan L. Black-Branch

Rapporteur: Dieter Fleck

U.S. Members: Daniel Joyner

Protection of Privacy in Private International and Procedural Law

Chair: Burkhard Hess

U.S. Members: David P. Stewart
Cristina M. Mariottini (alternate)

Recognition/Non-recognition in International Law

Chair: Wladyslaw Czaplinski

Co-Rapporteurs: Christopher Borgen
Aziz Tuffi Saliba

U.S. Members: Christopher Borgen
Margaret McGuinness
Brad Roth
Chris Naticchia (Alternate)

Reparation for Victims of Armed Conflict

Chair: Natalino Ronzitti

Co-Rapporteurs: Rainer Hofmann
Shuichi Furuya

U.S. Members: Luke Lee
James Nafziger

Role of Sustainable Resource Management for Development

Chair: Nicolaas J. Schrijver

Co-Rapporteurs: Marie-Claire Cordonier-Segger
Ximena Fuentes

U.S. Members: Charles Marvin
Ved Nanda

Space Law

Chair: Maureen Williams

Rapporteur: Stephan Hobe

U.S. Members: Joanne Gabrynowicz
Jonathan Galloway
Rafael Moro Aguilar
Matthew Schaefer
Frans von der Dunk

The Legal Principles Relating to Climate Change

Chair: Shinya Murase

Rapporteur: Lavanya Rajamani

U.S. Members: Daniel Bodansky
Elizabeth Burleson
William Burns
Hari Osofsky
Howard Schiffman (Alternate)
Maxine Burkett (Alternate)
Anita Halvorssen (Alternate)

Use of Force

Chair: Michael C. Wood

Rapporteur: Noam Lubell

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Sean Murphy
Mary Ellen O’Connell
Ruth Wedgwood

ILA STUDY GROUPS

Business and Human Rights

Chair: Michael Addo

Co-Rapporteurs: Anthony Crockett
Rae Lindsay

Cybersecurity, Terrorism, and International Law

Chair: David Fidler

Co-Rapporteurs: Russell Buchan
Emily Crawford

U.S. Members: David Fidler

Due Diligence in International Law

Chair: Duncan French

Rapporteur: Tim Stephens

U.S. Members: Zarizana Abdul Aziz

Preferential Trade Agreements

Co-Chairs: Peter-Tobias Stoll
Andreas R Ziegler

Rapporteur: Freya Baetens
Christian Delpiano

Principles on the Engagement of Domestic Courts with International Law

- Chair:** Andre Nollkaemper
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- U.S. Members:** Curtis A. Bradley
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Role of Soft Law Instruments in International Investment Law

- Chair:** Franklin Berman
- Co-Rapporteurs:** Andrea Bjorklund
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- U.S. Members:** Andrea Bjorklund
Daniel Magraw, Jr.

Socially Responsible Investments

- Chair:** Ida Levine
- Rapporteur:** Myriam Senn
- U.S. Members:** Barbara Woodward

Sovereign Bankruptcy

Chair: Philip Wood

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Teaching of International Law (Interest Group)

Chair: John Gamble

U.S. Members: John Gamble

**The Conduct of Hostilities under International Humanitarian Law –
Challenges of 21st Century Warfare**

Chair: T.D. Gill

Co-Rapporteurs: Robin Geiss
Robert Heinsch

U.S. Members: Geoffrey S. Corn

The Use of Domestic Law Principles for the Development of International Law

Chair: M H Mendelson

Rapporteur: Alejandro Carballo

U.S. Members: Arnold Pronto

II. INTERNATIONAL LAW WEEKENDS

INTERNATIONAL LAW WEEKEND 2012

International Law Weekend 2012, held in conjunction with the 91st annual meeting of the American Branch of the International Law Association, took place October 25-27, 2012. The opening panel and reception were held at the House of the Association of the Bar of the City of New York, 42 West 44th Street, New York City, and the Friday and Saturday panels were held at Fordham Law School, 140 West 62nd Street, New York City. The theme of the Weekend: *Ideas, Institutions, and Interests – Dynamics of Change in International Law*, was addressed in over forty 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 25, was entitled *The Rise of China and the rule of International Law*. The panel was moderated by Benjamin L. Liebman and featured Jerome Cohen, John G. Crowley, Elizabeth Economy, and Ambassador Winston Lord. A reception sponsored by the Permanent Mission of the Philippines to the United Nations followed.

Panels on Friday morning, October 26, were:

- *Resource Management in Common (Non-Sovereign) Areas: Law of the Sea and Space Law Compared*
- *Comparative Corporate Governance: Stakeholders and Quotas*
- *Dynamics of Change in International Disabilities Law: The Case of Access to Justice* (chaired by Steven Hill)
- *Intellectual Property and Sustainable Development* (chaired by Peter Yu)
- *Due Process in U.N. Security Council Sanctions Committees* (chaired by John F. Murphy)
- *A Conversation with Mary Jo White, former U.S. Attorney for the Southern District of New York and Current Head of Litigation at Debevoise & Plimpton: "Prosecuting Al Qaeda Terrorism and Exposing Corporate Corruption—A Life in the Law* (chaired by Ruth Wedgwood)
- *Current Developments in Sovereign Debt Claims: Disappointed Investors Take Action* (chaired by Steven A. Hammond)

- *Solitary Confinement in a Supermax Prison: Is this Cruel and Inhuman Punishment?* (chaired by Christina Cerna)
- *Legislative and Executive Authority when Congress & the President Disagree on Matters that May Affect Foreign Affairs: Clinton v. Zivotofsky*
- *Roundtable on Climate Geoengineering* (chaired by Andrew Strauss)

After lunch, the Keynote Address was given by Theodor Meron, President, International Criminal Tribunal for the former Yugoslavia, *From Ad Hoc Tribunals to the Residual Mechanism: A New Model of International Criminal Tribunals*.

Panels on Friday afternoon were:

- *Lawyers and China's Future*
- *International Investment Law and Dispute Settlement Part I: Educating Lawyers in Law Schools, Firms and at the Bar* (moderated by Norman Gregory Young and Roberto Aguirre Luzi)
- *The Global Fight Against Sex Trafficking: Finding Synergies Between NGOs, the Private Bar, and Corporate Law Departments in Responding to the Crisis* (chaired by Lauren Hersh)
- *European Union—Progress, Setbacks and Crises*
- *The 1982 Manila Declaration on the Peaceful Settlement of International Disputes: Modern Applicability and Relevance* (moderated by Roy S. Lee)
- *Maritime Delimitation—A 30-Year Perspective Since the 1982 Law of the Sea Convention* (chaired by Andrew Jacovides)
- *Guantanamo Military Commissions and the Future of International Criminal Law* (chaired by Karen Greenberg)
- *International Investment Law and Dispute Settlement Part II: A Conversation with Meg Kinnear, Secretary-General of ICSID* (introduced by Ruth Wedgwood)
- *Taming Globalization: U.S. Foreign Affairs Law and the Next Administration* (chaired by Julian Ku)
- *Foreign State Immunity in National Courts as Required by International Law*
- *Recent Developments in International Family Law* (chaired by David P. Stewart)

- *Maritime Law and Piracy*

On Friday evening, October 26, the Permanent Mission of New Zealand to the United Nations hosted a Reception at the Permanent Mission. The American Branch is grateful to the New Zealand Mission for its hospitality and generosity.

Saturday morning, October 27, featured an array of panels. The topics addressed included:

- *Anticipatory Self-Defense: The Israeli-Iranian Crisis* (chaired by Glenn M. Sulmasy)
- *The Alien Tort Statute and the Future of Transnational Litigation*
- *Perspectives on Crimes of Sexual Violence in International Law*
- *The International Climate Change Regime and Africa* (moderated by Paolo Galizzi)
- *Law in the Time of Cholera: Haiti's Epidemic, the UN & Responsibilities of International Organizations*
- *Rule of Law and Development: Why Nations Fail and What We can Do About It*
- *The Future of the Ad Hoc International Criminal Tribunal Option* (moderated by Milena Sterio)
- *Tax Havens and Tax Justice: Offshore Banking, Transfer Pricing, and Public Policy* (speaker: James S. Henry)
- *Integrity in International Sport: Current Challenges and Legal Responses* (chaired by Ank Santens)
- *International Aspects and Comparative Perspectives of Intellectual Property Rights Enforcement*
- *Emerging International Decision-Making: the Role of the International Law Commission for Legal Consensus Building*
- *Towards a Culture of Accountability: A New Dawn for Egypt*
- *Pathways to International Law Employment* (moderated by Lesley Benn)
- *The U.S. Advancing the International Criminal Court: Positive Contributions and Future Predictions for a Change in Relationship* (moderated by Jennifer Trahan)
- *The Evolving Role of the Public—Past, Present and Future—In the Development of International Environmental Law*

- *Bribery Prosecutions for Profit? Policy and Practical Implications* (chaired by Bruce W. Bean)
- *International Organizations and the Use of Armed Force* (moderated by Vincent J. Vitkovsky)
- *Countering Incitement of Terrorism Through the Internet While Respecting Human Rights* (moderated by Michele Ameri)

International Law Weekend 2012 concluded on Saturday afternoon with a number of panels, including panels on careers in international law. The panels were:

- *Careers in International Human Rights, International Rule of Law, Part I* (moderated by D. Wes Rist)
- *Careers in International Arbitration Part I* (moderated by Paul R. Dubinsky)
- *Teaching International Law: Principles for Framing a Survey Course* (moderated by Mark Shulman)
- *Islamic Finance—in Law & Practice Both Very Old and Wholly New*
- *Outlawing Nuclear Weapons* (moderated by John H. Kim)
- *Careers in International Human Rights, International Rule of Law Part II: Informal Networking*
- *Careers in International Arbitration Part II: Informal Networking*
- *Metatheory of International Law* (chaired by Aaron Fellmeth)
- *Liability for Damage in Space: Should it Continue as a Unique Legal Regime* (chaired by Henry Hertzfeld)
- *Lawyering and Advocacy in Transnational Cases* (moderated by Aníbal M. Sabater)

Selected panel papers from International Law Weekend 2012 were published in the *ILSA Journal of International and Comparative Law*, 19 ILSA J. INT'L & COMP. L. NO. 2 (SPRING 2013)

International Law Weekend 2012 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
American Society of International Law
American University Washington College of Law
Amherst College, Department of Law, Jurisprudence & Social Thought
Association of the Bar of the City of New York, Council on International Affairs
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Vivian Shen, International Law Students Association

Ruth Wedgwood, American Branch of the International Law Association

**From The *Ad Hoc* Tribunals to the Mechanism:
A New Model of
International Criminal Tribunal?**

President Theodor Meron
International Law Weekend
American Branch, International Law Association
New York City, October 26, 2012^{*}

It is a great honor for me to join you today, and I am very grateful to Professor Wedgwood and the other organizers for inviting me to take part in this meeting of the American Branch of the International Law Association. I am particularly glad to be here for this year's International Law Weekend, which takes as its theme the dynamics of change in international law. Over the course of my career I have had the pleasure of witnessing and, at times, perhaps modestly contributing to a number of important changes—even sea changes—in international law. But clearly the greatest change in international law in my lifetime has been the creation of a new universe of international and hybrid criminal tribunals.

Twenty years ago, few would have predicted the current prominence of international criminal courts, much less the revolution that these courts have created in the fight against impunity, in the field of customary international humanitarian law, and in the whole approach taken—both internationally and nationally—to the assessment of individual responsibility for the most serious of crimes. Yet here we are, in 2012, marking the tenth anniversary of the entry-into-force of the Rome Statute of the International Criminal Court.

And while this first, permanent international criminal court deserves a great deal of our attention, particularly as new conflicts emerge, there is another important milestone that we should mark this year: the opening this past July of the first branch of the Mechanism for International Criminal Tribunals. This newest international criminal court is designed to be the single, successor institution to the first two *ad hoc* international criminal tribunals of the modern era: the International Criminal Tribunal for the former Yugoslavia (or “ICTY”) and the International Criminal Tribunal for Rwanda (or “ICTR”).

The transition from the ICTY and the ICTR to a new and in many ways

^{*} President, International Criminal Tribunal for the former Yugoslavia and Mechanism for International Criminal Tribunals.

unprecedented type of institution represents uncharted territory in the field of international criminal justice. It is this transition and this new institution that will be the focus of my remarks to you today.

* * *

Before turning to discuss the Mechanism, we should pause and remember that the ICTY is a pioneer in the world of international criminal justice. Created in 1993, the ICTY became the first tribunal of its kind in the nearly half-century since Nuremberg to try war crimes and other war-time atrocities. And, since it was established by the international community as a whole, it was also the first truly *international* criminal court. After all, let us remember that despite its great merit, Nuremberg was, in a way, a court established by occupying countries: an occupation court.

Since its founding, the ICTY—along with its sister tribunal, the ICTR—has also been at the forefront of articulating and applying substantive international criminal law. Through its jurisprudence, the ICTY has shown that it is both possible and practical to apply international criminal and humanitarian law in actual cases—not just a few times, as in Nuremberg, but repeatedly and in ways consistent with fair trial and due process guarantees.

In so doing, the ICTY has not simply strengthened the legal prohibitions related to genocide and other international crimes, both by clarifying the parameters of these crimes as well as by articulating the different modes of international criminal responsibility. It has also made respect for the fundamental principle of legality—*nullum crimen sine lege*, or the principle that a defendant may only be convicted on the basis of legal rules clearly established at the time of the offense—a central tenet of its judicial action.

In addition, and no less important, the decisions and judgments of the ICTY have addressed a wide variety of procedural and evidentiary issues with reference to, and in accordance with, international standards, making the ICTY the first international criminal court to apply an entire panoply of human rights and procedural protections during its proceedings. Many of these principles were only nascent ideals or rudimentary notions at Nuremberg in the wake of World War II. At the same time, the ICTY has led the way in developing and implementing innovative approaches to evidence-gathering and conducting investigations far from the seat of the Tribunal and in the absence of police powers. In doing all of this, the ICTY has served as an important model, not only for other *ad hoc* tribunals and hybrid courts, but also for the International Criminal Court and for a number of national judiciaries.

Having recently taken into custody the two remaining fugitives under indictment—a remarkable achievement and a feat matched by few national jurisdictions to my knowledge—the ICTY has, perhaps fittingly, started upon

yet another “first” for the institution: closing its doors. This sounds, of course, far simpler than it is, and I would like to spend the next few minutes providing a short overview of the Completion Strategy of the ICTY and how that Strategy relates to the new tribunal: the new Mechanism for International Criminal Tribunals. I will then move on to discuss the Mechanism itself and describe a bit about how the Mechanism will function in practice. I will conclude my remarks by offering some thoughts as to the unique challenges that the Mechanism may pose going forward—as well as the special opportunities its establishment creates in the realm of international law.

* * *

Let me say a few words now about the Completion Strategy. The ICTY was never intended to be a permanent institution or a replacement for national courts, even at the time of its founding in 1993. Rather, the Tribunal was envisaged as a temporary measure, created to secure justice with respect to the worst crimes when local judiciaries could or would not do so.

By early in the new millennium, however, national judicial systems in the region of the former Yugoslavia had begun to demonstrate the will and ability to prosecute war crimes cases themselves. This opened the way for the transfer of certain cases from the ICTY to national courts.

At the same time, enhanced cooperation by States had also led to the arrests and transfer to the ICTY of a growing number of military leaders as well as high-ranking government officials, thus allowing the ICTY to increasingly focus its actions and resources on cases involving the most senior military and civilian leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction.

In light of these shifts in the legal and political landscape, the ICTY decided to devise a program setting forth how its three organs—the Chambers, the Office of the Prosecutor, and the Registry—would move towards winding down. This program, which became known as the Completion Strategy, has the goal of ensuring that the ICTY concludes its work successfully, in a timely manner, and in full respect for due process norms. The ICTR likewise developed a Completion Strategy in anticipation of completing its own work and closing its doors.

Given the complexity of the cases before them—including the need to bring witnesses from thousands of kilometers away, the need to translate every word into the language of the accused, and the sheer magnitude of the crimes alleged to have been committed and which need to be proven—the ICTY and the ICTR have continued to revise the target dates in their Completion Strategies during the intervening years. They have, nonetheless, made remarkable progress towards the goals reflected in their respective Completion Strategies,

adopting numerous measures to speed up trials, enhance efficiency, and work as rapidly as possible—all the while contending with the constraints imposed by limited resources and remaining committed to the need to assure the highest standards of procedural fairness.

The impending completion of on-going trials and appeals at the ICTY and the ICTR does not, however, signal the end of the tasks of either Tribunal. To the contrary, even after these trials and appeals are concluded, much work will remain, including: the continued protection of witnesses; the determination of applications for review of judgments, variation of protective measures, and access to evidence; the supervision of the enforcement of sentences and determination of applications for early release and clemency; co-operation with requests from other jurisdictions; archival work; and the conduct of proceedings involving any of the remaining fugitives indicted by the ICTR, if and, I would like to say, *when* they are taken into custody.

It was in light of both the remaining work and the U.N. Security Council's goal to encourage the completion of the Tribunals' judicial work without further delay that the Security Council decided to establish the Mechanism for International Criminal Tribunals on 22 December 2010 in Security Council Resolution 1966.

* * *

Let me turn to the functions and functioning of the Mechanism. As established by the Security Council under Chapter VII of the Charter, the Mechanism comprises two branches—one in Arusha and one at The Hague—and it will consist of the three classical organs of every court: (i) Chambers, including a Trial Chamber for each branch of the Mechanism, and an Appeals Chamber common to both branches; (ii) a Prosecutor common to both branches; and (iii) a Registry common to both branches. The President of the Mechanism, common to both branches, is the head of the institution.

The Mechanism's Statute provides that the institution shall have a roster of 25 independent judges, who were elected by the U.N. General Assembly last December. However, only the President of the Mechanism, who will also preside over the Appeals Chamber, will be full time.

Importantly, in founding the Mechanism, the Security Council decided that it should continue the jurisdiction, rights and obligations, and essential functions of both the ICTY and the ICTR, subject to certain conditions set forth in Resolution 1966 and in the Statute of the Mechanism. The Council also provided that the Mechanism's Rules of Procedure and Evidence would be based on the Rules of Procedure and Evidence of both the ICTY and the ICTR. In essence, the Mechanism is designed to provide jurisdictional and functional continuity—to step into the shoes of the two Tribunals when it comes to their

vital functions, and to advance and preserve their legacies. Indeed, the Mechanism's Appeals Chamber recognized in its first decision—which we filed just a few weeks ago—that the Statute and Rules of the Mechanism reflect normative continuity with the Statute of the ICTR and the Statute of the ICTY, as well as with the Rules of Procedure and Evidence of the ICTR and the ICTY. As the Appeals Chamber explained, “[t]hese parallels are not simply a matter of convenience or efficiency but serve to uphold principles of due process and fundamental fairness, which are the cornerstones of international justice.”¹

Pursuant to Resolution 1966, the Arusha branch of the Mechanism commenced functioning on 1 July 2012—less than four months ago—and the ICTY branch will commence on 1 July 2013. After periods of overlap, the ICTY and the ICTR will officially close, to be succeeded by the Mechanism alone. The Mechanism, in turn, will operate for an initial period of four years from the commencement date of 1 July 2012.

Now, what is the mandate of the Mechanism? In the simplest terms, under its Statute, the Mechanism has both “continuous” and “*ad hoc*” activities. The “continuous” activities of the Mechanism comprise all activities mandated by Security Council Resolution 1966 that are ongoing in nature—that is, activities which need to be carried out at all times irrespective of whether the Mechanism is conducting any trials or appeals. These activities include: protection of witnesses; assistance to national jurisdictions; the supervision or enforcement of sentences; and management of archives.

The “*ad hoc*” activities of the Mechanism are those activities mandated by Security Council Resolution 1966 that occur from time to time—primarily the conduct of trials and appeals. Examples of these “*ad hoc*” activities include the trials of accused who fall within the jurisdiction of the Mechanism, such as the trials of ICTR fugitives indicted by the ICTR who are among the most senior leaders suspected of being the most responsible for crimes committed in Rwanda; appeal proceedings that come within the Mechanism's jurisdiction; and review proceedings involving the review of final judgments of the ICTR, the ICTY, or the Mechanism.

Let me add that the Mechanism will have to consider any appeals in some of the most historic, high profile ICTY cases—the appeal of Mr. Karadžić, the appeal of General Mladić, and the appeal of Mr. Hadžić. According to the timetable envisaged by the Security Council, they all will be handled by the Appeals Chamber of the Mechanism, over which I have the honor to preside. (In an annex to Resolution 1966, the Security Council set out detailed provisions

¹ Phénéas Munyarugarama v. Prosecutor, Case No. MICT-12-09-AR14, Decision on Appeal against Referral of Phénéas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, ¶ 5 (Mechanism for Int'l. Crim. Tribunals Oct. 5, 2012).

as to which proceedings are to be assigned to the ICTY, the ICTR, or the Mechanism during the period of transition and overlap.)

Fortunately, in the beginning, the Tribunals and the Mechanism will not be mutually exclusive organizations. Their functions will for some time overlap; the Tribunals will complete their trials and appeals, while the Mechanism takes responsibility for matters including any late arrests, possible re-trials, and especially, as I have already mentioned, the appeals of Mr. Karadžić, Mr. Mladić, and Mr. Hadžić. Accordingly, the Tribunals and the Mechanism will share resources and provide mutual support during the transitional period of their co-existence in order to achieve maximum cost effectiveness, ensure that the Tribunals receive appropriate support, and allow the Mechanism to draw on the Tribunals' knowledge and expertise as it commences its operations.

Thus, for example, the Tribunals and the Mechanism will share key staff, and, indeed, are already doing so. They already also share some judges—including myself—who are judges of the existing Tribunals and of the Mechanism following our election as judges of the Mechanism by the General Assembly in December 2011.

I expect that coordination between the organizations will continue to be seamless, as it has been so far. The joint responsibilities for coordination and the sharing of staff—a type of “double-hatting”—will also ensure that even as the Tribunals give way to a formally separate institution, the transfer will not take place at the expense of the rights of the accused or the convicted.

Of course, certain aspects of the Mechanism's functioning will be different from that of its predecessor institutions. In keeping with the governing principles set forth in Security Council Resolution 1966, the Mechanism will be a small, temporary, and efficient structure with a limited number of staff commensurate with its reduced functions, although it will have the capacity to rapidly increase staff and resources as and when required, for example, when—I do not say if—some of the ICTR fugitives are arrested.

The costs associated with the Mechanism will also be much lower and will decline as the Mechanism completes cases. This is in part because the Mechanism will have fewer cases than the ICTY and the ICTR. But it is also due to the fact that the Mechanism's organizational structure has been designed to maximize savings. For example, following the model of the remuneration scheme of the International Court of Justice's *ad hoc* judges, judges on the Mechanism's roster will not be paid any salary or retainer, and will be compensated only for the days they work. The Mechanism will also function as one entity with two branches, generating additional cost savings in the unity of its senior leadership: one President, one Prosecutor, one Registrar.

* * *

Let me now say a few words about the challenges and opportunities facing the Mechanism. As I hope that you can tell from my overview, much about the Mechanism's structures and functions will be familiar to all of us who have spent time working with either the ICTY or the ICTR. But there is still much about the Mechanism that is new and uncharted territory. Before closing today, I would like to go through a few of the challenges that we may expect going forward as well as some of the opportunities created by the Mechanism.

First, there are obvious operational, administrative, and managerial challenges inherent in the transition of functions from one institution to another—and, in this case, from *two* institutions, each with their own internal practices and each with their own Chambers, Registries, Offices of the Prosecutor, and Rules of Procedure and Evidence.

There will, for instance, almost inevitably be challenges with regard to staffing. The retention of qualified, long-serving staff has increasingly been a problem for both the ICTY and the ICTR in recent years, and I am not confident that the Mechanism will avoid facing this problem as well.

It is also, of course, difficult to predict how readily judges elected to the Mechanism's roster will answer the call to work on a case, particularly if they have taken on other—perhaps even full-time—employment elsewhere. To the extent that judges of the Mechanism continue to work in other posts around the world, they will often have to work with their legal support staff via email or telephone rather than in person, which for many judges will be a new, and perhaps a difficult, challenge. More seemingly mundane things, like the creation of a single filing system to cover both branches or the transfer of the ICTY's and the ICTR's respective archives to the Mechanism, will nonetheless raise novel logistical questions.

The challenges posed by the Mechanism are not all operational in nature, of course. Some are of a legal and ethical nature as well. I cannot, of course, go into these potential challenges in any detail, but one may well ask, for instance, whether a judge on the Mechanism's roster may properly serve on a case at the Mechanism if he or she is also currently employed in occupations in conflict with working in the international judiciary. More fundamentally, one wonders if we will see individuals who were tried by either the ICTY or the ICTR raise jurisdictional or other legal challenges when their appeals or their applications for review of judgment go not to the original Tribunal that heard their case, but to the new Mechanism.

Finally, one might ask what the future holds for the Mechanism in the long term. In that respect, it would seem that the work of the Mechanism—

including the enforcement of sentences, witness protection, cooperating with requests from other jurisdictions, and addressing requests for clemency and review of judgments—will continue for some considerable time. To my mind, the continuation of these activities and of the jurisdiction of the ICTY and the ICTR is vitally important. Indeed, the Mechanism is a living example of the international community's commitment to upholding the legacy of the Tribunals and to ensuring not only an end to impunity for the most horrific of international crimes, but also the continuation of principled justice and due process.

While I have focused thus far on the challenges associated with the move to this new institution, in concluding, I would like to briefly note some of the important opportunities that the Mechanism offers. As we establish the practices and policies of the Mechanism, we are drawing as much as possible on those of the Mechanism's predecessor entities, the ICTY and the ICTR. But where, of course, those practices and policies differ, we have a unique chance to assess those differences and determine what model will work best for the new tribunal: the Mechanism. The founding of the Mechanism has thus created a terrific opportunity—often absent in continuing institutions—to pause and assess existing working methods and practices, and then look for ways to increase efficiency, enhance operations, or otherwise find new, innovative solutions.

The Mechanism has also been created after the establishment of a number of other international courts and tribunals, thus allowing my colleagues, my staff, and me to learn from their methods and approaches to various practical problems, even as we continue to focus on ensuring continuity with the ICTY and the ICTR. Yet, given the lean, efficient structure of the Mechanism mandated by the Security Council, there are limits to how much we can draw upon the practices of other institutions. We must, instead, forge new approaches to address some of the unique challenges that result from this novel structure and mandate: new internal processes, new working methods, and new solutions. It is my strong belief that in doing so, we will be setting vital examples for a new generation of international institutions and perhaps even of international courts, when and if the need for new courts may arise.

INTERNATIONAL LAW WEEKEND WEST 2013

The American Branch's International Law Weekend West 2013 was hosted on March 2, 2013, by the International Legal Studies Program at the University of Denver Sturm College of Law. The theme of the Conference was *International Law & Human Security in the 21st Century*.

Panels were:

- *Environmental threats to Human Security and International Law's Response* (speaker and chair, Annecoos Wiersma)
- *Human Security and International Criminal Law* (speaker and chair, Ved P. Nanda)
- *Human Security and Human Rights* (speaker and chair, James A.R. Nafziger)
- *Human Security and International Business and Trade* (chaired by Ian Bird)

After lunch, Professor Ruth Wedgwood, Edward B. Burling Professor of International Law and Diplomacy, Johns Hopkins University, gave the Myres S. McDougal Distinguished Lecture on *Human Security and the Tradition of Myres McDougal*.

Partners for International Law Weekend-West were the Ved Nanda Center for International and Comparative Law, the International Legal Studies Program, the International Law Society, and the *Denver Journal of International Law & Policy*, (all at the University of Denver Sturm College of Law), as well as the American Society of International Law, and the Josef Korbel School of International Studies at the University of Denver.

INTERNATIONAL LAW WEEKEND MIDWEST 2013

International Law Weekend Midwest was held at Washington University School of Law on September 19-21, 2013. The theme of the Weekend was *The Legal Challenges of Globalization: A View from the Heartland*.

On Thursday evening, September 19, welcoming remarks were followed by an opening panel, entitled *International Law and Practice in Times of Change*. Leila Nadya Sadat moderated the panel, which also featured Ann E. Crosslin, Marcella David, Richard Longworth, and Frank L. Steeves. A reception sponsored by the law firm of Armstrong Teasdale LLP followed.

Panel presentations were held on Friday, September 20:

- *South China Sea: The Intersection of Politics and International Law* (chaired by John E. Noyes)
- *International Contract Farming (UNIDROIT)* (chaired by Anjanette Raymond)
- *Regulating and Incentivizing New and Existing Commercial Space Markets* (chaired by Matthew Schaefer)
- *The Role of Institutions in Developing and Enforcing International Human Rights Law* (chaired by Janet Levit)
- *Current and Future Trends in Private International Law* (chaired by David Stewart)
- *The Role of Local Efforts in Addressing “Global” Climate Change* (chaired by Hari Osofsky)
- *Current Issues in International Criminal Law* (chaired by Karen Tokarz)
- *Cross-Border Regionalism and the Public-Private Divide* (chaired by Constance Z. Wagner)

Professor Ruth Wedgwood, ABILA President and Edward B. Burling Professor of International Law and Diplomacy, Johns Hopkins School of Advanced International Studies, gave the luncheon Keynote Address on Friday, entitled *United Nations Peacekeeping and Organizational Responsibility: The Case of Haitian Cholera*.

Early Friday evening, the International Law Society hosted a program, followed by a happy hour. The program panel addressed *Careers in International Law*, and was chaired by Rebecca Brown.

A dinner was held later Friday evening, featuring a Keynote Address by David Wippman, Dean and William S. Pattee Professor of Law, University of Minnesota Law School, entitled *How We Talk About International Law*.

The concluding day of the conference, Saturday, September 21, featured a Closing Plenary Panel and a lunch with a Keynote Address. The Plenary Panel was on *The Future of Human Rights Litigation in the Wake of Kiobel*, chaired by Michael J. Kelly. Mary Ellen O'Connell, Robert and Marion Short Professor of Law and Research Professor of International Dispute Resolution, University of Notre Dame Law School, gave the Luncheon Keynote on *21st Century Arms Control Challenges: Drones, Cyber, Fully Autonomous, and WMD*.

The symposium was organized by the Whitney R. Harris World Law Institute in conjunction with the American Branch of the International Law Association, and co-sponsored by the International Association of Penal Law (American National Section).

The Program Committee consisted of Leila Nadya Sadat (chair), Shahram Dana, Aaron Fellmeth, Michael Kelly, John Noyes, Hari Osofsky, Jennifer Schwesig, David Stewart, and Ruth Wedgwood. The Event Coordinator was Bethel Mulugeta Mandefro.

How We Talk About International Law

David Wippman

International Law Weekend Midwest
American Branch, International Law Association
St. Louis, Missouri, September 20, 2013*

When I started teaching, over twenty years ago, I was fortunate to be given my choice of classes. I chose public international law, human rights, and a seminar on sovereignty. On hearing this lineup, my colleagues would often ask, aren't you going to teach any law classes? This was always asked in a good humored way, and I suspect some of them are chuckling still. Witticisms in law schools, after all, are often in short supply.

At the time, international law was on the margins of most law school curricula. My efforts to persuade my colleagues to hire another international law specialist met with puzzlement; after all, they would point out, we have one faculty member in public international law and one in private. Why would we need another one? We're good; we're done.

The good news is that international law is no longer at the margins. Many law schools, including Minnesota, now offer it in the first year. Some even require it. More and more students take it. And law schools have added more and more international law scholars to their faculty, with a corresponding growth in the depth and breadth of international law offerings and in international law scholarship.

I no longer even get asked very often whether I plan ever to teach a law course. That may be in part because I don't teach much of anything anymore. But even when I teach international law, I'm not asked the law question. After all, if it's part of the first-year curriculum, it must be law.

But one group is still very much focused on the law question. That would be us. Or should that be that would be we? Whichever. We can't give that up. Virtually every international law casebook still starts with some variation on the "is it law" question. Who else does that? Can you imagine a contracts or torts casebook starting that way?

Of course, just because we're paranoid doesn't mean they aren't out to get us. They are. The political scientists, that is. And the news media. And,

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well, just about everyone who, knowing that you teach international law, likes to ask, at the most inconvenient time, like whenever anything bad happens in the world, some variation of “well, there aren’t any consequences to violating international law, are there?”

We have our stock answers, of course, starting with Lou Henkin’s “almost all nations observe almost all of their obligations almost all of the time.”¹ And beyond that, we have a number of theories to explain when and why compliance can be expected (or not), and how international law can shape or at least influence a country’s behavior, even if not always in a central or dispositive way. We even have a growing body of empirical studies, which, if we could only get them to align, instead of wandering off in multiple directions, might offer some added support to our shared project.

But at the end of the day, at least when it comes to the ultimate questions of war and peace, most of us are probably at least a little ambivalent about our subject. And I suspect we convey that ambivalence not only to the casual interlocutor, but also, and more importantly, to our students. This makes me wonder if we aren’t creating some sort of feedback loop, since some of our students will eventually be the policy makers and legal advisers who decide whether international law will be followed in a given instance. I’m not sure there is much we can do about this. We can scarcely ignore international law’s limited impact on issues from torture to targeted killing. And we are hardly likely to stop debating among ourselves or with our colleagues in political science the meaning of what we see.

Jeff Dunoff, Steve Ratner, and I, in our own casebook decided to put the “is it law” question at the end of the book, rather than the beginning. We thought students should have a chance to see how international law does—and doesn’t—work, in various contexts before getting deeply into the “is it law” discussion. But even so, we just couldn’t stop ourselves from opening the book with a problem that invites at least a preliminary conversation about the impact of international law on state behavior.

And we, and by we, I mean all of us, are back at it again. The conflict in Syria has provided yet another occasion for our “invisible college” to engage in its favorite exercise—self-flagellation. How many of us have been called upon to speak to local news outlets (or even national and international news outlets) and in the process to explain why it is that international law, clear as it seemingly is on the legality of the U.S. use of force, to say nothing of the use of chemical weapons, doesn’t really seem to matter? How many blog posts and op-eds and articles have we devoted to defending international law’s relevance

¹ LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979) (emphasis omitted).

while explaining away its apparent impotence? I'll admit, this inconvenience to our profession is perhaps not the worst thing to come out of the Syrian conflict so far. But it's our inconvenience, so we may as well talk about it.

I will use the August, 2013 contemplated U.S. strike on Syria as a focal point, not because there is anything particularly special about it, but because it is recent. The fact that it immediately calls up ghosts of military interventions past, from Iraq, to Kosovo, to Libya, to mention just a few, is part of the problem. We've been down this road before. In fact, we've been down this road this afternoon, so forgive me if these remarks seem just to be piling on.

Immediately after the Syrian government used chemical weapons, President Putin began lecturing President Obama, reminding him that "any unilateral military action bypassing the U.N. Security Council" would be a "direct violation of international law."² Putin said this at the exact same time his police were confiscating paintings showing him wearing women's lingerie,³ but then freedom of expression *is* governed by a different set of treaties. But the really awkward thing is that Putin was obviously right (not about the paintings, of course, but about the U.N. Charter). A few weeks later, having seized the initiative with his proposal to eliminate Syria's chemical weapons, Putin gleefully rubbed salt into the wound with his op-ed in the New York Times:

We are not protecting the Syrian government, but international law. We need to use the United Nations Security Council and believe that preserving law and order in today's complex and turbulent world is one of the few ways to keep international relations from sliding into chaos. The law is still the law, and we must follow it whether we like it or not.⁴

Well, that's awkward. Because, setting aside the obvious hypocrisy, Putin has a point.

For all the arguments one can dredge up—about R2P and humanitarian intervention, about collective self-defense, about counter-proliferation and enforcement of international norms against the use of chemical weapons—the

² Tom Porter, *Vladimir Putin Rubbishes U.S. Syria Claims*, INT'L BUS. TIMES, Aug. 31, 2013), <http://www.ibtimes.co.uk/syria-france-putin-russia-military-attacks-502752>.

³ Liza Dobkina, *Russian Police Seize Painting of Putin in Women's Underwear*, REUTERS (Aug. 27, 2013), <http://www.reuters.com/article/2013/08/27/us-russia-putin-underwear-idUSBRE97Q0U720130827>.

⁴ Vladimir V. Putin, *A Plea for Caution from Russia: What Putin Has to Say to Americans About Syria*, N.Y. TIMES, Sept. 11, 2013, http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html?pagewanted=all&_r=0.

language of the Charter is, at least in connection with the events in Syria, pretty clear. You need Security Council authorization or an armed attack to warrant military action, and we had neither. I realize, of course, that this is an oversimplification, but I think it's close enough for government work.

And it's more or less what President Obama himself said early on, while he was still debating with himself whether tis nobler to suffer the slings and arrows of chemical weapons, or fire a few cruise missiles and by opposing do, well, who knows what. As he noted on CNN, "if the U.S. goes in and attacks another country, without a U.N. mandate and without clear evidence . . . then there are questions in terms of whether international law supports it."⁵

And yet, in the week-long run-up to Obama's decision to punt the ball to Congress, the administration rarely mentioned international law. The President did note, of course, that a major goal of intervention was to enforce "an international norm"⁶ (he didn't say law, or even treaty, perhaps in part because of the inconvenient fact that at the time Syria was one of only seven states that had not ratified the Chemical Weapons Convention).⁷

During the debate in Congress, the arguments pro and con were virtually all political and prudential. In a hearing before the Senate Foreign Relations Committee, Secretary Kerry mentioned the Syria Accountability Act and the CWC, but omitted any reference to the U.N. Charter.⁸ He and others argued that American credibility was at stake, that failure to respond would "embolden" not only Syria but Iran and North Korea and Al Qaeda and Hezbollah and fill-in-the-adversary blank, and that important U.S. interests were at stake. Occasionally, hints appeared that might have represented a half-hearted effort to pave the way for a self-defense justification—claims that failure to respond would open the door to attacks on allies such as Israel and Turkey. But it was clear that almost no one, on either side of the debate, really took international law very seriously. In fact, during the hearings, only one Senator raised the issue. That was Senator Udall, who noted that "we are on

⁵ See *Syria Chemical Weapons Response Poses Major Test for Obama*, L.A. TIMES, Aug. 28, 2013, <http://articles.latimes.com/2013/aug/28/world/la-fg-obama-dilemma-20130828/2> (quoting Obama on CNN).

⁶ Frederik Pleitgen & Tom Cohen, 'War-weary' Obama Says Syria Chemical Attack Requires Response, CNN WORLD (Aug. 30, 2013), <http://www.cnn.com/2013/08/30/world/europe/syria-civil-war/>.

⁷ Syria acceded to the CWC in October 2013 in an effort to avert U.S. airstrikes. *Syria Says It Ratified Treaty Banning Use of Chemical Weapons*, JERUSALEM POST, Sept. 13, 2013, <http://www.jpost.com/Middle-East/Syria-says-it-ratified-treaty-banning-use-of-chemical-weapons-326057>.

⁸ The transcript is available at: http://www.washingtonpost.com/politics/2013/09/03/35ae1048-14ca-11e3-b182-1b3bb2eb474c_story.html (hearing Sept. 3, 2013).

shaky legal international legal foundations with this potential strike” and urged condemnation of Russia and China for blocking U.N. action.⁹ To this, Secretary Kerry responded that yes, the “U.N. Security Council [is] having difficulties at the moment performing its functions,” and then went on to ask “[d]oes that mean the United States of America and the rest of the world that thinks we ought to act should shrink from it? No.”¹⁰ If the Security Council is blocked, he added, we can act anyway, as we did in Bosnia.

Now, imagine, for a moment, that Articles 2(4) and 51 appeared in the U.S. Constitution. How would the administration have responded? Plainly, we would not be having the conversations we are having. This is not to say that there wouldn’t have been endless discussion about the precise meaning of the language in those articles. But the content would have been clear enough for present purposes, and it would have been dispositive.

It may be old news, but the obvious reality is that the United States government and, for that matter, most of us, think about international law and national law quite differently. That the government does so is hardly surprising; that we think that way, maybe a little more so.

As a director at the National Security Council during the Kosovo conflict, I had a ringside seat during the U.S. deliberations regarding the use of force to persuade Milosevic of the error of his ways. As you know, the legal situation was much the same: Milosevic was violating international law through ethnic cleansing, and we wanted to stop him, in part for humanitarian reasons and in part over concerns about regional stability. During the discussions, there was never any doubt among the participants that the administration would comply with applicable U.S. law, at least when that law was clear. Whether to comply with U.S. law was never an issue – it was simply assumed. Discussion centered on ensuring that all the applicable laws were identified and followed. In fairness, some of the laws at issue were quite technical (e.g., from which agency funds should come for particular purposes). On a much larger question—the president’s authority to engage in military action without prior Congressional approval—the administration felt that the long-running debate over this question afforded considerable leeway. Thus, President Clinton ordered military action in Kosovo without Congressional authorization.¹¹ When a vote was finally taken, Congress declined to provide that authorization, but separately decided to fund the ongoing military operations, giving the Clinton

⁹ *Id.*

¹⁰ *Id.*

¹¹ Bill Miller, *Clinton’s War Powers Upheld*, WASH. POST, June 9, 1999, <http://www.washingtonpost.com/wp-srv/national/daily/june99/dismiss09.htm>.

Administration the ability to see the conflict through.¹² I have no doubt, though, that if the Clinton administration thought prior authorization was required under U.S. law, no use of force would have been initiated without it, whether or not the legal requirement could be enforced.

When it came to following the dictates of international law, a quite different approach was followed. International law, if not an afterthought, was hardly central to decision making. The question asked was “how shall we explain what we are doing, now that we have already decided to do it?” The question was not, “how shall we comply with international law?”

Intervention in Kosovo pretty plainly violated the U.N. Charter, and since the United States, unlike some of its N.A.T.O. allies, was not prepared to endorse humanitarian intervention, it came up with a somewhat tortured “multi-factor” explanation for why military intervention in Kosovo was “justified”. Famously, the United States did not claim specifically that the intervention was legal under international law, just that it was justified.

That in itself is fairly extraordinary. In the past, the United States pretty routinely offered an international law justification for any significant use of force, however strained the justification might be. Even more striking, though, was the response of international lawyers and particularly international law academics. Some, of course, declared U.S. military action to be illegal under the Charter. But many of us, and I include myself in this group, found it hard to treat military action by the world’s richest and most powerful democracies as simply illegal. So various theories were advanced, from humanitarian intervention to acceptable breach to what in the end became a fairly widespread assessment of “illegal but justified.” It’s hard to imagine reaching a comparable conclusion on any national law issue of comparable significance.

Much the same was on the table for Syria, until Putin helped us take it off. International law plainly was not a significant constraint in U.S. decision making, for the Obama administration or for Congress. That’s not to say that international law had no impact, just that it was not seen as a significant hurdle. Even our European allies, who tend to take international law rather more seriously than we do, at least on human security issues, seemed to put surprisingly little weight on international law in their public statements. France announced its willingness to support military action; according to the French foreign minister, “in certain circumstances we can bypass it [the Security Council], but international law does exist.”¹³ The United Kingdom, of course,

¹² *Id.*

¹³ John Irish, *France Says Would Be Hard To Bypass U.N. in Action Against Syria*, REUTERS (Aug. 26, 2013), <http://www.reuters.com/article/2013/08/26/us-syria-crisis->

was planning to join us in a strike, until Prime Minister Cameron ran aground in Parliament.¹⁴ The U.K. cited humanitarian intervention as its legal rationale, using the same language it employed to explain its involvement in Kosovo.¹⁵ At least the U.K. felt some obligation to offer an international law rationale. As we know from documents released in connection with the U.K.'s role in Iraq, the United Kingdom needs an international law green light from the Attorney General to proceed with military action abroad. But as significant as this may be, that green light is apparently not all that hard to get.

International law academics, of course, weighed in as a strike appeared imminent. Again, some (probably most) declared the contemplated strike illegal, but without much conviction that considerations of international legality actually mattered. A few argued that international law already permitted humanitarian intervention, or that military action in Syria would be another step in reconstructing the law to permit humanitarian intervention. Others expressed mixed reactions. In a very thoughtful ASIL Insight, Ken Anderson reviewed the various legal arguments that might be made to support U.S. military intervention and their defects under a conventional legal analysis. He went on to argue, however, that under a pragmatic, as opposed to a formalist, approach to international law, “consequences-based, real world concerns,” such as the need to maintain international prohibitions against the use of chemical weapons, may be incorporated into the law itself.”¹⁶ In this way, he contends, the United States “may claim that it is entitled to pursue a position that it considers pragmatically necessary and reasonably justified under international law.”¹⁷ As a practical matter, Professor Anderson’s characterization pretty closely approximates how the United States acts.

As Professor Anderson acknowledges, if the United States can take this approach, so can others, to the detriment of the Security Council’s authority.

france-idUSBRE97P04B20130826.

¹⁴ Anthony Faiola, *British Prime Minister David Cameron Loses Parliamentary Vote on Syrian Military Strike*, WASH. POST, Aug. 29, 2013, http://www.washingtonpost.com/world/europe/british-prime-minister-david-cameron-loses-parliamentary-vote-on-syrian-military-strike/2013/08/29/4fabb080-10f7-11e3-bdf6-e4fc677d94a1_story.html.

¹⁵ CHEMICAL WEAPON USE BY SYRIAN REGIME – UK GOVERNMENT LEGAL POSITION, Aug. 29, 2013, *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235098/Chemical-weapon-use-by-Syrian-regime-UK-government-legal-position.pdf.

¹⁶ Kenneth Anderson, *Legality of Intervention in Syria in Response to Chemical Weapon Attacks*, 17 ASIL INSIGHTS, Aug. 30, 2013, at 5, <http://www.asil.org/insights/volume/17/issue/21/legality-intervention-syria-response-chemical-weapon-attacks>.

¹⁷ *Id.* at 6.

And, of course, they do. Russia, for example, invoked humanitarian intervention when it intervened in Georgia.¹⁸

Perhaps more surprising, African states have in recent years entered or amended treaties to authorize regional organizations, most notably the African Union and the Economic Community of West African States, to intervene militarily in member states in the event of an unconstitutional seizure of power or humanitarian disaster.¹⁹ As attractive as this might sound in the abstract, it clearly arrogates to regional organizations powers supposedly reserved to the Security Council, and its primary purpose is not to protect democracy and human rights, but to keep sitting governments in power.

You might think that these treaties would spark some outrage. But they have scarcely attracted any attention, positive or negative, even among legal academics. Partly, I suppose, that's because we continue to focus on the U.S. and Europe as the standard by which to measure international law's relevance and vitality. Most western governments, anyway, seem happy with the idea that these treaties might yield "African solutions to African problems," and they are not inclined to inquire too closely into the details. Still, it's a pretty open end-run around the Charter, presumably encouraged at least in part by N.A.T.O.'s example in Kosovo.

So where does all this leave us? When it comes to the use of force, we are, as legal academics, all over the map, both literally and figuratively. We do not have a coherent response even to what would seem to be open violations of the cornerstone of the international legal system. Of course, there's nothing new in this. It's been over 40 years since Tom Franck famously inquired who killed article 2(4).²⁰ But that's part of the problem. After 40 years, it would be nice to be able to tell a story of progress, of the gradual strengthening of international norms and institutions.

We can and do tell that story in some areas, of course. International trade, for example, can tell a story of growing impact, with most of the world already in or clamoring to get in to an increasingly legalized and judicialized system. But when it comes to issues of war and peace, human rights and international crimes, it's still a mixed bag, at best.

One response is to capitulate to the realists and declare, with greater (think Jack Goldsmith and Eric Posner) or lesser (think John Bolton) degrees of

¹⁸ Gareth Evans, *Russia and the 'Responsibility to Protect'*, L.A. TIMES, Aug. 31, 2008, <http://www.latimes.com/la-oe-evans31-2008aug31-story.html>.

¹⁹ African Union Constitutive Act art. 4(h), May 26, 2001; 2158 U.N.T.S. 3, Economic Community of West African States, Protocol Relating to Mutual Assistance on Defence art. 4, 1690 U.N.T.S. 51 (entered into force May 29, 1981).

²⁰ Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 Am. J. Int'l L. 809 (1970).

sophistication, that international law is really just politics and that “it is no more unlawful to contravene a treaty or a rule of customary international law than it would be to disregard a nonbinding letter of intent.”²¹ A second response is simply to declare the Charter rules governing the use of force dead, leaving the rest of international law intact (sort of). Michael Glennon has taken the lead in that vein.²² Another, more common, response is to talk in terms of degrees of impact, to identify ways in which international law influences, even if does not determine, state behavior, and in the process to build increasingly sophisticated models—managerial, rational choice, empirical, what have you—to explain how, when, and why that works.

All of these responses sound defensive. In one way or another, they downplay our discipline’s status as law. But even as we do that, we also, many of us, tend to overstate, sometimes wildly, what international law and international institutions can achieve. A recent, almost comic, example comes from the Inter American Commission on Human Rights. On July 23, 2013, the Commission, not happy with U.S. responses to its previous issuance of precautionary measures in favor of Guantanamo detainees, announced its decision to “require the United States to proceed to immediately close the detention facilities” at Guantanamo.²³ Incredibly, those facilities remain open.

A more serious example is the hype that surrounded the creation of the International Criminal Court. It would, we were told, deter atrocities, end impunity, foster national reconciliation in war-torn countries, and wash the dishes. This was never realistic, any more than were similar claims made on behalf of the International Court of Justice at its creation. A dozen years and hundreds of millions spent, and the ICC has concluded only a couple of trials. Kenya, after electing two ICC indictees as President and Deputy President, recently moved to withdraw from the ICC.²⁴ This isn’t to say that the ICC has no value, only that the value has been greatly overstated.

²¹ See Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate*, 31 Cardozo L. Rev. 45, 46 (2009) (citing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW*, 90 (2005) and Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 Stan. L. Rev. 1901 (2003)).

²² See, e.g., Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFF., May/June 2003 at 16.

²³ *Precautionary Measures Regarding Guantanamo: Extension of PM 259/02 (2013)*, ORG. AM. STATES, <http://www.oas.org/en/iachr/pdl/decisions/GuantanamoMC.asp#23jul> (summarizing PM 259/02 – *Detainees in the U.S. Military Base in Guantanamo*, July 23, 2013).

²⁴ *Kenya MPs Vote to Withdraw from ICC*, BBC AFRICA (Sept. 5, 2013), <http://www.bbc.com/news/world-africa-23969316>.

So it appears we continue to alternate between apology and utopia, sometimes defensive, sometimes Pollyannish. And all of this is grist for the “is it law” mill. I opened the Minnesota Law Review the other day to find a lead article with the title “Does International Law Matter?” The ASIL’s 2014 annual meeting is focused on the same question, though it’s phrased a little differently. It’s a question we can’t escape.

So what should we tell our students when they ask the “is it law” question? I have tried the nuanced approach—talking about the different theories and the different ways in which international law matters. But they don’t really want nuance. They want clarity. They want rules. They want to know what the black letter law is and, more important, whether it will be on the exam.

Talking to first year students about realists and neorealists, rationalists and constructivists, quantitative empiricists and qualitative empiricists, game theory and what have you, invites blank stares and a quick visit to RateMyProfessors.com. So mostly I tell them, when they ask what I think, that yes, international law is law. Of course, I admit, its impact varies widely depending on the region, the country, the issue, and the circumstances. It may seem to matter least when it should matter most; it may not always operate as national law does in the U.S., but as with all big issues, law is only one element in a complex political calculation. And then I punt the ball back to them and tell them their job is to figure out how it works and how it might work better. It’s good to be the professor. No doubt many of you have better answers. I hope you will share them with me so I can appropriate them for my own.

21st Century Arms Control Challenges: Drones, Cyber Weapons, Killer Robots, and WMDs

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American Branch, International Law Association

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Dean David Wippman's remarks at the 2013 Midwest Meeting of the International Law Association focused on how we in international law struggle with the view that international law is not really law—or not really law when it comes to the use of military force. Students of legal theory will tell you, however, that defining law poses challenges in all areas of law. Understanding what counts as law is no simple task. Still, the question of whether international law is really law may be more important, especially when it comes to the use of force, because the stakes are so high. Indeed, the stakes are probably higher than with respect to any other body of rules.

Compare, for example, the city of Chicago where the law against murder is frequently violated. In 2012, 500 people were murdered in Chicago;¹ few of the perpetrators will ever be identified, let alone prosecuted. When the rules on the use of force are violated, it is not hundreds that will die but hundreds of thousands. We typically know who is ultimately responsible for the resort to unlawful war and the resulting loss of life and destruction, but rarely are such persons prosecuted. In both contexts—domestic law against murder and international law against war—we must do better. I choose to work in the area of law against war and accept the challenge of persuading others as to why the law of the United Nations Charter binds the United States and all states, and

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¹ U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIM. JUST. INFO. SERVICES DIVISION, *Crime in the United States: Illinois*, FBI.GOV, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/8tabledataadecpdf/table-8-state-cuts/table_8_offenses_known_toLaw_enforcement_by_illinois_by_city_2012.xls (last updated June 13, 2013).

why it matters that the United States and all states comply with this law. The task is challenging for a number of reasons, including the apparent decline in general knowledge respecting international law in the United States and the popularity of resort to military force. During 2013, however, we could see several indications that Americans were thinking differently about war. “War fatigue” has become a common phrase. The poor results and unintended consequences of major wars involving the United States against Serbia (1999), Afghanistan (2001–), Iraq (2003–), and Libya (2011–) are apparent.

Moreover, rather than resort to armed force in Syria in August 2013 over the use of chemical weapons, diplomacy prevailed and an agreement backed by a UN Security Council resolution led quickly to progress in the demolition of Syria’s chemical weapons capacity.² If Syrian chemical weapons are destroyed through the art of diplomacy, we may see a revival of interest in alternatives to military force even in Washington, D.C. In September 2013, President Obama spoke by telephone with Iran’s President Rouhani, giving further support to the view that diplomacy might be on an upswing.³

If the United States is moving toward a less militaristic phase, it will be an important time for international law specialists. We need to be ready to fill the knowledge vacuum when asked how the United States can forgo military force and yet promote security, prosperity, human dignity, and the natural environment both in the United States and in the world. Too many Americans—on the left and the right—have believed for too long that military force is the most effective way to deal with a range of complex problems from human rights violations to terrorism to arms control. The focus of these remarks is on the last problem in the list: arms control.⁴ International law clearly prohibits the use of military force for arms control, but that is not the end of the story. International law embraces alternatives to the use of force to control certain weapons and certain weapons systems. I will illustrate this contrast of lawful and unlawful means by looking at four weapons categories:

- WMDs, or weapons of mass destruction, which are chemical, biological, and nuclear weapons;
- Drones, or unmanned aerial launch vehicles; the United States also possesses unmanned land and sea launch vehicles;

² See S.C. Res. 2118, U.N. Doc. S/RES/2118 (Sept. 27, 2013).

³ See *Iran News Round Up*, IRAN TRACKER (Apr. 10, 2013), <http://www.irantracker.org/iran-news-round-april-10-2013>.

⁴ For a general introduction to the international law restricting resort to force, see Mary Ellen O’Connell, *The Prohibition of the Use of Force*, in RESEARCH HANDBOOK ON CONFLICT AND SECURITY LAW: JUS AD BELLUM, JUS IN BELLO, JUS POST BELLUM 89 (Nigel White & Christian Henderson eds., 2013).

- Cyber weapons, which are computer programs designed to have destructive capacity; and the newest category,
- Fully autonomous weapons systems, which are robotic weapons programed to select and attack targets without further human intervention following the initial programing of the robot.⁵

All four categories pose challenges for the international community. Although chemical, biological, and nuclear weapons are clearly unlawful to use, a few states still possess them and, in the case of nuclear weapons, may even be seeking to obtain them.⁶ Respecting unmanned, cyber, and fully autonomous weapons, certain commentators in the international security field indicate they are unaware of relevant international legal rules or seem to believe international law should play no role in regulating their use.⁷

International law does exist respecting all of these weapons categories. Moreover, looking to the lessons taught by twentieth century arms control efforts, we find that international law is uniquely effective and appropriate for regulating weapons. Here are just three constructive lessons from twentieth century arms control:

1. Controlling weapons proliferation by trying to keep a monopoly on technology or by staying ahead in technological development has not worked.

2. Attempting to control weapons development, proliferation, or use through unlawful means, such as the use of force, has proven ineffective and counter-productive.

3. Using the lawful means available in international law has succeeded in controlling weapons and in achieving other desiderata of the international community.

We will begin by looking first at nuclear weapons, then at the other weapons categories.

NUCLEAR WEAPONS

Most will know at least the outlines of the story of the secret Manhattan project to produce an atomic bomb during World War II. Thanks in large part to

⁵ See Rob Sparrow, *Killer Robots*, 24 J. APPLIED PHIL. 62 (2007).

⁶ This is the conclusion of some respecting Iran, despite Iran's official position that it is developing a domestic nuclear power capacity, not nuclear weapons.

⁷ See, e.g., the comments of a former National Security Agency lawyer, Stewart Baker, *Denial of Service, Lawyers are Crippling America's Ability to Defend Against Cyberwar with Arcane Rules and Regulations*, FOREIGN POL'Y (Sept. 30, 2011), http://www.foreignpolicy.com/articles/2011/09/30/denial_of_service.

old-fashioned espionage, the Soviets quickly acquired the technology to create their own atomic weapons. As Robert O'Connell describes in his book *Of Arms and Men*:

Initially, Americans dealt with the bomb from the perspective of their own enormous postwar national power and the presumption of a nuclear monopoly of some considerable duration . . . [Then] on 3 September 1949 a B-29 flying over the South Pacific detected higher than normal radiation levels explicable only in terms of a Russian atomic bomb test. After only four short years, the nuclear monopoly had ended.⁸

Since 1949, both lawful and unlawful measures have been taken to try to prevent more states from acquiring nuclear weapons. Starting with several examples of unlawful measures, we will quickly see that such measures have been inadequate and even counter-productive. In 1981, Israeli jets bombed a nuclear reactor under construction at Osirik, Iraq. The Security Council unanimously condemned the bombing as a violation of United Nations Charter Article 2(4) that was not excused as an exercise of self-defense under Article 51 of the Charter.⁹ In the Security Council debate, most delegations pointed to the absence of an armed attack by Iraq on Israel as the most important missing element for lawful self-defense. States made it clear that they do not equate a future risk of nuclear attack with the armed attack requirement of Article 51.

The American representative to the UN Security Council, Ambassador Jeanne Kirkpatrick, stated that the United States, too, understood Israel had violated the Charter, in particular because Israeli leaders had not exhausted peaceful alternatives before ordering the attack. Many representatives were impressed by the testimony of the Director General of the International Atomic Energy Agency that the IAEA had found no evidence of unlawful weapons development by the Iraqi government, such as diversion of nuclear material. Following Israel's attack, Iraq did pursue nuclear weapons, but did so secretly in protected sites.¹⁰ Following the 1991 Gulf War, the United Nations undertook concerted steps to ensure the elimination of all WMDs in Iraq. Those efforts succeeded well before the United States, United Kingdom, and Australia invaded in 2003. In letters to the Security Council, the three invading states

⁸ ROBERT L. O'CONNELL, *OF ARMS AND MEN, A HISTORY OF WAR, WEAPONS, AND AGGRESSION* 303 (1989).

⁹ See S.C. Res. 487, U.N. Doc. S/RES/487 (June 19, 1981), and accompanying debate.

¹⁰ *Country Profiles: Iraq*, NUCLEAR THREAT INITIATIVE, <http://www.nti.org/country-profiles/iraq> (last visited Jan. 23, 2014).

sought to justify their resort to force as enforcement of Security Council resolutions mandating that Iraq eliminate its WMD programs.¹¹

Israel has also sought to prevent Iran from acquiring nuclear weapons through a variety of means, including assassinations of scientists.¹² The United States has denied any involvement in violent action within Iran; Israel refuses to comment.¹³ Nevertheless, the United States has said that military force against Iran is “on the table.”¹⁴ Whether Iran’s nuclear ambitions have been slowed by either tactic is difficult to say. Some Iranian hardliners have likely cited the threats of military force to support the acquisition of nuclear weapons and to do so as soon as possible. Most observers credit tough economic sanctions as providing the pressure necessary to bring about the new round of negotiations with Iran that began in 2013.¹⁵

Another unlawful measure taken against Iran has been the Stuxnet worm, apparently released by one or more governments, most likely the United States and Israel, in 2009–10 to slow the progress of Iran’s nuclear program.¹⁶ Stuxnet attacked computers manufactured by Siemens and used in the Iranian nuclear program. The effect of the worm in Iran was to cause centrifuges to turn far more rapidly than appropriate. In early 2011, officials in Israel and the United States announced that Iran’s nuclear program had been set back “by several years.” The Stuxnet worm, however, affected computers in other countries as well, including India, Indonesia, and Russia. Indeed, it is believed that forty percent of the computers affected were outside Iran. Stuxnet is said to be “the first-known worm designed to target real-world infrastructure such as power stations, water plants and industrial units.”¹⁷

¹¹ Letter of John Negroponte, former United States Ambassador to the United Nations, to the President of the Security Council (Mar. 20, 2003) (on file with author).

¹² Saeed Kamali Dehghan, *Iran Nuclear Scientist Killed in Tehran Motorbike Bomb Attack*, GUARDIAN (Jan. 11, 2012), <http://www.theguardian.com/world/2012/jan/11/iran-nuclear-scientist-killed>.

¹³ See Thomas Erdbrink & Joby Warbrick, *Iranian Scientist Involved in Nuclear Program Killed in Tehran Bomb Attack*, WASH. POST (Jan. 11, 2012), http://www.washingtonpost.com/world/iranian-scientist-killed-in-tehran-bomb-attack/2012/01/11/gIQAT1V7pP_story.html.

¹⁴ Mark Landler, *Obama Says Iran Strike Is an Option, but Warns Israel*, N.Y. TIMES (Mar. 2, 2012), http://www.nytimes.com/2012/03/03/world/middleeast/obama-says-military-option-on-iran-not-a-bluff.html?pagewanted=all&_r=0.

¹⁵ This is the position taken by President Obama. See *Deal Reached on Implementing Iranian Nuclear Agreement*, AL JAZEERA AMERICA (Jan. 12, 2013), <http://america.aljazeera.com/articles/2014/1/12/report-iran-saysallsidesagreetonucleardeal.html>.

¹⁶ James Hilder, *Computer Virus Used to Sabotage Iran’s Nuclear Plan “Built by US and Israel”*, AUSTRALIAN (Jan. 27, 2011), <http://www.theaustralian.com.au/news/world/>.

¹⁷ Johnathan Fildes, *Stuxnet Work “Targeted High-Value Iranian Assets”*, BBC (Sept.

Ralph Langner, a German computer security expert, is convinced Stuxnet is a government-produced worm: "This is not some hacker sitting in the basement of his parents' house. To me, it seems that the resources needed to stage this attack point to a nation state."¹⁸ In another interview, Langer added: "Code analysis makes it clear that Stuxnet is not about sending a message or providing a concept. It is about destroying its targets with utmost determination in military style"¹⁹ The worm may have slowed Iranian progress for some months, but it is now in the hands of criminal hackers and governments everywhere.

In short, the use of military force, assassinations, threats of force, and cyber attacks have all proven ineffective to end nuclear programs. By contrast to these various unlawful means, lawful means available within international law have proven successful without serious negative and unintended consequences. Thanks to the Treaty on Non-Proliferation of Nuclear Weapons (NPT),²⁰ the vast majority of states in the world do not possess nuclear weapons and do not seek them. This is an extraordinary accomplishment. Of the 193 sovereign states in the world that are members of the United Nations, only nine have nuclear weapons and only one state, Iran, is allegedly seeking them.

Through the NPT, an international legal instrument, the world has built an important norm against the possession or use of nuclear weapons. Moreover, the weight of evidence indicates that with a greater effort by the United States, the newer nuclear powers—India, Israel, North Korea, and Pakistan—might not have acquired nuclear weapons or might have been persuaded to give them up by now. Libya and Brazil were both persuaded to give up nuclear weapons programs. South Africa and Ukraine were persuaded to actually give up the weapons they possessed. Iraq gave up its nuclear ambitions following its defeat in the Gulf War of 1991. UN weapons inspectors succeeded in exposing Iraq's program, and it was dismantled. Then thanks to the sanctions imposed on Iraq, which were enforced by NATO and largely by the United States, Iraq was never able to acquire inputs to any of its WMD programs. The human rights advocacy community heavily criticized the sanctions regime and even those who defended it.²¹ Yet the defenders could tell the sanctions were working to prevent Saddam Hussein from building WMDs. The UN's Oil for Food program assured Iraq's ability to purchase food and medicine for the population. It was Saddam's

23, 2010), <http://www.bbc.co.uk/news/technology-11388018>.

¹⁸ *Id.*

¹⁹ Hilder, *supra* note 16.

²⁰ July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

²¹ One of the most critical assessments of sanctions on Iraq used a title that entered the vernacular: "Sanctions of Mass Destruction." John Mueller & Karl Mueller, *Sanctions of Mass Destruction*, 78 FOREIGN AFF. 43 (1999).

decision to warehouse the purchases to create a media impression of the devastating impact of sanctions. In fact, Saddam Hussein had no WMDs by 2003, but did have warehouses full of food and medicine.

At the urging of the Soviet Union, North Korea joined the NPT in December 1985. In 1994, the U.S. was able to persuade North Korea to suspend building its own nuclear power capacity in exchange for two light water reactors.²² The Clinton administration never delivered the reactors. North Korea subsequently withdrew from the NPT in 2003 and began developing a nuclear weapons capacity.²³ The Bush administration made a new pledge to supply the reactors in 2005. It, too, failed to fulfill the U.S. promise. By 2006, North Korea had a nuclear weapon.²⁴ No one can say with certainty whether North Korea would have lived up to its end of the bargain, but under international law, North Korea's performance of its promise was premised on the prior U.S. performance.

Iran, the IAEA, which monitors the NPT, the United States, UK, Germany, France, China, and Russia are at the time of this writing involved in intense negotiations to end the conflict over Iran's nuclear program. Iran's President, Hassan Rouhani, invited new negotiations on Iran's nuclear problem soon after the U.S. turn to diplomacy respecting Syrian chemical weapons, a turn that included a move away from a military attack.²⁵ Successful negotiations will require following the classic steps of *Getting to Yes*.²⁶ Both sides will need to consider what the other needs in order to agree to concessions.

UNMANNED WEAPONS

Arguably, the first major revolution in military weapons development since the advent of nuclear weapons is owed to the computer. Computers have revolutionized war fighting in many ways, but computer-controlled unmanned launch vehicles are the weapons part of the revolution. The United States developed a drone at the end of World War II or soon after. Drones were used for reconnaissance in Vietnam, the Gulf War, the Balkans conflicts, and in all

²² *The U.S.-North Korean Agreed Framework at a Glance*, ARMS CONTROL ASSOC. (Aug. 2004), <http://www.armscontrol.org/factsheets/agreedframework>.

²³ *Id.*

²⁴ Erik Mobrand, *The Road to North Korea's Nuclear Test*, WORLD SECURITY NETWORK (Oct. 8, 2006), <http://www.worldsecuritynetwork.com/Koreas/erik-mobrand/The-Road-to-North-Korea%E2%80%99s-Nuclear-Test>.

²⁵ See Symposium, *The U.S.-Iranian Relationship and the Future of International Order*, 2 PENN. ST. J.L. & INT'L AFF. 237 (2013), available at <http://elibrary.law.psu.edu/jlia/vol2/iss2/12/>.

²⁶ ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1983).

wars since. The first use of a drone in a lethal operation occurred in November, 2001 in the Afghanistan War. The legality of that use is hard to dispute, given that the United States was engaged in armed conflict with the Taliban and al Qaeda in Afghanistan at the time and was firing missiles and dropping bombs from manned aircraft.

In November, 2002, however, the CIA carried out the first killings using a drone far from the battlefields of Afghanistan. The attack occurred in Yemen where, at the time, no armed conflict was underway and no attack on the United States had occurred that could give rise to a U.S. right to undertake military action in Yemen. In 2004, the CIA began a campaign of targeted killing in Pakistan and, in late 2006, similar attacks began in Somalia. New drone bases are being established around the world, raising the expectation of future drone attacks. According to The Bureau of Investigative Journalism, by the end of 2013, the United States had killed as many as 4100 people beyond armed conflict zones with drones, including over 200 children.²⁷

The Obama Administration has tried to characterize these U.S. drone attacks as lawful by invoking as many as six distinct but contradictory justifications.²⁸ In an approach reminiscent of the legal argument made to justify the Cuban quarantine during the Cuban Missile Crisis and the use of force in the Kosovo intervention, the Administration's lawyers seem to pile on many arguments that might almost work in the hope that the public and allies might see the accumulated arguments as sufficient. These lawyers likely know that the arguments are not sufficient in international law but hope they will create a case of special circumstances that allows the United States, and perhaps a few close allies such as the UK and Israel, to use drones beyond armed conflict zones.

The U.S. position is, of course, untenable as a matter of law. Other countries are showing an interest in using drones in the same way the United States does, in particular, China. The *New York Times* carried a front-page article on the day these remarks were delivered, reading: "Hacking U.S. Secrets, China Pushes for Drones."²⁹ China has apparently targeted companies that have developed U.S. drone technology with considerable success: "Chinese officials this month sent a drone near disputed islands administered by Japan; debated using a weaponized drone last year to kill a criminal suspect in Myanmar; and

²⁷ *Monthly Updates on the Covert War*, BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/category/projects/drones/monthly-updates/> (last visited Jan. 24, 2014).

²⁸ Mary Ellen O'Connell, *Drone Attacks & International Law*, Address at the Indianapolis Peace and Justice Center (Nov. 26, 2013), available at http://indianapolis.granicus.com/MediaPlayer.php?view_id=51&clip_id=10804.

²⁹ Edward Wong, *Hacking U.S. Secrets, China Pushes for Drones*, N.Y. TIMES, Sept. 21, 2013, at A1.

sold homemade drones resembling the Predator, the American model, to other countries for less than a million dollars each.”³⁰

The United States has set the precedent of using military force in situations in which, prior to 9/11, the United States would have used law enforcement methods. As a result, the legal and ethical barriers to resort to significant violence are being eroded. The United States is in the best position to slow this development by admitting its legal error and complying with its obligations. Only then will it be in position to protest China’s conduct or the conduct of other states.

CYBER WEAPONS

We have already discussed the Stuxnet worm as the first use of a computer program by one government to do significant physical damage to another. In January, 2010, investigators with the IAEA noticed something was wrong with the centrifuges at an Iranian nuclear facility. The Iranian scientists had been replacing the centrifuges at many times the normal rate.³¹ They discovered that, in 2009, someone had unleashed a program that had infiltrated computers across the world using the most complex malware ever written.³²

In response to the attack, Iran began recruiting its own team of elite hackers.³³ The goal was to prevent another attack and to gain the capacity to retaliate with a virus of its own. Something like a world arms race for cyber weapons may now be underway. The ability to keep the code for cyber weapons secret may prove even more difficult than keeping the secrets of nuclear, biological, and chemical weapons.³⁴ An adaptation of Stuxnet known as DuQu has already been created.³⁵ CrSyS, a lab of the Budapest University of Technology, discovered the program and wrote a sixty-page report on it.³⁶

³⁰ Edward Wong, *Hacking U.S. Secrets, China Pushes for Drones*, N.Y. TIMES (Sept. 20, 2013), http://www.nytimes.com/2013/09/21/world/asia/hacking-us-secrets-china-pushes-for-drones.html?_r=0.

³¹ See Kim Zetter, *How Digital Detectives Deciphered Stuxnet, the Most Menacing Malware in History*, WIRED (July 11, 2011), <http://www.wired.com/threatlevel/2011/07/how-digital-detectives-deciphered-stuxnet/>.

³² *Id.*

³³ Shaun Waterman, *Iran Readying Hacker Attacks on U.S. Infrastructure, Specialists Say*, WASH. TIMES (Apr. 25, 2012), <http://www.washingtontimes.com/news/2012/apr/25/iran-readying-hacker-attacks-us-infrastructure-spe/>.

³⁴ Adam Levin, *Hackers: If You Can’t Beat ‘Em, Hire ‘Em*, ABC NEWS (June 16, 2012), <http://abcnews.go.com/Business/hackers-beat-em-hire-em/story?id=16578552>.

³⁵ Kim Zetter, *DuQu Mystery Language Solved With the Help of Crowdsourcing*, WIRED (Mar. 19, 2012), <http://www.wired.com/threatlevel/2012/03/duqu-mystery-language-solved/>.

³⁶ SYMANTEC SECURITY RESPONSE, W32.DUQU: THE PRECURSOR TO THE NEXT STUXNET

CrSyS found it is “nearly identical to Stuxnet” but built for a different purpose.³⁷ DuQu was made to gather information,³⁸ specifically, to steal the blueprints of Iran’s nuclear program and then remove itself from Iran’s computers.³⁹ DuQu has also provided additional insight into the origins of Stuxnet. For example, researchers found that the Stuxnet’s working hours coincided with Jerusalem local time.⁴⁰

The invention of DuQu as a consequence of Stuxnet has not, apparently, deterred the United States. In 2012, another virus was detected, known as “Flame,” which appears to be a part of the same campaign as Stuxnet.⁴¹ A researcher at Kaspersky Labs, who brought Flame’s existence to public light, said, “We believe Flame was written by a different team of programmers but commissioned by the same larger entity.”⁴² Like DuQu, Flame is an espionage tool. It spreads through BlueTooth.⁴³ Also, like DuQu, Flame names many of its processes after American media characters, including BeetleJuice and Jason Bourne.⁴⁴ Virkam Thakur, a Symantec researcher, said, “This is the third such virus we’ve seen in the past three years. It’s larger than all of them. The question we should be asking now is: How many more such campaigns are going on that we don’t know about?”⁴⁵

Cyber weapons are very difficult to keep secret. Once they are decoded, they can be turned into new weapons. The Stuxnet virus was intended to target facilities with a specific layout.⁴⁶ However, it was spread using USB flash drives⁴⁷ and other means which have reached across the globe.⁴⁸

(2011), *available at* http://www.symantec.com/content/en/us/enterprise/media/security_response/whitepapers/w32_duqu_the_precursor_to_the_next_stuxnet.pdf.

³⁷ *Id.* at 1.

³⁸ Steven Cherry, *Hackers are Learning New Lessons from the Most Sophisticated Virus Code Ever Written*, IEEE SPECTRUM (Dec. 14, 2011), <http://spectrum.ieee.org/podcast/telecom/security/sons-of-stuxnet>.

³⁹ Nicole Perlroth, *Researchers Find Clues in Malware*, N.Y. TIMES (May 30, 2012), <http://www.nytimes.com/2012/05/31/technology/researchers-link-flame-virus-to-stuxnet-and-duqu.html>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Paul Mueller & Babak Yadegari, *The Stuxnet Worm* (University of Arizona Student Research Presentation), <http://www.cs.arizona.edu/~collberg/Teaching/466-566/2012/Resources/presentations/2012/topic9-final/report.pdf>.

⁴⁷ *Id.*

⁴⁸ *Stuxnet Goes Out of Control: Chevron Infected by Anti-Iranian Virus, Others Could Be Next*, RT (Nov. 9, 2012), <http://rt.com/usa/stuxnet-chevron-cyber-virus-348/>.

“[Stuxnet] spun out of control. Although it was intended to stop the progress of Iran’s nuclear program, it also damaged 100,000 computers all over Europe. There was a need to stop it. Cyberwars act like boomerangs . . . So it would be advisable for governments not to enter cyber-wars because in a boomerang war there are no winners.”⁴⁹

Even if the United States and Israel used Stuxnet, it did not rise to the level of an armed attack that could trigger Iran’s right to respond in self-defense by using force on the territory of the United States or Israel. Stuxnet did not meet the *Nicaragua* case test of a forceful or coercive action significant enough to be an armed attack.⁵⁰ Instead, it was a violation of the non-intervention principle.

International law raises substantial barriers to both using cyber weapons and defending cyberspace from cyber attacks through the use of military force. In general, international law supports regulating cyberspace as an economic and communications sphere and contains coercive means of responding lawfully to cyber provocations of all types. The same sort of coercive measures that are lawful to use against economic wrongs and violations of arms control treaties will generally be lawful to use in the case of a cyber attack. In the economic sphere, coercive responses to violations tend to be known as “countermeasures”; in arms control, such countermeasures are commonly known as “sanctions.”

Whether designated countermeasures or sanctions, there are coercive enforcement measures not involving the use of significant military force available to states acting unilaterally in response to an internationally wrongful act.⁵¹ Despite the availability of these alternatives to the use of military force, it is important to reiterate that protecting cyberspace—keeping it viable for economic and communication uses—will generally require defensive measures, not offensive ones. Countermeasures are no substitute for good computer security.

When a state is the victim of a cyberattack or cyber espionage, and it has clear and convincing evidence that the wrong is attributable to a foreign sovereign state, the victim state may itself commit a wrong against the attacking

⁴⁹ Ilan Gattegno, *Exclusive: Stuxnet Was Out of Control, We Had to Reveal It*, ISRAEL HAYOM (June 14, 2013), http://www.israelhayom.com/site/newsletter_article.php?id=9983.

⁵⁰ The International Court of Justice has ruled on this very point in a number of important cases. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 98–106 (June 27); *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, 222–3, 268 (Dec. 19).

⁵¹ *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), 1997 ICJ REP. 7, 52–57 (Sept. 25).

state, so long as the wrong is commensurate with the initial wrong (proportionality) and aimed at inducing an end to the initial wrong (necessity) or the provision of damages. In most cases of cyber wrongs, the evidence that a foreign state is behind a particular act will come after the act is over or the damage is done. This fact indicates that most countermeasures aimed at cyber wrongs will aim at collecting money damages.

FULLY AUTONOMOUS ROBOTIC WEAPONS

The advent of robots with computer programs that can learn is triggering a new and intense discussion of the law and ethics around such weapons.⁵² Advances in artificial intelligence mean that once a robot is constructed and programmed, it will be able to make the decision to attack without additional human intervention.⁵³ Such an attack could occur years after the robot is programed. The parties to the Convention on Certain Conventional Weapons⁵⁴ began a process in 2013 to study fully autonomous robotic weapons as the first step toward a new protocol controlling or prohibiting such weapons.⁵⁵ In April, 2013, UN Special Rapporteur Christof Heyns called for a moratorium on moving beyond the design stage in the development of fully autonomous weapons pending the formation of a panel of experts to “articulate a policy for the international community on the issue.”⁵⁶

BIOLOGICAL WEAPONS

Biological weapons have existed as long as warfare has. The modern

⁵² U.S. Dep’t of Defense Directive 3000.09, *Autonomy in Weapon Systems* 2 (Nov. 21, 2012), available at <http://www.dtic.mil/whs/directives/corres/pdf/300009p.pdf> (“Autonomous and semi-autonomous weapon systems shall be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force.”); HUMAN RIGHTS WATCH, *LOSING HUMANITY: THE CASE AGAINST KILLER ROBOTS* (Nov. 2012), available at http://www.hrw.org/sites/default/files/reports/arms1112_ForUpload.pdf.

⁵³ Peter W. Singer, *In the Loop? Armed Robots and the Future of War*, BROOKINGS INST. (Jan. 28, 2009), http://www.brookings.edu/articles/2009/0128_robots_singer.aspx.

⁵⁴ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137.

⁵⁵ CAMPAIGN TO STOP KILLER ROBOTS, *THE CONVENTION ON CONVENTIONAL WEAPONS AND FULLY AUTONOMOUS WEAPONS: BACKGROUND PAPER BY THE CAMPAIGN TO STOP KILLER ROBOTS* (Sept. 26, 2013), available at http://www.stopkillerrobots.org/wp-content/uploads/2013/09/KRC_BackgrounderCCW_26Sep2013.pdf.

⁵⁶ Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/23/47 (Apr. 9, 2013) (by Cristof Heyns).

word “toxin” derives from the Ancient Greek word for a poisoned arrow.⁵⁷ Early biological weapons “included the contamination of water with animal carcasses and filth.”⁵⁸ Some ancient military leaders used biological projectile weapons. For example, in a naval battle, Hannibal launched poisonous snakes onto enemy ships.⁵⁹ This tactic continued into the dark ages where armies flung plague victims into besieged cities.⁶⁰ European settlers in North America used smallpox as a biological weapon against the Native Americans. In the battle for Fort Pitt, one local militia leader wrote, “We gave them two Blankets and a Handkerchief from the Smallpox Hospital. I hope it will have the desired effect.”⁶¹ Similar tactics were used in the Ohio River Valley.⁶²

With the advent of scientific bacteriology in the nineteenth century, the world became more worried about the possibility of mass biological warfare. The Hague Conventions of 1899 and 1907 banned the use of “poison or poisoned arms.”⁶³ However, this measure did little to deter their use during the First World War. While both sides participated in biological warfare, the Germans led the effort. They started the first known state-sponsored biological research program,⁶⁴ and preemptively sent animals infected with anthrax to the United States and other countries.⁶⁵ Germany also attempted to destroy crops in Argentina using a fungus.⁶⁶

As a result of the failure of the 1907 Hague Convention to stop the use of these weapons (although perhaps it was more motivated by the use of chemical weapons to kill over 90,000 individuals in World War I), the 1925 Geneva Protocol banned the “use in war of asphyxiating, poisonous or other

⁵⁷ James W. Martin et al., *History of Biological Weapons: From Poisoned Darts to Intentional Epidemics*, in MEDICAL ASPECTS OF BIOLOGICAL WARFARE 1, 2 (Zygmunt F. Dembek ed., 2007), available at https://ke.army.mil/bordeninstitute/published_volumes/biological_warfare/BW-ch01.pdf.

⁵⁸ *Id.*

⁵⁹ BRIG. GEN. J. H. ROTHSCHILD, TOMORROW’S WEAPONS: CHEMICAL AND BIOLOGICAL 12 (1964).

⁶⁰ Martin et al., *supra* note 57, at 2.

⁶¹ E. WAGNER STEARN & ALLEN E. STEARN, THE EFFECT OF SMALLPOX ON THE DESTINY OF THE AMERINDIAN 45 (1945).

⁶² *Id.*

⁶³ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. 539. “In addition to the prohibitions provided by special Conventions, it is especially forbidden: (a) To employ poison or poisoned weapons.” *Id.* Regulations art. 23.

⁶⁴ Martin et al., *supra* note 57, at 3.

⁶⁵ Michael Jacobs, *The History of Biologic Warfare and Bioterrorism*, 22 DERMATOLOGIC CLINICS 231 (2004).

⁶⁶ Martin et al., *supra* note 57, at 3.

gasses, and of all analogous liquids, materials or devices.”⁶⁷ The treaty was credited with the prevention of the use of these weapons during World War II, but nevertheless had serious gaps in its coverage.⁶⁸ The parties reserved the right to use the weapons against non-parties; to use the weapons in retaliation; to stockpile, design, and test the weapons; and to limit the prohibition to wartime use.⁶⁹

Therefore, in the 1930s, Japan created a biological weapon program (eventually referred to using the unit references of the groups carrying out the research, Unit 731 and Unit 100). Japan’s program was on a far larger scale than Germany’s pre-World War I effort. More than 3000 Chinese prisoners were killed during testing.⁷⁰ Eleven Chinese cities were attacked during “field trials.” While these trials backfired on the Japanese (a number of their own citizens died in the process), an estimated 580,000 Chinese were killed.⁷¹ However, without an effective delivery system, the weapons were never deployed in war. The British also developed antipersonnel and anti-cattle biological weapons but never deployed them.⁷²

The United States took a defensive approach to biological warfare, focusing efforts on preventing an attack through President Roosevelt’s War Reserve Service.⁷³ The United States did, however, give Japanese scientists amnesty in exchange for the data resulting from their atrocities. After the start of the Korean War, the United States developed its own anti-crop and antipersonnel weapons but never deployed them. Still, North Korean, Chinese, and Soviet officials have made numerous allegations against the United States.⁷⁴ However, these allegations were unsubstantiated, and the accusing countries refused offers by the ICRC and WHO to conduct investigations and thwarted a UN proposal to establish a neutral investigative body.⁷⁵

In 1972, as a result of the weak 1925 Geneva Protocol, the Biological

⁶⁷ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

⁶⁸ Michael P. Scharf, *Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization*, 20 MICH. J. INT’L L. 477 (1999). See also *Chemical and Biological Weapons: Can they Be Eliminated or Controlled?*, 23 C.Q. RESEARCHER 1053 (2013).

⁶⁹ Scharf, *supra* note 68, at 481.

⁷⁰ Martin et al., *supra* note 57, at 3.

⁷¹ *Id.* at 4.

⁷² *Id.*

⁷³ *Id.* at 5.

⁷⁴ *Id.* at 6.

⁷⁵ *Id.* at 7.

Weapons Convention was adopted.⁷⁶ Under article I, parties agreed to never produce, stockpile, or otherwise acquire:

Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; [and] [w]eapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.⁷⁷

Also, article II required the destruction of all such weapons.⁷⁸ It remains to improve the enforcement provisions of the treaty. Major efforts in this direction were made in the 1990s, and an on-site investigation capacity was proposed in

a protocol that envisioned states submitting to an international body declarations of treaty-relevant facilities and activities. That body would conduct routine on-site visits to declared facilities and could conduct challenge inspections of suspect facilities and activities as well.

However, a number of fundamental issues—such as the scope of on-site visits and the role export controls would play in the regime—proved difficult to resolve. In March 2001, the Ad Hoc Group’s chairman issued a draft protocol containing language attempting to strike a compromise on disputed issues. But in July 2001, at the Ad Hoc Group’s last scheduled meeting, the United States rejected the draft and any further protocol negotiations, claiming such a protocol could not help strengthen compliance with the BWC and could hurt U.S. national security and commercial interests.⁷⁹

⁷⁶ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

⁷⁷ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction art. I, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

⁷⁸ *Id.* art. II. See Susan Wright, *Prospects for Biological Disarmament in the 1990s*, 2 TRANSNAT’L L. & CONTEMP. PROBS. L. 453, 454 (1992).

⁷⁹ *The Biological Weapons Convention (BWC) at a Glance*, ARMS CONTROL ASSOCIATION, <http://www.armscontrol.org/factsheets/bwc> (last visited Jan. 26, 2014).

CHEMICAL WEAPONS

The use of modern chemical weapons began in World War I. Robert O'Connell describes the moment:

Late in the afternoon on 22 April 1915 members of the French Forty-fifth (Algerian) and Eighty-seventh (Territorial) divisions were amazed to see a vast, greenish yellow cloud spring out of the ground and begin rolling toward their positions along the Ypres salient. Within moments the cloud had enveloped them, and they found themselves choking and fighting for breath. Those who were not immediately overcome ran in panic⁸⁰

The Allies had used some irritants earlier in the fighting, but the invention of a way to release bottled chlorine on the battlefield was a German scientific breakthrough. “[W]ithin a year the Allies would field workable chemical munitions of their own.”⁸¹ Both sides also quickly developed techniques and equipment for protecting their troops. To the extent the Germans tried to keep their chemical weapons technology secret or to stay ahead of the Allies, they failed. The Germans gained little or no advantage from their lead in developing chemical weapons. Already in 1925, the Geneva Gas Protocol came into force banning use of chemical weapons. The ban emerged from moral outrage, but took the form of a rule of international law. Then in 1993, the world adopted a comprehensive treaty declaring unlawful the use, production, and stockpiling of chemical weapons.

In addition to secrecy, we have examples of states attempting to use military force to stop the development of chemical weapons. In 2007, Israel bombed Syria aiming to end an alleged weapons program.⁸² Israel sent eight fighter jets to destroy an alleged secret weapons production facility Syria was building with assistance from North Korea. Reports stated that it was a nuclear weapons facility, but the facts indicate it was more likely a chemical weapons facility, specifically to manufacture nerve agents. Several days passed before Syria protested against the attack. It held back apparently to try to avoid drawing attention to its illicit activities.⁸³ Plainly this attack had little or no

⁸⁰ ROBERT O'CONNELL, *supra* note 8, at 252.

⁸¹ *Id.* at 253.

⁸² See Ben Piven, *Timeline: Israeli Attacks on Syrian Targets*, ALJAZEERA (May 5, 2013), <http://www.aljazeera.com/indepth/features/2013/05/20135512739431489.html>.

⁸³ See Mary Ellen O'Connell, *Affirming the Ban on Bombing Iran*, SYRACUSE L. REV. (2012), <http://www.law.syr.edu/student-life/publications/law-review/iran-nuclear-symposium/mary-ellen-oconnell.aspx>.

impact on Syrian chemical stockpiles, as chemical weapons have been used in the Syrian civil war that began in 2011.⁸⁴ The open question is whether Israel's attack explains why Syria did not join the Chemical Weapons Convention⁸⁵ in recent years despite indications from the UN Secretary-General that it was close to doing so.

In addition to Israel's actual use of unlawful force against Syria, the United States threatened to use force against Syria in August, 2013 following a use of chemical weapons during the civil war. The United States did not cite any basis in international law to justify such a use of force. Rather, references were made to the use of force in the Kosovo crisis in 1999. U.S. Ambassador to the UN Samantha Power, was asked on National Public Radio on September 9 whether a U.S. attack on Syria would be "legal." She answered that it would be a "legitimate, necessary, and proportionate response."⁸⁶

Ambassador Power's answer recalls a report Sweden commissioned following NATO's use of force against Serbia during the Kosovo crisis of 1999. The report's authors concluded that the seventy-eight days of bombing was unlawful under international law but, nevertheless, "legitimate."⁸⁷ In 2003, following the U.S.-led invasion of Iraq, the UN Secretary-General ordered a thorough review of the UN Charter rules on the use of force. The preliminary report of his High Level Panel concluded that, contrary to statements of some in the international law community that the use of force in Kosovo was "illegal but legitimate," the measure of legitimacy in the international community is legality. It must be—law is the common code of all humanity. It is not the moral discernment of any particular national leaders.

Attacking Syria without Security Council authorization would violate law even more fundamental than the chemical weapons ban. Ambassador Power argued that because the Security Council will not authorize force, force must be used, lawful or not. She implies that force is the only way to keep important norms viable. Using force unlawfully, however, will only undermine the very system that also prohibits the use of chemical weapons.

⁸⁴ See U.N. Mission to Investigate Allegations of the Use of the Chemical Weapons in the Syrian Arab Republic, Rep. on the Allegations of the Use of Chemical Weapons in the Ghouta Area of Damascus, U.N. Doc. A/67/997 (Aug. 21, 2013) .

⁸⁵ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45.

⁸⁶ Mark Memmott, *Strike on Syria: Meaningless Gesture or Necessary Response?*, NPR (Sept. 9, 2013), <http://www.npr.org/blogs/thetwo-way/2013/09/09/220611202/strike-on-syria-meaningless-gesture-or-necessary-response>.

⁸⁷ THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT (2001), *available at* [http://global.oup.com/academic/product/kosovo-report-9780199243099;jsessionid=32E75834D8BE857DD343D673C3C51981?cc=us&lang=en](http://global.oup.com/academic/product/kosovo-report-9780199243099;jsessionid=32E75834D8BE857DD343D673C3C51981?cc=us&lang=en&) &.

It is important that a response be made to chemical weapons use, but the response needs to be a lawful response. As already discussed, international law has a variety of means, including countermeasures. Individual national leaders can be held accountable today for the use of chemical weapons. The International Criminal Court might have jurisdiction. Where it does not, the Security Council has established a variety of ad hoc criminal courts.

The Obama administration was aware that Syria was stockpiling chemical weapons and did not stop it. Interdicting such weapons would have been a lawful countermeasure in this case. An embargo kept Saddam Hussein from getting the inputs necessary to develop chemical, biological, and nuclear weapons programs. Having missed the opportunity to impose a similar embargo on Syria, the United States took the lead in the effort to destroy Syria's chemical weapons stockpile and production facilities. The U.S. action is exemplary and should support the understanding that the use of chemical weapons is absolutely prohibited in international law. A use of force, on the other hand, would have violated a higher norm against military force to enforce another important norm. Such conduct would have been illogical and destructive of the normative system as a whole that has created the international consensus against chemical weapons use.

Political observers say the real focus of the threat of force against Syria was not Syria and chemical weapons, but Iran and nuclear weapons. That may be, but just as with Syria, for the United States to get Iran to comply with international legal obligations by threatening or actually violating international law undermines the U.S. case. The United States has been saying to Iran for many years that Iran is legally prohibited from possessing nuclear weapons under the NPT and that the UN Security Council has mandated UN weapons inspectors to have access to alleged nuclear sites. The U.S. ability to apply moral and legal suasion has been undermined in recent years owing to everything from the Guantanamo Bay prison, to the invasion of Iraq, to the use of drones. Bombing Syria over the use of chemical weapons would have been another significant violation of international law, likely with similar consequences.

CONCLUSION

In the last third of 2013, the art of diplomacy had a resurgence in the area of arms control. Thanks to a deftly negotiated agreement, Syria became committed to destroying its chemical weapons and joining the Chemical Weapons Convention. Soon after, Iran agreed to allow IAEA inspectors into its facilities and new negotiations were underway with the United States and others

toward curtailing its nuclear program. Diplomacy, in contrast to secrecy or military force, has a proven record of success respecting arms control. In arms control, as in so much else, the past is prologue.

INTERNATIONAL LAW WEEKEND 2013

International Law Weekend 2013, held in conjunction with the 92nd annual meeting of the American Branch of the International Law Association, took place October 24-26, 2013. The opening panel and reception were held at the House of the Association of the Bar of the City of New York, 42 West 44th Street, New York City, and the Friday and Saturday panels were held at Fordham Law School, 140 West 62nd Street, New York City. The theme of the Weekend. Ideas, *Internationalization of Law & Legal Practice*, was addressed in over forty 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 25, was entitled *The International Arms Trade Treaty: Reducing Human Suffering Through Global Rules?* The panel was moderated by ABILA President Ruth Wedgwood and featured Pablo Arrocha, Steven Groves, Angela Kane, and Suzanne Nossel. A reception sponsored by the Permanent Mission of Mexico to the United Nations followed.

Panels on Friday morning, October 25, were:

- *Big Data: The End of Privacy or a New Beginning?* (chaired by Omar Tene)
- *Private International Law: Year in Review* (chaired by Ronald A. Brand)
- *Accounting for Children Affected by Armed Conflicts* (chaired by Jonathan Todres)
- *The Explosion in the Extraterritorial Application of U.S. Law* (chaired by Bruce Bean)
- *Complexities of Regulating the Outer Space Domain by Analogy to Legal Regimes in the Other Four Domains* (chaired by Matthew Schaefer)
- *Combating Human Trafficking Through International Law* (co-chaired by E. Christopher Johnson and Anna Williams Shavers)
- *In-House Counsel Roundtable* (chaired by Steven A. Hammond)
- *Rethinking the Rules for Conflict and Competition in Cyberspace*
- *Updates & Crisis in European Union Law* (chaired by Elizabeth F. Defeïs)

- *Teaching International Law Outside Law Schools* (chaired by Karen Bravo)

Donald Donovan, President of the American Society of International Law and Partner, Debevoise & Plimpton, LLP, gave the Keynote Address, entitled *The Advocate in the Transnational Justice System*.

Panels on Friday afternoon were:

- *Pathways to Employment in International Law* (chaired by Leslie Benn)
- *International Discovery and Privacy Conflicts*
- *Debating the Concept of “Grotian Moments”* (chaired by Paul R. Williams)
- *ICTR Referral of International Criminal Cases to National Jurisdictions: Lessons Learned and Best Practices for Closing the Impunity Gap*
- *Who Owns the North Pole? The Rush for Extending Maritime Boundaries in the Arctic* (chaired by Joseph Sweeney)
- *The Changing Face of International Family Law: A Roundtable on the Global Future of Same-Sex Marriage*
- *Standards of Review in Investment Arbitration: Reviewing Domestic Government Regulatory Conduct* (chaired by Rahim Moloo)
- *Reform of the Inter-American Human Rights System* (chaired by David Stewart)
- *Oceans Law and the Practitioner* (chaired by James Kraska)
- *The Crisis in Syria* (chaired by David Andelman)

On Friday evening, October 25, the Permanent Mission of the European Union to the United Nations hosted a Reception at the Permanent Mission. The American Branch is grateful to the EU Mission for its hospitality and generosity.

Saturday morning, October 26, featured the following panels:

- *Forging a Convention for Crimes Against Humanity* (chaired by Larry D. Johnson)

- *Conflict Minerals and International Business: National and International Responses* (chaired by Ved Nanda)
- *The Influence of National Laws on Multilateral Development Bank Systems* (moderated by Frank Fariello)
- *Web War 3.0 – The Conflict Over International Internet Governance, Monitoring and Transparency* (moderated by Vincent J. Vitkovsky)
- *Internationalizing Gender and Disability Law: International Accountability for Preventing and Ending Violence Against Women* (moderated by Hope Lewis)
- *Prosecuting Heads of State at the ICC: Bashir and Kenyatta* (moderated by Jennifer Trahan)
- *Revising the Restatement of Foreign Relations Law* (moderated by John M. Walker, Jr.)
- *The UNFCCC: What Can We Expect at COP 19 and Beyond* (moderated by Kate O'Neill)
- *Do We Need Investment Treaties?* (moderated by Wade Coriell and Elizabeth Silbert)
- *The Globalization of Child Rights and Remedies* (moderated by Aaron Fellmeth)
- *Disputes and the Regime of Rocks and Islands Under the U.N. Convention on the Law of the Sea* (chaired by Christina Hiouras)
- *Thinking Ahead: Six Questions to Ask at the Beginning of an International Arbitration* (moderated by B. Ted Howes)
- *Rights and Religion*
- *Bringing Terrorists to Justice: Legal and Policy Implications When the Military Plays a Role*
- *Standards of Responsibility for International Organizations: The Case of Haiti's Cholera Epidemic* (moderated by Ruth Wedgwood)

International Law Weekend 2013 concluded on Saturday afternoon with a number of panels, including panels on careers in international law. The panels were:

- *Careers in International Human Rights, Development, and Rule of Law, Part I* (moderated by E. Wes Rist)
- *Careers in Advising Small-to-Medium-Sized Foreign Companies: Part I* (moderated by Gregory Fox)

- *Careers in International Art Law: Part I* (moderated by Paul R. Dubinsky)
- *International Norms for Corporate Action and Anti-Corruption*
- *Intellectual Property and the Right to Science* (moderated by Peter Yu)
- *Careers in International Human Rights, Development, and Rule of Law — Part II: Informal Networking*
- *Careers in Advising Small-to-Medium-Sized Foreign Companies— Part II: Informal Networking*
- *Careers in International Art Law — Part II: Informal Networking*

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International Law Weekend
2013 Keynote Address: The Advocate in the Transnational Justice System

Donald F. Donovan
International Law Weekend
American Branch, International Law Association
New York City, October 25, 2013*

I am very grateful for the opportunity to address this audience at International Law Weekend 2013. I have practiced in New York now for more than twenty-five years, and I've watched this weekend grow into what Ruth Wedgwood has just fairly described as a landmark on the international law calendar. So thanks to Ruth,¹ and to David Stewart,² and to John Noyes,³ and to

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¹ Ruth Wedgwood, Edward B. Burling Professor of International Law and Diplomacy, Johns Hopkins University School of Advanced International Studies; 2013 President of

all their ABILA⁴ colleagues for inviting me, and to Fordham Law School and the Leitner Center for so generously hosting this whole event.

It's a special treat for the President of the American Society of International Law to be making this address this year, because as Ruth has mentioned, ASIL⁵ will be collaborating this coming spring with the American Branch of the International Law Association to host a joint meeting, which promises to gather some 2000 international lawyers from around the world. ASIL and the ILA⁶ are structurally different, but they are very much likeminded organizations. Each of us is in the business of developing, debating, and disseminating international law with the objective of strengthening the rule of law on the international plane. I should add, too, that even though we are the American Society, close to half our membership are non-U.S. nationals, and we very much aim at our annual meetings to provide an international forum. So we look forward to collaborating with the ILA and its American Branch this spring, and you all should plan to be there.

But I turn back to this meeting, and its focus on the internationalization of law and legal practice. Just glancing at the program, it's clear that you have before you an intellectual treat, in the form of an extraordinary range of projects and a truly impressive roster of speakers. But I start this talk with a glance at the program for an additional reason, as it confirms the conference theme by so pointedly illustrating the ferocious expansion of subject matter governed or touched by international law. You have programs on family law, Internet law, human trafficking not as a matter of domestic crime but as a human rights issue, and a whole range of other topics. The program also demonstrates how deeply international law has penetrated domestic legal systems, to a degree that would surely surprise the visionaries from a century or more ago who founded ASIL and the ILA. Finally, the program makes a parallel point by showing the expansion of conduct, by both state and private actors, that is subject to independent examination in the form of international adjudication and

the American Branch of the International Law Association.

² David P. Stewart, Director, Global Law Scholars Program; Co-Director, Center on Transnational Business and the Law and Visiting Professor of Law, Georgetown University Law Center; 2013 President-Elect of the American Branch of the International Law Association.

³ John E. Noyes, Roger J. Traynor Professor of Law, California Western School of Law; 2013 Chair of the Executive Committee of the American Branch of the International Law Association.

⁴ American Branch of the International Law Association.

⁵ American Society of International Law.

⁶ International Law Association.

arbitration. You have panels on international discovery and U.S. litigation, standards of review in investor-state arbitration, the referral mechanism of the international criminal tribunals, the Inter-American human rights system, head-of-state prosecutions at the ICC,⁷ and organizing arbitral proceedings. That's quite a range.

As I reflected on how I might address the conference theme today, I realized that, if you'll allow me to say so, that theme—the internationalization of law and legal practice—closely reflected my own career. Let me explain.

I went to law school thinking I was going to be a litigator, hopefully starting as a prosecutor at the U.S. Attorney's Office downtown. But I also had a real interest in international matters. So I faced a seeming dilemma—since litigation is jurisdiction-specific, how can I be a litigator and still do international work? Then, after having the great privilege of working for Justice Blackmun, who himself had great respect for the international system, I went to work for Judge Howard M. Holtzmann at the Iran-United States Claims Tribunal in The Hague. There I was introduced to the universe of international dispute resolution, though, as I will explain, it was not nearly as expansive a universe as it is today. So I came back to New York looking for a firm that had a discrete international dimension to its litigation practice, and a strong commitment to pro bono work as well.

My plan was to develop an international disputes practice that encompassed commercial work, public international law work, and human rights work. Actually, though I'm calling it a plan and making it sound quite specific, it would probably be more accurate to describe it as an instinct, a strong one, but not very specific. In my defense, I should note that this was twenty-five years ago, and there were few models for this kind of practice around. But whether by plan or by instinct, my practice has developed in a way that mirrors the theme you all have been discussing this weekend. So at the behest of Ruth and David, and with your indulgence, I will address the conference theme by combining in my remarks both professional observations and personal reflections.

That necessarily means that I will be looking at the theme through the lens of international adjudication and arbitration. Of course, I don't mean to suggest that the internationalization of law and legal practice is only evident in that field, or that that's the only lens through which one might examine the phenomenon. As I emphasized at the outset, far from it. But it's the means by which I will find it easiest to describe the contemporary practice of international law.

⁷ International Criminal Court.

I want to do this in five steps. First, I'll consider in turn 1) interstate adjudication; 2) the emerging transnational justice system of international arbitration; 3) the governance regime reflected in investor-state arbitration; and 4) the adjudication of international cases in national courts. I'll then consider 5) an especially compelling example of the intersection of the international and national planes. I recognize that this will not be a comprehensive tour even of the universe of international adjudication and arbitration. For example, I am not going to talk about the international trade regime and I will refer, if at all, only fleetingly to the international human rights system. But I think the areas I will address will suffice to make the point. Then I will conclude—be careful—with a few points of advice and encouragement.

I begin with the traditional model of international adjudication, that of interstate adjudicatory bodies. These bodies have one feature in common: They derive their jurisdiction from the consent of states. They are generally created by treaty, and as a consequence they exist and operate within the confines agreed to by states.

Though we have had examples in earlier times of arbitral commissions, such as those established by the Treaty of Paris, and of *ad hoc* tribunals, such as that established in the much-heralded *Alabama* arbitration, the first permanent body of this kind was the Permanent Court of Arbitration established by the First Hague Peace Conference in 1899. The international lawyers of the time who drove that vision were navigating uncharted territory. Never before had a permanent international court existed, and many thought that the enterprise was quixotic and bound to fail.

Those critics were wrong, as we know. Not only did the Permanent Court of International Justice and the International Court of Justice follow, but the soon-to-be-published Oxford Handbook on International Courts will count at least twenty-five permanent international courts and tribunals in existence. And these courts and tribunals have not only increased dramatically in number, but considered cumulatively, they have also acquired jurisdiction over an increasingly broad scope of subject matter and ever more diverse actors, including individuals.

Some years ago it seemed the intellectual vogue to talk about the fragmentation of international law, and many people thought of that as an unhelpful development brought about by the proliferation of international courts. But if you think of it from a different perspective, that is, as I said a moment ago, as an increase in the quantum of conduct that is subject to independent and impartial adjudication, it may appear differently. We might, indeed, begin to think of this set of international courts as an international judicial system.

I want to make two quick points in that vein. First, I want to focus on the term “judicial,” in order to ask whether we are looking at judicial institutions. I’m going to use the example of provisional measures before the ICJ.⁸ It was long the majority view that provisional measures indicated by the ICJ under Article 41 of the ICJ Statute were not binding. In the *Case on the Vienna Convention on Consular Relations*, though, after the United States failed to abide by an order of provisional measures requiring that it take all steps necessary to halt the execution of a Paraguayan national by the Commonwealth of Virginia, we made the argument on behalf of Paraguay that the order was indeed binding and that, as a consequence, the United States had breached an international obligation by failing to comply. That case did not go forward, but that same set of facts repeated themselves in the *LaGrand Case*, and there the Court held that provisional measures were binding. The question we had tried to put to the Court was straightforward—was the Court a court? The Court’s reasoning was equally straightforward, and I think it fair to say that it reduced to the proposition that if the Court were to fulfill its function as a “judicial” organ, it must have the authority to issue binding orders intended to preserve its capacity to decide the dispute. That ruling, in turn, had considerable influence over other international tribunals deciding, or reconsidering, the binding character of their own provisional measures orders.

Second, I want to focus on the term “system,” in order to ask whether we are dealing with an integrated justice system. The influence on one another of the various international courts and tribunals that considered the binding character of provisional measures would suggest that there was some form of system at work. We might confirm that sense by considering the further development by those international courts and tribunals that have recognized the binding character of provisional measures of the criteria for their issuance. Once these courts and tribunals decided that provisional measures were binding, they needed to decide the considerations by which an application would be evaluated. There has ensued a rich dialogue, in particular between the ICJ and investor-state tribunals constituted under the ICSID⁹ Convention and Rules and other regimes. Must the court or tribunal consider the applicant’s prospects of success, and at what threshold? What constitutes irreparable harm? Does the objective to avoid exacerbating the dispute constitute an independent ground on which provisional measures might be granted? The ICJ continues to work through these issues, and, frequently referring to but not always following ICJ jurisprudence, so do investor-state tribunals.

⁸ International Court of Justice.

⁹ International Centre for Settlement of Investment Disputes.

Indeed, as they consider awards rendered under other treaties on similar issues, investor-state tribunals constituted on an *ad hoc* basis to hear a single specific dispute now consider the very question of their relationship with other tribunals in this radically horizontal structure. Given that structure, is each tribunal a completely independent decision-maker, or should it take into account other decisions in order to provide predictability by developing a *jurisprudence constant* on recurring questions? In effect, these tribunals are debating to what extent the investor-state arbitration system is, in the end, an integrated system.

The second component of this international legal order that I want to mention is what I would consider the emerging transnational justice system represented by international commercial arbitration. What do I mean by transnational? There are three distinguishing features. First, the system involves the delegation of dispute resolution authority to decision-makers who are not directly appointed, regulated, or supervised by any individual state or group of states. To me, this is truly striking, as one of the core functions of the modern state is to provide for the impartial adjudication of civil disputes, and then to bring its coercive authority to bear in order to give effect to the resolution of the dispute. In international arbitration, that authority is delegated to a decision-maker operating outside the direct authority of any State.

The second feature of this transnational justice system is the application of a diverse body of national and international law to both substance and procedure. As to substance, it means that there is no such thing as foreign law in international arbitration. As to procedure, there has developed both a common set of expectations about the conduct of international arbitrations and the recognition of the tribunal's discretion to diverge from that common set of expectations to meet the particular needs of a given case.

The third feature I highlight is the willingness of national judicial authorities to enforce the decisions of entities that operate not only outside of their own jurisdiction, but outside the jurisdiction of any state. Due to the almost universal ratification of the New York Convention, most national courts are required to enforce foreign awards subject only to very limited review—essentially to ensure the basic integrity of the process that led to the award.

What does that mean for the practitioner? It means that we can develop a litigation practice that literally spans the globe. For example, I have tried cases in Moscow, Hong Kong, Rio, São Paulo, Zürich, Paris, London, San Francisco, Washington, and New York. It means also that you have the chance to work with and against truly talented lawyers from literally around the globe. Just a few weeks ago, before the parties settled the case on the Friday before a Monday start, we were about to try a case in São Paulo in which we had French, Brazilian, and New York lawyers on both sides, and a tribunal consisting of

arbitrators from Belgium, Germany, and Switzerland. And these cases go forward, as I said before, under a wide variety of governing laws and pursuant to a wide variety of procedures.

The third area I'd like to address is investor-state arbitration. It has frequently been remarked that one of the great developments of international law in the second half of the twentieth century has been the expansion of its subjects, and perhaps the two most important components of that development are, first, greater protection of fundamental human rights and the development of the notion that international law regulates to an important extent the relationship between nationals and their own state, and, second, the recognition that individuals and business entities may contract with and resolve disputes against states on the international plane. That latter phenomenon is manifested in the arbitration provisions of many bilateral investment treaties.

You will know of the basic investor-state regime. Over the last several decades, but at an accelerating pace more recently, there has been a proliferation of bilateral and multilateral investment treaties with two important features. First of all, these treaties provide substantive protections to nationals of one state investing in the other. But for my purposes, even more importantly, they provide in most cases for the right of an investor to bring arbitration proceedings to remedy breaches of the substantive standards. In effect, one state makes an open-ended offer to nationals of the other state as defined in the treaty to bring claims in their own name against the host state for alleged violations of the treaty protections. That, you will appreciate, is an extremely important move away from the traditional model of diplomatic protection. And it is reinforced by the obligation of other states, under either the New York Convention or the ICSID Convention, to give effect to foreign arbitral awards by reducing them to a national judgment.

To use a simple example from my own practice, some years ago we represented a cement manufacturer whose plant in a Latin American state had been expropriated. Had there been no applicable bilateral investment treaty, the investor would have had to face the frequently insuperable obstacles of suing the expropriating state in a national court. Instead, it brought proceedings under the BIT¹⁰ and reached a settlement that would almost certainly not have been possible absent the threat of the arbitration proceedings. In a different case in which I sat as arbitrator, the tribunal heard claims that actions by national prosecutors had breached the obligation of fair and equitable treatment accorded the investor by the bilateral investment treaty.

¹⁰ Bilateral Investment Treaty.

I turn finally to national courts. During the span of my own career, there has been a dramatic increase in both the number and type of international disputes submitted to national courts for resolution. National courts now routinely interpret and apply treaties, including human rights treaties and treaties governing more mundane matters, such as the Warsaw Convention. Similarly, national courts regularly interpret and apply foreign law, including in the interpretation of contracts, and more generally, resolve commercial disputes between entities and individuals from different jurisdictions.

National courts are also increasingly asked to adjudicate state conduct, particularly in light of the widespread acceptance of the restrictive view of sovereign immunity. Again, I'll give you a few examples from my own practice. I have done cases in which I have enforced the treaty rights of international organizations within the U.S. legal system. I have litigated sovereign immunity issues in the United States courts both in human rights cases and in commercial cases, and I have also litigated the question of what state should take cognizance of the dispute.

For example, I recently argued before the Third Circuit in a case involving the alleged violation by a foreign insurance commissioner of an anti-suit injunction issued by a U.S. federal court. The case arose when the commissioner sought to enforce in the Cayman Islands a judgment rendered in his own state. So, in effect, there was a three-way contest, and each of those courts had to decide the extent to which where they were prepared to assert their jurisdiction.

For another example, some years ago, we brought an action in federal court against Ethiopia on behalf of a class of Eritreans whom Ethiopia had deported during the Eritrean-Ethiopian War. We first went to the D.C. Circuit on the question of whether diplomatic protection by Eritrea in the form of claims brought before the Eritrea-Ethiopia Claims Commission in the exercise of diplomatic protection constituted an adequate forum for purposes of the *forum non conveniens* doctrine. We won on that score. We then went back to the D.C. Circuit on the question of whether the necessary contacts existed to confer subject matter jurisdiction under the FSIA.¹¹ On a fairly technical question, we did not prevail. But, again, the case serves as an example both of litigation against foreign states in national court and of courts trying to decide where such a case may be decided.

For another example, reverting to the transnational justice system I just mentioned, U.S. courts, like other national courts are regularly asked to determine whether to give effect to foreign arbitral awards. In a recent case I

¹¹ Foreign Sovereign Immunities Act.

argued in the Second Circuit, a Brazilian party was seeking to enforce an arbitral award rendered in São Paulo. The losing party argued that it had never agreed to arbitrate the dispute. We persuaded the Second Circuit that the district court had erred by failing to give effect to the arbitral tribunal's determination that the dispute was within the scope of the arbitration clause and hence that the tribunal had jurisdiction. The Court sent it back to the district court to determine whether the parties had formed an arbitration agreement in the first place, and proceedings are now pending there.

In a final example, we represented a foreign government in a case in federal court in D.C. in which an adverse party sought to enforce an award. We argued that the arbitral tribunal's authority had been properly revoked under the law applicable to the proceedings, that of the juridical seat. The district court agreed, effectively, that if the arbitrators' authority had been validly revoked the arbitration could not have gone forward and the award could not be enforced. So here's another instance of a national court having to decide whether to give effect to a foreign arbitral award.

So, before getting to the advice part, I want to talk about a set of recent cases in which there was an especially dramatic intersection of the international and national planes, which allows us to look closely at the evolving international legal order. In the *Avena* case between Mexico and the United States, the International Court of Justice held that the United States had violated its obligations under the Vienna Convention on Consular Relations in the case of fifty-two Mexican nationals on death row in various states of the United States.¹² To reach that decision, the ICJ had to decide to what extent obligations under the treaty reached into the criminal justice system of States party to the Convention, in the face of arguments by the United States that the Court should not insert itself into the dispute because, if it did, it would effectively be acting as a court of criminal appeal.¹³ The Court held that there had been violations in fifty-one of those cases, and provided as a remedy that the United States provide review and consideration of those convictions and sentences within its own legal system.¹⁴

By Article 94(1) of the United Nations Charter, the United States had undertaken to comply with the judgment of the ICJ in any case to which it was a party. President Bush, citing the paramount importance of complying with that obligation for purposes of maintaining the credibility of the United States in

¹² Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 128 (Mar. 31).

¹³ *Id.*

¹⁴ *Id.*

international affairs and the safety of U.S. nationals living, working, and traveling abroad, issued a memorandum in which he ordered state courts to take jurisdiction of claims for review and reconsideration by any of the fifty-one nationals.

In the *Medellín* case, one of the Mexican nationals subject to the *Avena* judgment sought to enforce that judgment, and as a consequence the U.S. Supreme Court considered the constitutional issues arising from his request.¹⁵ In that case, Medellín argued that pursuant to the Supremacy Clause, which made treaties, like statutes, the supreme law of the land, U.S. courts had to enforce the judgment by virtue of Article 94(1) without any further action by the President or Congress.¹⁶ The President argued that the U.S. courts did not have the constitutional authority to decide whether to enforce the judgment, but rather that that authority was entrusted to him by virtue of his Article II foreign affairs power, and he asked the Court to give effect to his determination that the United States would comply.¹⁷ Texas argued that neither the Supremacy Clause nor the President's determination was sufficient, but that Congress had to legislate compliance.¹⁸ Nobody questioned that the United States had an obligation to comply under international law; the only issue was whether and how that obligation was enforceable as a matter of U.S. law.

In the *Medellín* decision, the Supreme Court held that the Article 94(1) obligation did not have the status of domestic law and that hence neither the Court acting directly under the Supremacy Clause nor the President acting pursuant to Article II could give that obligation effect.¹⁹ In its view, because the Article 94(1) obligation was not “self-executing,” only Congress could act to comply.²⁰ Specifically, rather than assuming that the President and the Senate, the constitutionally authorized treaty-makers, would have intended the United States to comply absent contrary congressional direction under the later-in-time rule, the Court reasoned that Article 94(1) should be interpreted to preserve what it described as the “option of noncompliance.”²¹

As Ruth mentioned in her introduction, I argued for Mexico in the ICJ in *Avena* and for the petitioner in *Medellín*, so it will come as no surprise that I disagree with the conclusion. But I am not, I am quick to assure you, going to

¹⁵ *Medellín v. Texas*, 552 U.S. 491 (2010).

¹⁶ *Id.* at 504.

¹⁷ *Id.* at 523–24.

¹⁸ *Id.* at 504.

¹⁹ *Id.* at 498–99.

²⁰ *Medellín*, 552 U.S. at 525–26.

²¹ *Id.* at 511.

subject you this afternoon to my critique of that decision. I want instead to make a simple point about our subject today.

In *Avena*, by fashioning the remedy that it did, I think it fair to understand that the ICJ effectively invited the Supreme Court to partner with it in the enforcement of international law. This time, the Supreme Court declined that invitation. I maintain the hope that on some future occasion, in some other case, a different result will ensue. But just the fact that the situation arose in which the highest judicial organ of the United Nations and the U.S. Supreme Court both had to consider these fundamental questions and had to consider, in effect, the boundary between each other's authority illustrates in the brightest colors possible the internationalization of law and legal practice that is this conference's theme.

So, what does this all mean for all of you? Here, I direct my comments to the students and young lawyers at the conference. I have tried today to speak of four discrete spheres of international adjudication—the interstate, the transnational, the investor-state, and the national—and to try at the same time to suggest the coalescence to some degree of these spheres into a greater international legal order. This system is dynamic, and it has boundaries that are hard to define. Surely, for example, the traditional dichotomy between public international and private international law provides little help in understanding the international legal order as it exists today. For these reasons, this system will be subject to your influence as the international lawyers of today and tomorrow.

As you consider what role you might play in that international legal order, I want to give you three pieces of advice and three points of encouragement. First, if you want to be an international lawyer, a practicing international lawyer, there are some basic skill sets that you will need to have. I've suggested that this is a very wide legal order that touches on a lot of different areas. So it will be very important to be well versed not just in general public international law, not just in basic tools of treaty interpretation and the like, but also in fields such as comparative law, in commercial law, and in human rights law. In but one example, one of the debates happening at the moment in the investor-state community is the extent to which human rights law should have an impact on investment treaty interpretation and hence investor-state arbitration. To be an effective international lawyer, you need to have broad training in international law but also a grounding in national law and their intersection.

Secondly, no matter what form of practice you might take, whether you're going to be an advocate, a private advisor, an international transactional lawyer, a regulator, or a policy-maker, whether you're going to work at a law

firm, a private company, an NGO,²² an international organization, a foreign ministry, or another government body, you should have a sound grounding in international economics and corporate finance. This suggestion sometimes comes as a great shock to young lawyers thinking that they're going to practice international law. But governments are economic actors as well as regulators, and private companies generate enormous impact precisely because of their economic activity, and if one wishes to be effective in addressing that activity, whatever the context, one should have the relevant expertise.

And finally, if you want to be an advocate, it's extremely important that you have a wide range of advocacy skills. That is, if you're going to be an international practitioner, you really should be prepared to stand up in a national court one week, before an international arbitration tribunal composed of three common lawyers or civil lawyers or a mix of both the next, and in an international court or tribunal after that. What does that mean? That means you should be well trained in your own advocacy culture. We all come from some place and we all have to get our first set of skills. But we must also be prepared to adjust to new advocacy cultures so that you can operate in a wide variety of fora.

I will give you an example from international arbitration. As international arbitration has become more and more international, that is as more and more nationals from the jurisdictions that it actually affects become practitioners, and administrators, and arbitrators, we see the phenomenon, wonderful to watch, of young lawyers from Brazil, and India, and Japan, and other jurisdictions, many of whose advocacy cultures may not use cross-examination, become skilled cross-examiners. Why? Because the general set of expectations in most international arbitrations these days is that there will be witness testimony and that it will be subject to cross-examination. And so you have young lawyers who, in order to succeed in this transnational system, have developed skills that they wouldn't have necessarily developed in their original advocacy culture. So as I say, it is well and good to be grounded in your own advocacy culture, but you've got to be prepared to operate in a variety of systems.

I want to finish, if I may, with three points of encouragement. The bottom line is that you are incredibly lucky to be at this point in your career. As I said at the outset of these remarks, I started with a strong instinct about what I wanted to make happen, but I would never have been able to predict how things would actually play out. As Ruth will confirm, when you clerk at the U.S. Supreme Court, you always watch the arguments with the hope that you will

²² Non-Governmental Organization.

have the chance to stand there some time. But when I lived in The Hague, and passed the Peace Palace virtually every day on my way to the Tribunal, I never wondered whether I would have the chance to argue there, before the ICJ, or any of the other international tribunals that occasionally conduct proceedings there. Yet because of the developments of which I've spoken today, I've argued several times more in the Peace Palace than in the U.S. Supreme Court. You are sitting here now knowing that this international legal order, this universe, is expanding. That's for sure. But you don't know how it's going to expand, and you don't know yet what you'll be doing twenty-five years from now. I'm going to suggest that there are three things that make it well worthwhile plunging ahead.

First of all, it's enormous fun. If you are an international legal practitioner, you get to work with smart, dedicated, principled lawyers from all over the world. As much as I am a sentimental U.S. patriot, I love the opportunity to work all the time with people from all over the world. They will often have different backgrounds, different assumptions, different legal training, different politics. It all makes for a great challenge, and a truly rich intellectual exchange.

Second, and I say this recognizing that it may be that everybody thinks this about their own practice, but in this area of international law and international dispute resolution, theory and practice are very closely intertwined, and we are constantly dealing with legal issues where the public policy driving the issue is at the surface or right beneath it. Many of the legal issues I've just talked about, in public international law, in investor-state arbitration, in commercial arbitration, in national law like the FSIA, will be driven by important policy considerations. If you are prepared to test the theory against the practice and then have the practice test the theory, you will understand both dimensions much more fully.

And finally, I would hope that wherever you go and whatever practice area you take, you think of international law as an important component of the rule of law. At the end of the day, we're all in this business because we believe that the rule of law has the capacity to contribute to social and economic development, to protect people from physical and economic insecurity, and, at the risk of sounding grandiose, to promote the dignity of the human person.

That's why we're lawyers; that's why we think of ourselves as part of a noble profession. I hope that you remember that you are all members of an increasingly visible, an increasingly influential, and an increasingly global college of international lawyers, and that in that capacity you will pursue the goal of a just world under law.

Thanks very much.

ILA BIENNIAL AND ASIL ANNUAL MEETING 2014

The American Branch hosted the International Law Association's 76th Biennial Conference in Washington from April 8 – 12, 2014, in conjunction with the Annual Meeting of the American Society of International Law. The overall theme addressed how international law is adapting to a rapidly changing world in its various aspects. Over 400 American Branch members, and about 750 ILA members altogether, were among the nearly 4000 attendees at the joint meeting.

This historic conference featured a unique opportunity for members of the two organizations to attend each other's programs and to collaborate, formally and informally, on a full range of current international legal topics. Along with the ASIL's interest groups, over 20 ILA committees and study groups held open (as well as closed working) meetings, and the week featured dozens of timely panel discussions and presentations on current international law topics.

At the Opening Plenary Session on Monday, April 7, Professor Ruth Wedgwood, President of the American Branch, and Lord Mance, Executive Chair of the ILA, welcomed all participants and then gave opening remarks. A representative of the outgoing ILA President, Ambassador Alexander Yankov, then handed Professor Wedgwood the President's medal of office to mark her appointment as President of the ILA. Professor Marcel Brus, Director of Studies of the ILA, then discussed the important scholarly work of ILA committees. Donald Donovan, President of the ASIL, also addressed the conference, followed by the Keynote Speaker, Mary McLeod, Acting Legal Adviser of the United States, who spoke about the effectiveness of international law.

On Monday and Tuesday, April 7 and 8, the ILA Biennial took center stage, with ILA Committees and Study Groups conducting open working sessions. Open working sessions continued on Wednesday and Thursday mornings, alongside ASIL panels. The ILA Closing Plenary, held on Friday morning, April 11, featured remarks and reports by Lord Mance, Chair of the Executive Council, Director of Studies Marcel Brus, and newly anointed President Ruth Wedgwood, among others. In addition, four resolutions were adopted by the Plenary session regarding Reparation for Victims of Armed Conflict, Legal Principles Relating to Climate Change, Cultural Heritage Law, and International Trade Law.

At the joint Gala Dinner on Friday evening, April 11, Prof. Alain Pellet received the Manley O. Hudson Medal, Prof. M. Cherif Bassiouni was honored with the Goler T. Butcher Medal, former ICC Prosecutor Fatou Bensouda was made an Honorary ASIL Member, and the 2014 Arthur C. Helton Fellowship Award Winners were recognized. Danilo Turk, former President of Slovenia, spoke on *International Law and Effectiveness in the Post Cold War Era*.

Members of the Joint ABILA-ASIL Organizing Committee included Catherine Amirfar, Elizabeth Andersen, Donald Francis Donovan, James A.R. Nafziger, David Stewart and Ruth Wedgwood. The Co-Chairs of the Program Committee were Oona Hathaway, Larry Johnson and Fionnuala Ní Aoláin.

The Honorary Committee of the American Branch for this historic event included: Mr. Robert von Mehren, Esq. (chair), Hon. Sandra Day O'Connor, Hon. Stephen G. Breyer, Hon. Charles Brower, Hon. Thomas Buergerthal, Dean David D. Caron, Judge Joan Donoghue, Conrad Harper, Esq., Nicolas Kourides, Esq., Prof. Cynthia Lichtenstein, Hon. Gabrielle Kirk McDonald, Hon. Theodor Meron, Prof. Michael Reisman, Prof. Arthur Rovine, Hon. Stephen Schwebel, Hon. Patricia Wald, and Prof. Edith Brown Weiss.

The American Branch held its own separate Annual Meeting on Friday afternoon, April 11 — the 93rd in the Branch's history.

III. AMERICAN BRANCH COMMITTEES

**COMMITTEES OF THE
AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION**

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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 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 ABILA. Those who want to participate actively in committee work should be encouraged to join the ABILA. 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 ABILA 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 ABILA 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 ABILA.

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 ABILA 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.

INTERNATIONAL CRIMINAL COURT COMMITTEE

**THE KENYAN CASES
AT THE INTERNATIONAL CRIMINAL COURT
AND THE AFRICAN UNION 'S POSITIONS AS TO THEM:
QUESTIONS & ANSWERS**

December 8, 2014

**THE KENYAN CASES
AT THE INTERNATIONAL CRIMINAL COURT
AND THE AFRICAN UNION 'S POSITIONS AS TO THEM:
QUESTIONS & ANSWERS**

On December 3, 2014, after Pre-Trial Chamber II (“PTC II”) of the International Criminal Court (“ICC”) declined to further adjourn trial, the ICC’s Prosecutor withdrew the charges against current Kenyan President Uhuru Kenyatta. The withdrawal was without prejudice so that if additional evidence becomes available a new case may be pursued.

While some of the questions and answers below—discussing the Kenyatta case, the response of the Government of Kenya and the African Union (“AU”), and the challenges of trying a head of state— are for the time-being no longer at issue as to the Kenyatta case, the concerns raised remain relevant. Although some of Kenya’s and the AU’s issues with the ICC (discussed below) may be alleviated by this recent development, the issues are not necessarily moot, as the trial against Kenya’s Deputy President William Ruto continues, the Kenyatta case may resume in the future, and Sudanese President Bashir also faces charges against him at the ICC.

WHAT ARE/WERE THE KENYAN CASES ABOUT?

In March 2010, Pre-Trial Chamber II authorized the then-current ICC Prosecutor to open an investigation into crimes against humanity allegedly committed in Kenya in relation to violence that followed Kenya’s 2007 presidential election, which killed over 1,200 and displaced 600,000.¹ This was the first time² that the

* This document is primarily the work of the Drafting Subcommittee of the ABILA ICC Committee, consisting of Jennifer Trahan, Linda Carter, and Matthew Charity, assisted by the research assistance of NYU Center for Global Affairs student Alexandra Clare and alumna Erin Lovall. Two members of the ABILA ICC Committee have chosen not to be associated with this document. This document takes as its inspiration an excellent analysis of this topic by the American NGO Coalition for the International Criminal Court (“AMICC”). AMICC has fully consented to the ABILA ICC Committee’s reliance on their document. For further information as to the work of AMICC, see <http://www.amicc.org/>.

¹ Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, (Mar. 31, 2010).

² American NGO Coalition for the International Criminal Court, *The Challenges of the*

Prosecutor used his “*proprio motu*” powers to initiate an investigation without first having received a referral from a State Party to the ICC’s Rome Statute,³ or the U. N. Security Council.

WHO ARE/WERE THE ACCUSED?

Kenyan President Uhuru Kenyatta was alleged to have planned, financed, and coordinated violence perpetrated against supporters of the opposition Orange Democratic Movement (“ODM”) during the 2007-08 post-election violence.⁴ He was alleged to be criminally responsible as an indirect co-perpetrator pursuant to article 25(3)(a) of the Rome Statute for the crimes against humanity of murder, deportation or forcible transfer, rape, persecution, and other inhumane acts.⁵ It was alleged that Kenyatta had control over the criminal Mungiki organization and directed it to commit the above crimes in the towns of Kibera, Kisumu, Naivasha, and Nakuru from December 30, 2007 to January 16, 2008.⁶

In addition, **Deputy President William Samoei Ruto** and broadcaster **Joshua Arap Sang** are on trial and alleged to have planned and organized crimes against humanity against perceived supporters of the Party of National Unity (“PNU”)—predominantly from the Kikuyu, Kamba and Kisii ethnic groups—during the 2007-08 post-election violence. Both Ruto and Sang are accused of having contributed to the crimes against humanity of murder, deportation or forcible transfer, and persecution.⁷ The Prosecutor contends that Ruto along with others, and supported by Sang, worked for up to a year before the election to create a network to carry out a plan, and that this network was activated when the election results in favor of Kibaki were announced.⁸ The goals of the plan, the Prosecutor alleges, were to punish and expel from the Rift Valley people

Kenyan Cases at the International Criminal Court at 2 (June 17, 2014), <http://www.amicc.org/docs/The%20Kenya%20Cases%20at%20the%20International%20Criminal%20Court.pdf>, [hereinafter AMICC Report].

³ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, available at <http://untreaty.un.org/cod/icc/statute/rome.htm> [hereinafter Rome Statute].

⁴ Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigui Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09-02/11, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigui Kenyatta and Mohammed Hussein Ali, 6-7 (Mar. 8, 2011).

⁵ *Id.*

⁶ *Id.*

⁷ Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11, Decision on Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 6-7, (Mar. 8, 2011).

⁸ *Id.*

perceived to support the PNU, and to gain power in the province.⁹

Ruto was elected Kenya's Deputy President in March 2013 and was formerly a Member of Parliament for Eldoret North (Rift Valley).¹⁰ In 2010, Ruto was suspended from public office as a result of corruption allegations. However, he was acquitted of all charges in April 2011 and in 2013 ran for his current position. He was sworn in as Deputy President on April 9, 2013.¹¹ **Sang** is a former radio personality and the head of operations at Kass FM radio station in Nairobi. In 2012, he resigned from his position in order to run in the 2013 general elections for the Kenyan Senate seat in Trans Nzoia (Rift Valley). However, he dropped his bid in order to focus on his upcoming trial at the ICC.

The trial of Ruto and Sang commenced on September 10, 2013. While Henry Kosgey (a prominent ODM politician) and Muhammed Ali (a former police commissioner) were originally issued summonses to appear in relation to their alleged roles in the 2007-8 post-election violence, PTC II's judges declined to confirm the charges against them, with Judge Hans-Peter Kaul dissenting.¹² The case against Francis Muthaura (a former head of civil service) was dropped in March 2013.¹³

WERE KENYATTA AND RUTO STATE OFFICIALS WHEN CHARGED?

Both Kenyatta and Ruto only gained their current positions as President and Deputy President, respectively, after charges were confirmed.¹⁴

⁹ *Id.*

¹⁰ Open Society Foundation, *Briefing Paper: Kenya – Trial of William Samoei Ruto and Joshua Arap Sang at the International Criminal Court*, (Sept. 2013), <http://www.opensocietyfoundations.org/briefing-papers/kenya-trial-william-samoei-ruto-and-joshua-arap-sang-international-criminal-court> [hereinafter OSF Kenya Briefing Paper]; Human Rights Watch, *Kenya: Q & A on Pre-trial Hearing in Second ICC Case*, (Sept. 21, 2011), <http://www.hrw.org/news/2011/09/20/kenya-qa-pre-trial-hearing-second-icc-case>; Human Rights Watch, *Kenya and the International Criminal Court: Questions and Answers 2* (Jan. 25, 2011), http://www.hrw.org/sites/default/files/related_material/QA%20-%20Kenya%20and%20the%20ICC%2001.25.11.pdf [hereinafter HRW Kenya Q&A].

¹¹ OSF Kenya Briefing Paper, *supra* note 10, at 2.

¹² Rob Jillo, *Ocampo Will Not Appeal Kosgey, Ali Acquittals*, CAPITAL NEWS (Jan. 24, 2012), <http://www.capitalfm.co.ke/news/2012/01/ocampo-will-not-appeal-kosgey-ali-acquittals/>.

¹³ *ICC Prosecutors Drop Case Against Kenyan Politician Francis Muthaura*, THE GUARDIAN, Mar. 11, 2013, <http://www.theguardian.com/law/2013/mar/11/icc-prosecutors-kenyan-francis-muthaura>.

¹⁴ AMICC Report, *supra* note 2, at 2.

DID KENYA FIRST HAVE THE OPPORTUNITY TO TRY THESE CASES ITSELF?

Yes. In 2008, the Kenyan Coalition Government of National Unity set up the Commission of Inquiry on Post-Election Violence (the “Waki Commission”).¹⁵ The Waki Commission recommended establishing a special tribunal modeled on the Special Court for Sierra Leone to investigate and prosecute those responsible for the violence. The Commission also set a strict timeline for this development, which, if breached, would result in Kofi Annan delivering the names of suspects to the International Criminal Court. Kenya’s Parliament voted against the adoption of the bill that would have established the planned tribunal, prompting Kenyan civil society to lobby the former Secretary-General to hand over the envelope containing the names.¹⁶ In July 2009, the Kenyan delegation to The Hague informed Luis Moreno Ocampo, the ICC Prosecutor at that time, that Kenya would either hold national trials or it would refer the situation to the ICC for investigation.¹⁷

The Kenyan Parliament abandoned their plans for the tribunal, and, in November 2009, the ICC stepped in and sought authorization from the Pre-Trial Chamber to open an investigation. The PTC noted that the Kenyan government has been “reluctant” to address the post-election violence and that there were no relevant national proceedings (as required under Article 19 of the Rome Statute). Subsequently, in December 2010, the ICC Prosecutor announced that he was seeking six separate summonses to appear against individuals alleged to have been involved.¹⁸

Since then, the Kenyan Government has repeatedly tried to seek support from regional leaders and political bodies – including the United Nations Security Council and the AU to end the ICC’s Kenya cases.¹⁹

HAVE THERE HISTORICALLY BEEN TRIALS OF HEADS OF STATE AT THE INTERNATIONAL LEVEL?

Yes. After World War II, the charters of the International Military Tribunal (the “Nuremberg Tribunal”) and the International Tribunal for the Far East (the “Tokyo Tribunal”) each provided for jurisdiction over individuals, irrespective

¹⁵ Human Rights Watch, *Establishing a Special Tribunal for Kenya and the Role of the ICC* (Mar. 25, 2009), <http://www.hrw.org/news/2009/03/25/establishing-special-tribunal-kenya-and-role-international-criminal-court>.

¹⁶ *Id.*

¹⁷ HRW Kenya Q&A, *supra* note 10, at 5.

¹⁸ *Id.*

¹⁹ *Id.*

of official position, including as a head of state.²⁰ Adolf Hitler and Benito Mussolini died before the Nuremberg Tribunal was established; however, Karl Dönitz, the German head of state for several weeks after the death of Hitler, was tried and convicted for war crimes.²¹ Although Japan's Emperor Hirohito survived the end of World War II, he was granted immunity by the Allied Nations and not prosecuted by the Tokyo Tribunal.²² However, Hideki Tōjō, the Japanese Prime Minister from 1941 to 1944 who ordered the Pearl Harbor attack, was tried and convicted by the tribunal.²³

The International Criminal Tribunal for the Former Yugoslavia (the "ICTY") was created in 1993 to prosecute war crimes, crimes against humanity, and genocide committed in the region from 1991 going forward.²⁴ Article 7.2 of the statute for the ICTY explicitly states: "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."²⁵ In May 1999, the ICTY released its first indictment of Slobodan Milošević, the former President of Serbia and the Federal Republic of Yugoslavia.²⁶ He was arrested in April 2001 and turned over to the ICTY.²⁷

²⁰ Charter of the International Military Tribunal, art. 7, Aug. 8, 1945, 59 Stat. 1544, 85 U.N.T.S. 251, *available at* <http://avalon.law.yale.edu/imt/imtconst.asp>, ("The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."); International Military Tribunal for the Far East Charter, art. 6, Jan. 19, 1946, T.I.A.S. No. 158, *available at* <http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml> ("Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.").

²¹ JOHN TOLAND, *THE LAST 100 DAYS: THE TUMULTUOUS AND CONTROVERSIAL STORY OF THE FINAL DAYS OF WORLD WAR II IN EUROPE* (2003); *see also* Mary Margaret Penrose, *The Emperor's Clothes: Evaluating Head of State Immunity Under International Law*, 7 SANTA CLARA J. INT'L L., No. 2, 85, 104 (2010).

²² Penrose, *supra* note 21, at 104-107; *see also* HERBERT P. BIX, *HIROHITO AND THE MAKING OF MODERN JAPAN* 592-93 (2000).

²³ *Hideki Tojo Biography*, SPARTACUS EDUCATIONAL, <http://spartacus-educational.com/J2WWtojo.htm>.

²⁴ *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, arts. 2-5, adopted in S.C. Res 827, U.N. Doc. S/RES/827 (May 25, 1993) (*as amended as of Sept.*, 2009), *available at* http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [hereinafter ICTY Statute].

²⁵ *Id.*, art. 7.2.

²⁶ *Prosecutor v. Slobodan Milošević, et al.*, Case No. IT-99-37, Indictment 'Kosovo,' (Int'l Crim. Trib. for the Former Yugoslavia May 22, 1999). This indictment, termed the "Kosovo" indictment, was amended twice. A second indictment, termed the "Croatia" indictment, was issued against Milošević in September 2001 and also amended twice. *Prosecutor v. Slobodan Milošević, et al.*, Case No. IT-99-37, Indictment 'Croatia,' (Int'l

Milošević was the “first former head of state delivered by a government to face an international war crimes court [since Karl Dönitz].”²⁸ However, as the trial neared its end, Milošević died in his prison cell.²⁹ Radovan Karadžić, the former President of Republika Srpska, was indicted by the ICTY in 1995.³⁰ He was charged with genocide, war crimes, and crimes against humanity for his role in, *inter alia*, the shelling of Sarajevo and the Srebrenica massacre.³¹ Karadžić’s trial is pending before the ICTY.

Shortly after the ICTY was created, the U.N. Security Council created the International Criminal Tribunal for Rwanda (“ICTR”) to prosecute genocide, crimes against humanity, and war crimes³² that were committed when over 800,000 people were slaughtered in Rwanda in a mere three months.³³ Like Article 7(2) of the ICTY Statute, Article 6(2) of the statute for the ICTR (the “ICTR Statute”) provides that “head of state” status will not relieve an individual of criminal responsibility nor provide mitigation.³⁴ Jean Kambanda, Prime Minister of Rwanda after former President Habyarimana and the previous Prime Minister were assassinated in April 1994,³⁵ was indicted, in October

Crim. Trib. for the Former Yugoslavia Sept. 27, 2001). A third indictment, termed the “Bosnia and Herzegovina” indictment, was issued against Milošević in 2001 and was later amended once. *Prosecutor v. Slobodan Milošević, et al.*, Case No. IT-99-37, Indictment ‘Bosnia and Herzegovina,’ (Int’l Crim. Trib. for the Former Yugoslavia Nov. 22, 2001).

²⁷ *Milosevic Arrested*, BBC NEWS (Apr. 1, 2001), <http://news.bbc.co.uk/2/hi/europe/1254263.stm>

²⁸ Marlise Simons and Carlotta Gall, *The Handover of Milosevic: The Overview; Milosevic is Given to U.N. for Trial in War-Crime Case*, N.Y. TIMES, June 29, 2001, <http://www.nytimes.com/2001/06/29/world/handover-milosevic-overview-milosevic-given-un-for-trial-war-crime-case.html?ref=slobodanmilosevic>.

²⁹ See Marlise Simons and Alison Smale, *Slobodan Milosevic, 64, Former Yugoslav Leader Accused of War Crimes Dies*, N.Y. TIMES, March 12, 2006, http://www.nytimes.com/2006/03/12/international/europe/12milosevic.html?pagewanted=all&_r=0.

³⁰ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-I, Indictment ‘Bosnia and Herzegovina,’ (Int’l Crim. Trib. for the Former Yugoslavia July 24, 1995); *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-I, Indictment ‘Srebrenica,’ (Int’l Crim. Trib. for the Former Yugoslavia Nov. 14, 1995).

³¹ *Karadzic Genocide Charge Reinstated*, BBC NEWS (July 11, 2013), <http://www.bbc.com/news/world-europe-23275181>

³² S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994)

³³ Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AMER. J. INT’L L., 501, 501-04 (1996).

³⁴ Statute of the International Criminal Tribunal for Rwanda, art. 6(2), adopted in S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), (as amended as of Jan. 31, 2010), available at http://www.unictr.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf [hereinafter ICTR Statute]

³⁵ James C. McKinley, Jr., *Ex-Rwandan Premier Gets Life in Prison on Charges of Genocide in ‘94 Massacres*, N.Y. TIMES, Sept. 5, 1998, <http://www.nytimes.com/1998/09/05/world/ex-rwandan-premier-gets-life-in-prison-on-charges-of-genocide-in-94->

1997, for genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity.³⁶ After his guilty plea, Kambanda became the first person ever to be sentenced for genocide.³⁷

The Special Court for Sierra Leone (“SCSL”) is a hybrid international-national tribunal created by agreement between the United Nations and Government of Sierra Leone.³⁸ The statute for the SCSL (the “SCSL Statute”) contains the same language as the ICTY and ICTR Statutes regarding no immunity for heads of state.³⁹ In March 2003, the SCSL issued a sealed indictment against Charles Taylor, then the sitting President of Liberia, for war crimes and crimes against humanity, including recruitment of child soldiers and murder.⁴⁰ Following a difficult process leading to Taylor’s apprehension and his subsequent trial in The Hague, Taylor was convicted in 2012 of war crimes and crimes against humanity.⁴¹

While talks between the United Nations and the government of Cambodia to establish a Cambodia tribunal began in 1997,⁴² an agreement was not reached until 2003.⁴³ Article 29 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea provides: “The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate

massacres.html.

³⁶ *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-DP, Indictment, (Int’l Crim. Trib. for Rwanda Oct. 28, 1997).

³⁷ McKinley, *supra* note 35.

³⁸ See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 138, available at <http://www.rscsl.org/Documents/scsl-agreement.pdf>; S.C. Res. 1315, S/RES/1315 (Aug. 14, 2000) (calling for the creation of the Special Court and setting out its parameters).

³⁹ Statute of the Special Court for Sierra Leone, art. 6(2), Jan. 16, 2002, 2178 U.N.T.S. 138, 145 available at <http://www.rscsl.org/Documents/scsl-statute.pdf> [hereinafter SCSL Statute].

⁴⁰ *The Taylor Trial; The Prosecutor v. Charles Ghankay Taylor*, THE RESIDUAL SPECIAL COURT FOR SIERRA LEONE, <http://www.rscsl.org/Taylor.html>; see also CNN Library, *Charles Taylor Fast Facts*, CNN (Oct. 3, 2013), <http://www.cnn.com/2013/04/26/world/africa/charles-taylor-fast-facts/>.

⁴¹ See *The Taylor Trial*, *supra* note 40.

⁴² Daniel Kemper Donovan, *Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal*, 44 HARV. INT’L L.J., 551, 551 (2003).

⁴³ AGREEMENT CONCERNING THE PROSECUTION UNDER CAMBODIAN LAW OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA, 2329 U.N.T.S. 117 (June 6, 2003).

punishment.”⁴⁴ In Case 2 before the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), one of the defendants is Khieu Samphan, the former head of state of Democratic Kampuchea. Samphan was charged with genocide, crimes against humanity, and war crimes.⁴⁵ While he was convicted of crimes against humanity as part of the first phase of the trial, the second phase is still ongoing.⁴⁶

Thus, there is solid precedent for the trial of high level officials, including heads of state, at the international level, going back nearly a half century to the precedent set at the Nuremberg Tribunal.

WOULD A DIFFERENT ANSWER ATTACH AT THE DOMESTIC LEVEL?

Potentially. In 2002, the International Court of Justice held in the *Yerodia/Arrest Warrant* case that serving heads of state and heads of government have a broad personal immunity from the jurisdiction of *foreign domestic courts*, including from prosecution for international crimes.⁴⁷ However, “a growing number of states reject immunity based on official capacity when it comes to serious crimes.”⁴⁸

DOES THE ROME STATUTE PROVIDE THAT HEADS OF STATE MAY BE TRIED BY THE ICC?

Yes. Article 27 of the Rome Statute provides:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

⁴⁴ LAW ON THE ESTABLISHMENT OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA, (2001) *as amended by* NS/RKM/1004/006 (Oct. 27, 2004), http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (unofficial translation).

⁴⁵ *Prosecutor v. Khieu Samphan, et al.*, Case No. 002, Closing Order (Indictment), (Extraordinary Chambers in the Courts of Cambodia Sept. 15, 2010).

⁴⁶ *Case 002*, ECCC, <http://www.eccc.gov.kh/en/case/topic/2>.

⁴⁷ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, 2002 I.C.J. 3; 128 I.L.R. 1 (Feb. 14, 2002).

⁴⁸ Human Rights Watch, *Human Rights Watch Memorandum for the Thirteenth Session of the International Criminal Court Assembly of States Parties*, at 17 (Nov. 2014), available at http://www.hrw.org/sites/default/files/related_material/HRW%20ASP13%20Memorandum%20Final%20ENG.pdf.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.⁴⁹

Because Kenya is a State Party to the Rome Statute, Kenya has voluntarily joined a statute that clearly provides that there is no head of state immunity or immunity for any other government official (such as a Deputy President) before the ICC for crimes committed in its territory and by its nationals.

DID THE AFRICAN UNION OPPOSE THE KENYATTA AND RUTO TRIALS?

Notwithstanding Kenya's decision to join the ICC (complete with article 27), the Kenya cases have evoked much criticism and resistance from the Government of Kenya and the AU. In May 2013, the AU issued a resolution calling for the ICC to halt its proceedings against Ruto, Sang, and Kenyatta and for the cases to be handled by a "national mechanism" in Kenya.⁵⁰ The AU Chairman and Ethiopian Prime Minister, Hailemariam Desalegn, accused the ICC of unfairly targeting Africans.⁵¹ Later that year, at the 12th session of the Assembly of State Parties ("ASP"), the AU contended that standing trial as a sitting head of state would interfere with official duties.⁵² They argued the absence of the Kenyan President and Deputy resulting from their presence at the ICC would constrain them from attending the domestic security situation in Kenya after the attack of a Nairobi shopping center on September 21, 2013.⁵³ In October 2013, the AU also requested the UN Security Council to defer the two Kenyan cases pursuant to Article 16 of the Rome Statute, a request which was denied by the Council.⁵⁴ Several African states also threatened to withdraw from the Court, including Kenya itself.⁵⁵

⁴⁹ Rome Statute, *supra* note 3, at art. 27.

⁵⁰ OSF Kenya Briefing Paper, *supra* note 10.

⁵¹ *Id.*

⁵² AMICC Report, *supra* note 2, at 3.

⁵³ *Id.*; see also Matthew Pomy, *African Union Urges Members to Stand Against ICC Trials of Presidents*, JURIST (Feb. 1, 2014, 10:50 AM), <http://jurist.org/paperchase/2014/02/african-union-urges-members-to-stand-against-icc-trials-of-presidents.php>.

⁵⁴ AMICC Report, *supra* note 2, at 3.

⁵⁵ OSF Kenya Briefing Paper, *supra* note 10.

DID SUCH OPPOSITION REPRESENT THE VIEWS OF AFRICAN CIVIL SOCIETY?

According to Human Rights Watch, “Kenya’s proposed withdrawal from the Rome Statute has been greeted with wide disapproval by Kenyan civil society. Groups are organizing demonstrations against withdrawal and seeking to collect a million signatures on a petition calling on the Kenyan government to remain in the ICC.”⁵⁶ African civil society groups are also actively advocating the Court’s work in post-conflict situations.⁵⁷

DOES THE ASP AGREE THAT THERE SHOULD BE HEAD OF STATE IMMUNITY?

In November 2013, the Assembly of State Parties (ASP) convened a special segment to discuss the *Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation*.⁵⁸ However, the ASP did not debate whether a sitting head of state should stand trial, as article 27 of the Rome Statute makes clear the irrelevance of official capacity for establishing criminal responsibility.⁵⁹ Furthermore, there seems little momentum outside AU leadership for undermining this fundamental rule in the Rome Statute, one that (as discussed above) dates back to the Nuremberg Tribunal. To create such immunity for heads of state who are implicated in mass atrocity crimes would undermine the entire purpose of the Court and Statute.⁶⁰

While Kenya has again asked for a special segment at the upcoming December 2014 ASP to discuss “the conduct of the Court and the Office of the Prosecutor,”⁶¹ recent developments may minimize the perceived need for any such discussion.

⁵⁶ HRW Kenya Q&A, *supra* note 10, at 8.

⁵⁷ AMICC Report, *supra* note 2, at 3.

⁵⁸ I.C.C. Assembly of States Parties, Special Segment as Requested by the African Union: “Indictment of Sitting Heads of State and Government and its Consequences on Peace and Stability and Reconciliation,” Informal Summary by the Moderator, Nov. 20-28, 2013, ICC-ASP/12/61 (Nov. 27, 2013), available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-61-ENG.pdf. See also AMICC Report, *supra* note 2, at 2; Coalition for the International Criminal Court, *Report on the 12th Session of the Assembly of States Parties to the Rome Statute, November 20-28, 2013*, 6-8, http://www.iccnw.org/documents/asp12_report.pdf.

⁵⁹ AMICC Report, *supra* note 2, at 3.

⁶⁰ See *id.* at 5.

⁶¹ HRW, Memorandum for the Thirteenth Session of the ICC ASP, *supra* note 48, at 11.

DID THE ASP ATTEMPT TO ACCOMMODATE THE AU'S CONCERNS?

Yes. The ASP tried to be responsive to the Kenyan government by considering its request that sitting heads of state should not have to attend their trials.⁶² In November 2013, States Parties agreed to modify the ICC's Rules of Evidence and Procedure regarding the requirement that the accused be present at trial. Specifically, the ASP added Rule 134*bis*, which allows the accused to request to attend the proceedings through video link instead of in person, and Rule 134*quater*, which allows an accused who has "extraordinary public duties at the highest level" to request to be exempt from attending parts of the trial, if certain strict criteria are met.⁶³ The Prosecutor has appealed these rule changes, and the Appeals Chamber must determine whether they conflict with the presence requirement in the Rome Statute.⁶⁴

ARE THE AU'S CONCERNS ALLEVIATED?

The AU has continued to push for additional changes to the Rome Statute including granting complete immunity to sitting heads of state.⁶⁵ Kenya has also proposed that sitting presidents *and their deputies* "be exempt from prosecution during their current term in office."⁶⁶ To enact such changes to the Rome Statute however, ratification by 87.5% of the State Parties would be required.⁶⁷ The AU's momentum in pressing for these changes may be somewhat blunted by withdrawal of the Kenyatta charges.

HAS THE AU'S CRITICAL STANCE RELATED ONLY TO THE KENYATTA CASE?

No. The critical stance of the AU has been broader than merely the Kenya cases. Some AU dissatisfaction surfaced already with the ICC's 2009 indictment

⁶² See *id.* at 3.

⁶³ I.C.C. Assembly of States Parties, Amendments to the Rules of Procedure and Evidence, Res. ICC-ASP/12/Res.7, (Nov. 27, 2013), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf.

⁶⁴ See Rome Statute, *supra* note 3, art. 63.1 ("The accused shall be present during the trial.").

⁶⁵ See AMICC Report, *supra* note 2, at 3. Kenya's proposed amendment to article 27 derives from an AU extraordinary summit decision, that: "no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office." HRW, Memorandum for the Thirteenth Session of the ICC ASP, *supra* note 48, at 17-18.

⁶⁶ AMICC Report, *supra* note 2, at 3-4.; see also, Solomon Dersso, *The AU's Extraordinary Summit Decisions on Africa-ICC Relationship*, EJIL: TALK! (Oct. 28, 2013), <http://www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/>.

⁶⁷ See AMICC Report, *supra* note 2, at 3.

of President Omar Hassan al-Bashir, the sitting Head of State of Sudan.⁶⁸ The AU subsequently adopted a hostile posture towards the ICC, calling for a policy of non-cooperation.⁶⁹ Rwanda's President, Paul Kagame has also openly criticized the court, contending that it is not plausible to have a justice system where justice is dispensed "selectively or politically."⁷⁰

COULD THE KENYATTA CASE HAVE BEEN DEFERRED IF IT REALLY THREATENED KENYA'S PEACE AND SECURITY?

Yes. The U.N. Security Council has the mandate to address political issues including issues of international peace and security.⁷¹ The Rome Statute, in articles 13(b) and 16, specifies how the UN Security Council's power interrelates with the Court.⁷² Specifically, article 13(b) provides that the UN Security Council may refer situations to the ICC,⁷³ and, under article 16, it may defer situations, utilizing its Chapter VII powers, if the Security Council perceives the prosecution to constitute a threat to international peace and security.⁷⁴ Thus, if the UN Security Council legitimately believed that Kenyatta's trial threatened the peace and security of Kenya, it could have deferred the case. It did not do so.

The possibility of deferral also remains as to the Deputy President's case, were it to actually constitute a threat to international peace and security. (Such a threat,

⁶⁸ See Jemima Kariri, *Reflections on African Union's Stance on the International Criminal Court, Towards the 22nd Assembly of States Parties*, in REFLECTIONS ON THE AFRICAN UNION ICC RELATIONSHIP 1, (African Network on International Criminal Justice, ICJ Kenya, 2014), <http://www.icj-kenya.org/dmdocuments/books/reflections%20on%20the%20african%20union%20icc%20relationship.pdf>.

⁶⁹ See Tim Murithi, *Policy Brief: The African Union and the International Criminal Court: An Embattled Relationship?*, INSTITUTE FOR JUSTICE AND RECONCILIATION (Mar. 2013), <http://www.ijr.org.za/publications/pdfs/IJR%20Policy%20Brief%20No%208%20Tim%20Muruthi.pdf>.

⁷⁰ Ibrahim Tommy, *Africa's Unfinished Business: Ensuring Justice for Victims of Serious International Crimes*, in REFLECTIONS ON AFRICAN UNION'S STANCE ON THE ICC 3, (African Network on International Criminal Justice, ICJ Kenya, 2014), <http://www.icj-kenya.org/dmdocuments/books/reflections%20on%20the%20african%20union%20icc%20relationship.pdf>.

⁷¹ UN Charter, Chapter VII.

⁷² For background on the topic, see Jennifer Trahan, *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, 24 CRIM. L. FORUM 417 (2013).

⁷³ Rome Statute, *supra* note 3, art. 13(b).

⁷⁴ Article 16 provides: "No investigation or prosecution may be commenced or proceeded the Court to that effect; that request may be renewed by the Council under the same conditions." *Id.* art. 16.

however, appears doubtful, since prior arguments—that having *both* the President and Deputy President on trial would not allow Kenya to address its domestic security situation—are now moot.) Absent a true threat to international peace and security, the Security Council must respect the Court’s independence and allow the judicial process to proceed.

HAS THERE BEEN INTIMIDATION AND WITHDRAWAL OF WITNESSES IN THE KENYA CASES?

Leading up to the trial, numerous reports surfaced regarding the intimidation of Prosecution witnesses.⁷⁵ According to the ICC Prosecutor, the level of interference has been “unprecedented”; she has stated that “witness protection remains one of our highest priorities.”⁷⁶ The ICC court filings have noted that security concerns have prevented at least two witnesses from testifying at trial—which is what caused the ICC Prosecutor to adjourn Kenyatta’s trial date.⁷⁷ The Government of Kenya has also failed to provide access to required records.⁷⁸ In 2013, the ICC also requested Kenya to arrest Walter Osapiri Barasa and indicted him with three counts for corruptly influencing, or attempting to corruptly influence, three ICC witnesses testifying against Deputy President William Ruto.⁷⁹

HAS KENYA FAILED TO COOPERATE IN THE KENYATTA INVESTIGATION?

According to ICC Prosecutor Bensouda:

On the 3rd of December 2014, the Judges of Trial Chamber V (B) . . . found that the Government of Kenya had failed to adequately cooperate with my investigations in the case against Mr. Uhuru Muigai Kenyatta. The Chamber stated, ‘[it] finds that, cumulatively, the

⁷⁵ OSF Kenya Briefing Paper, *supra* note 10.

⁷⁶ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in Relation to Kenya (Apr. 5, 2013), http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statement%20statement/Pages/otp-statement-05-04-2013.aspx.

⁷⁷ OSF Kenya Briefing Paper, *supra* note 10; AMICC Report, *supra* note 2, at 3.

⁷⁸ See Thomas Escritt, *Prosecutors ‘Failed’ to Prove Case Against Kenya’s President: Attorney*, REUTERS, Oct. 8, 2014, <http://www.reuters.com/article/2014/10/08/us-kenya-court-idUSKCN0HX0LE20141008>.

⁷⁹ *Prosecutor v. Walter Osapiri Barasa*, Case No. ICC-01/09-01/13, Warrant of Arrest (Aug. 8, 2013). Ruto’s lawyer Karim Khan has denied interfering with witnesses, stating that the claim is “preposterous.” Aggrey Mutambo, *Ruto’s ICC Lawyer Denies Interfering with Witnesses*, DAILY NATION, (Aug. 15, 2013), <http://www.nation.co.ke/news/politics/-/1064/1955020/-/kh82ci/-/index.html>.

approach of the Kenyan Government [...] falls short of the standard of good faith cooperation' and 'that this failure has reached the threshold of non-compliance' required under the Rome Statute.⁸⁰

In its ruling, the Chamber, therefore, found, '[...] that the Kenyan Government's non-compliance has not only compromised the Prosecution's ability to thoroughly investigate the charges, but has ultimately impinged upon the Chamber's ability to fulfil its mandate under Article 64, and in particular, its truth-seeking function in accordance with Article 69 (3) of the Statute.'⁸¹

She noted that "[c]rucial documentary evidence regarding the 2007-2008 post-election violence, including concerning the conduct of the accused, can only be found in Kenya and is only accessible to the Prosecution through the assistance of the Government of Kenya."⁸² And, that ultimately, the investigation was hampered by:

- Failure to provide those documents, as well as
- "A steady and relentless stream of false media reports about the Kenya cases;"
- "An unprecedented campaign on social media to expose the identity of protected witnesses in the Kenya cases;" and
- "Concerted and wide-ranging efforts to harass, intimidate and threaten individuals who would wish to be witnesses."⁸³

IS THE AU ALSO TRYING TO CREATE A TRIBUNAL WITH IMMUNITY FOR ATROCITY CRIMES FOR HEADS OF STATE AND SENIOR STATE OFFICIALS?

Yes. The AU has recently voted to establish the African Court of Justice and Human and Peoples Rights, which would prosecute a wide list of crimes.⁸⁴ The draft Statute provides for immunity for "any serving African Union Head of

⁸⁰ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Status of the Government of Kenya's Cooperation with the Prosecution's Investigations in the Kenyatta case, Dec. 5, 2014, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-04-12-2014.aspx

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ For background, see Beth Van Schaack, *Immunity Before the African Court of Justice & Human & Peoples Rights – The Potential Outlier*, JUST SECURITY (July 20, 2014 8:02 AM), <http://justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/>.

State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure in office.”⁸⁵ Such immunity provisions, which civil society members vehemently oppose, would make the tribunal (if created) an “outlier amongst international courts.”⁸⁶

IS IT EXTREMELY DIFFICULT FOR AN INTERNATIONAL TRIBUNAL TO PROSECUTE A HIGH LEVEL STATE OFFICIAL?

As detailed above, over the last half century, various leaders and former leaders have been charged and, in some cases, prosecuted and convicted, by international tribunals for mass atrocity crimes, including Hitler’s successor Karl Dönitz, former Liberian President Charles Taylor, former Rwandan Prime Minister Jean Kambanda, former Serbian president Slobodan Milosevic, and former Khmer Rouge head of state Khieu Samphan. Sudanese President Omar Hassan al-Bashir is subject to an ICC arrest warrant for war crimes, crimes against humanity and genocide, and most recently the ICC issued an arrest warrant (now terminated due to his fatality) for Libya’s former President Muammar Gaddafi for crimes against humanity.

In practice, however, it remains extremely difficult for even international tribunals to try sitting heads of state or other high-ranking officials as it usually requires the cooperation of their home state for investigation and surrender of the indictees. It is thus a challenge for any international tribunal to try a current high level government official, and sometimes also difficult to proceed against former high level government officials if they continue to hold strong ties to the state. The current Prosecutor’s determination to proceed with the Kenya cases despite abundant interference has shown the Court’s commitment to ensuring that the rule of law prevails. That the Kenyatta case has been withdrawn reveals the vulnerability of the Court to interference with its work, and the need for all States Parties to adhere to their cooperation obligations to the Court.

-- American Branch, International Law Association,
International Criminal Court Committee
Jennifer Trahan, Chair

⁸⁵ Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples Rights, art. 46*Abis*, in The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs, A.U. Doc. EX.CL/846(XXV) (2014), *available at* <http://justsecurity.org/wp-content/uploads/2014/07/Legal-Instruments-Adopted-in-Malabo-July-2014.pdf>

⁸⁶ Van Schaack, *supra* note 84.

INTERNATIONAL CRIMINAL COURT COMMITTEE

Letter to Stephen J. Rapp
and William K. Lietzau
Re: U.S. Policy Toward
the International Criminal Court

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION
INTERNATIONAL CRIMINAL COURT COMMITTEE**

July 24, 2013

Stephen J. Rapp, Ambassador-at-Large
Office of Global Criminal Justice
U.S. Department of State
2201 C Street NW
Washington, D.C. 20520

William K. Lietzau, Deputy Assistant
Secretary of Defense (Detainee Policy)
2900 Defense Pentagon, 4C882
Washington, D.C. 20301-2900

Re: U.S. Policy Toward the International Criminal Court

Dear Ambassador Rapp and Deputy Assistant Secretary of Defense Lietzau:

As chairperson of the Committee on the International Criminal Court of the American Branch of the International Law Association (“ABILA”).¹ I appreciate this opportunity to write to you as the principal officials dealing with the United States’ relationship with the International Criminal Court (“ICC”). The Committee recognizes the value of the Administration’s case-by-case support for the ICC.

We are encouraged by the participation of the United States as an observer in ICC meetings during the first term of the Obama Administration, the U.S.’s position of principled engagement with the Court, and its willingness to support individual investigations and prosecutions on a case-by-case basis. We hope the U.S. will continue to expand its relationship with the Court, which is an important shift from the policies of the previous administration. However, we

¹ The ABILA ICC Committee consists of approximately 125 professional members and student associates. This letter does not represent the views of the American Branch of the International Law Association, which does not take positions on issues.

also recognize that the U.S. has ongoing concerns regarding the ICC, and no immediate plans for ratification.

This ABILA ICC Committee's statement is intended to assist you over the next three years in further developing U.S. policy vis-à-vis the ICC. We encourage you to continue to pursue the goal of creating a sustained relationship between the U.S. and ICC that will further build U.S. confidence in the Court, and, when the time is right, lead to eventual U.S. ratification of the Rome Statute.

(1) The Administration should create a firm policy of support for the ICC

As previously mentioned, this Committee welcomes improvements made in the relationship between the U.S. and the ICC during the first term of the Obama Administration. The Administration has taken a number of positive steps including its decision to participate as an observer in ICC meetings, its willingness to support individual investigations and prosecutions carried out by the Court on a case-by-case basis, and its willingness to publicly state that the U.S. "respects the rights of every country to join the ICC."² That said, the current Administration has fallen short of creating a comprehensive policy on the ICC.

To further the U.S.'s principled engagement with the Court during President Obama's second term, the Administration should set forth a clear and unwavering position of support for the ICC. As set forth below, there are a number of concrete steps the Administration should take to affirm its continuous support of the Court and remove any ambiguity regarding its position. Additionally, rather than collaborating only on a case- by-case basis, the Administration should provide a clear and comprehensive policy statement as to its position regarding the Court.

Such a statement would reinforce the Administration's support for the ICC, provide a basis for further consultations among ICC stakeholders in the U.S. Government, and ensure that the U.S. is able to respond to situations that arise in relation to the ICC, in line with U.S. policy goals. We believe that a comprehensive policy statement, together with the measures set forth below, are important elements in constructive and principled engagement with the Court,

² "Where Can Victims of Atrocities find Justice?," Remarks by Steven J. Rapp, Ambassador-at-Large for War Crimes, May 10, 2011, Makati, Philippines, at http://www.state.gov/j/gcj/us_releases/remarks/2011/165257.htm.

and would enhance U.S. credibility in its commitment to multilateral engagement and support for international justice.

(2) The U.S. should formally recommit to its Rome Statute signatory obligations

As this Committee has previously recommended, the U.S. should send a note to the United Nations Secretary-General indicating that the U.S. upholds its signatory obligations with respect to the Rome Statute. Such action seems particularly appropriate given that then-State Department Legal Advisor Harold H. Koh has verbally articulated this position in official administration speeches.

The U.S. purported to deactivate its signatory status by means of then-Under Secretary of State John Bolton's May 2002 note to the U.N. Secretary-General,³ whereby he declared that the U.S. "has no legal obligations arising from its signature."⁴ The Administration should reverse this action by sending a counter-note to the U.N. Secretary General affirming that it will indeed abide by its signatory obligations.

As a signatory to the Rome Statute, the U.S. is only committed to support the "object and purpose" of the treaty. Reaffirming U.S. commitment would reinforce the Administration's current position of supporting the Court on a case-by-case basis. Formal action would also be in line with former State Department Legal Advisor Harold H. Koh's public statements, iterated on three separate occasions, that the U.S. respects the "object and purpose" of the Rome Statute.⁵ These statements, however, are insufficient to revoke the Bolton note without more, as there is still a footnote by the U.S.'s name in the U.N.'s listing of Rome Statute States Parties and signatories quoting the contents of the Bolton note.⁶

Formally revoking the May 2002 letter would unequivocally establish the U.S. position on its signatory obligations and solidify its position on the ICC,

³ Letter from John R. Bolton, U.S. Under-Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary General (May 6, 2002).

⁴ Press Briefing with Steven J. Rapp, Ambassador-at-Large for War Crimes, <http://geneva.usmission.gov/2010/01/22/stephen-rapp/>.

⁵ Koh stated this at N.Y.U.'s Center for Global Affairs on October 27, 2010, the Grotius Center of Leiden University on November 16, 2012, and the New York City Bar Association on November 26, 2012.

⁶ See U.N. Treaty Collection at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#11.

restoring the credibility of its commitment to the Court and clarifying its position among states. Sending a note does not require Congressional approval and would eliminate ambiguity about the U.S.'s status. Additionally, the note would reaffirm the Administration's position, which has now been informally acknowledged on a number of instances by various officials, that it is committed to cooperation with the Court.

(3) The U.S. should work towards repeal of current law banning U.S. funding of the ICC, and eventual repeal of the American Servicemembers' Protection Act

The Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act expressly prohibits the use of funds to the ICC, stating that "[n]one of the funds authorized to be appropriated by this or any other Act may be obligated for use by, or for support of, the International Criminal Court unless the United States has become a party to the Court pursuant to a treaty made under Article II, section 2, clause 2 of the Constitution of the United States on or after the date of enactment of this Act."⁷ Furthermore, the so-called American Servicemembers' Protection Act of 2002 ("ASPA"),⁸ includes a number of objectionable provisions, including one that provides authority to use military force to free U.S. members of the armed forces from the ICC—which would presumably include use of force at the Court itself, in The Hague, Netherlands.⁹ In line with the Administration's current position on the

⁷ Foreign Relations Authorization Act (H.R. 3427), Public Law No. 106-113, §§ 705-706, November 29, 1999.

⁸ American Servicemembers' Protection Act of 2002 (H.R. 4775), Public Law No. 107-206 (as amended October 17, 2006 and January 28, 2008).

⁹ Specifically, ASPA permits the U.S. to "to use all means necessary and appropriate to bring about the release of any" American detained by the ICC. ASPA, § 208(a). Other provisions of ASPA (although subject to waiver) include:

- Restrictions on U.S. participation in U.N. peacekeeping operations without an exemption from ICC jurisdiction covering them,
- Prohibition on direct or indirect transfer of classified national security information, including law enforcement information, to the International Criminal Court, even if no American is accused of a crime.

AMICC website, "Anti-ICC Legislation Generally," at <http://www.amicc.org/usicc/legislation>. ASPA also prohibited cooperation with the ICC, but the subsequent "Dodd Amendment," however, states: "Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity." Amendment No. 3787 to Amendment No. 3597, at <http://www.amicc.org/docs/Dodd2nddeg.pdf> (emphasis added). Thus, the U.S. is not prevented from cooperating as to ICC

ICC, the Administration should work towards Congressional repeal of ASPA and omission of the funding prohibition from the Foreign Relations Authorization Act so as to allow for additional U.S. support for the Court.

In recent remarks during a U.N. Security Council Debate on Peace and Justice, Ambassador Rice stated, on October 17, 2012, that the U.S. is “actively engaged with the ICC Prosecutor and Registrar to consider how we can support specific prosecutions already underway, and [the United States] responded positively to informal requests for assistance.”¹⁰ Accordingly, the Administration has offered what they refer to as “in-kind support” to the ICC on a case-by-case basis. That said, without the repeal of the current laws prohibiting funding to the ICC, the U.S. will continue to be impeded in support that the Administration may want to provide to the Court. While in-kind support is an important mechanism, the U.S. could further, and more effectively, support the Court by offering monetary assistance, yet still do so on a case-by-case basis.

(4) The U.S. should support the referral by the U.N. Security Council of the situation in Syria to the ICC

The death toll in Syria is now estimated to exceed 100,000¹¹ and there are credible reports that over 100 civilians continue to be killed each day.¹² The Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, published on February 5, 2013, as well as the High Commissioner for Human Rights, have both characterized the acts that are occurring as “war crimes” and “crimes against humanity.”¹³

trials (since all ICC trials are necessarily of persons accused of genocide, war crimes or crimes against humanity).

¹⁰ U.N. Security Council Debate on Peace & Justice, with a Special Focus on the Role of the International Criminal Court, remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the Nations, October 17, 2012, New York, NY.

¹¹ Reuters, Dominic Evans and Oliver Holmes, Syria Death Toll Tops 100,000, Rebels Lose Border Town (June 26, 2013). The U.N. has estimated over 92,000 fatalities as of the end of April. N.Y. Times, David Jolly, Death Toll in Syrian Civil War Near 93,000, U.N. Says (June 13, 2013).

¹² “Syria Unrest: ‘Humanitarian’ Vote Pressed at UN,” BBC News, February 29, 2012.

¹³ U.N. General Assembly, Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 1, 42-162, U.N. DOC. A/HRC/22/59 (Feb. 5, 2013) (detailing reported instances of war crimes and crimes against humanity committed during the Syrian crisis); see also Nick Cumming-Bruce, U.N. Rights Officials Urge Syria War Crimes Charges, N.Y. TIMES, Feb. 18, 2013, A10, at http://www.nytimes.com/2013/02/19/world/middleeast/un-rights-panel-says-violence-in-syria-is-mounting.html?_r=0 (Navi Pillay, the U.N. High Commissioner for Human Rights, and the U.N. Human Rights Council state that war crimes and crimes against

Prompt action by the Security Council is needed to stop the appalling atrocities being committed. Because Syria is not a party to the Rome Statute, the ICC lacks jurisdiction absent a referral by the Security Council. The U.S. should support a U.N. Security Council referral of the situation to the International Criminal Court's Prosecutor for investigation and prosecution in order to seek justice for Syrian victims.

Referring the Syrian situation to the ICC is not tantamount to aligning the U.S. with any party to the conflict. Such a referral operates in a neutral way, only requiring the Prosecutor to investigate whether atrocities occurred in Syria. Nor would a referral increase the possibility of escalating the conflict. It would simply ensure that justice for victims of such atrocities is achieved by prosecuting those responsible for perpetrating those crimes.

The Security Council has previously referred two situations to the International Criminal Court: (1) the situation in Darfur (U.N.S.C. Resolution 1593) and (2) the situation in Libya (U.N.S.C. 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 protection of the Syrian people and the Security Council's and Court's credibility. Consistently referring situations such as the one in Syria to the ICC may also deter those committing atrocities from continuing to commit such crimes, thereby saving lives.

It is far too soon to predict whether the Syrian justice system will eventually have the will and capacity to prosecute the crimes now being committed in a timely and effective manner. Regardless, should Syria demonstrate the will and capacity to effectively prosecute atrocities, the complementarity provision of the Rome Statute¹⁴ would preserve Syria's ability to prosecute its nationals.

(5) The U.S. should not include language opposing allocation of U.N. funds in Security Council referral resolutions

Given the budget constraints that the ICC has been facing, with an ever-expanding number of investigations and cases, and demands for even more investigations and prosecutions, it is a matter of serious concern to ICC officials and State Parties that the two U.N. Security Council referral resolutions to date

humanity have been committed in Syria and renew requests that the Syrian crisis should be referred by the Security Council to the International Criminal Court).

¹⁴ See Rome Statute, art. 17.

contain language that states that none of the expenses incurred in connection with the referral shall be borne by the U.N.¹⁵ Neither does the Rome Statute require that funding accompany referrals, nor could the Rome Statute mandate that the Security Council or General Assembly allocate funding, since both those entities derive their powers from the U.N. Charter. Yet, pragmatically, if the Security Council made a number of consecutive referrals without funding accompanying them, then the Court could be in the impossible position of having insufficient funding to investigate and/or prosecute the referred matters. This potential predicament has led some to suggest that the Prosecutor should decline to initiate an investigation on a referred matter for which she does not have sufficient funding, by invoking Rome Statute article 53.1(c) that it would “not serve the interests of justice” to proceed, if unable to do so properly, due to lack of sufficient funding.¹⁶ The judges too might refuse to authorize the commencement of an investigation in the case of an unfunded Security Council referral.¹⁷ As a practical matter, Security Council member states should, in order to ensure successful referrals, consider excluding such language, leaving it to the General Assembly to consider the matter of funding. Note also that a serious legal issue exists as to whether the Security Council actually has the power to refuse to allocate funds to accompany the referral, when budget decisions, under the U.N. Charter, are made by the General Assembly.¹⁸

We understand that the U.S. has particular concerns about U.N. funds being utilized to pay for ICC investigations and prosecutions. U.S. dues comprised 22% of the U.N. budget for 2013,¹⁹ and, as noted above, the U.S. has a current legislative ban on funding the ICC. Thus, the argument is sometimes made that

¹⁵ S.C. res. 1593, para. 7; S.C. res. 1970, para. 8.

¹⁶ See Rome Statute, art. 53.1(c) (“In deciding whether to initiate an investigation, the Prosecutor shall consider whether . . . [t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice”). Kevin Jon Heller, *Opinio Juris*, “A Few Thoughts on a Syria Referral,” at <http://opiniojuris.org/2013/01/14/a-few-thoughts-on-a-syria-referral/> (arguing same).

¹⁷ See Rome Statute, art. 13 (“The Court may exercise its jurisdiction . . .”). Compare Rome Statute, art. 15 (4) (“If the Pre-Trial Chamber . . . considers that there is a reasonable basis to proceed with an investigation . . . it shall authorize the commencement of the investigation . . .”).

¹⁸ U.N. Charter, art. 17.1.

¹⁹ U.N. Secretariat, *Assessment of Member States’ Contributions to the United Nations Regular Budget for the Year 2013 and of New Member States’ Advances to the Working Capital Fund for the Biennium 2010- 2011 and Contributions to the United Nations Regular Budget for 2011 and 2012*, at p. 6, U.N. DOC. ST/ADM/SER.B/866 (Dec. 24, 2012), http://www.un.org/ga/search/view_doc.asp?symbol=ST/ADM/SER.B/866.

the U.S. may not permit U.N. funds to go to the ICC as doing so would violate U.S. law. Yet, another reading of U.S. law is that it only prohibits direct U.S. funding to the ICC, such that there would be no impediment to using U.N. dues to fund the ICC. Acknowledging that the U.S. government, including members of Congress and the Department of Defense, may not agree with this reading, and that domestic politics may make it difficult for the U.S. to accept such a reading, we urge you nonetheless to consider this interpretation of U.S. law. Alternatively, as noted above, the Administration should work towards Congressional repeal of the legislation that prevents U.S. funding of the ICC. If the U.S. supports a Security Council referral to the ICC (as it did in the situation of Libya), then it, along with other Security Council member states, has a vested interest in ensuring that the Court has sufficient funds to carry out the Security Council's directive.

(6) The U.S. should consider whether it always needs to include a clause exempting the nationals of non-States Parties from referred situations

The text of the two referrals made to date also contains clauses exempting the nationals of non-ICC States Parties from jurisdiction that would otherwise follow from referral of the situation.²⁰ While a complete discussion of the merits of whether the U.S. should insist on such language is beyond the scope of this letter, we note that it generates considerable hostility internationally for the U.S. to insist on such jurisdictional exclusions. It is also worth considering that Rome Statute article 13(b) only permits the Security Council to refer a "situation" to the ICC.²¹ Just as the Security Council would not be permitted to refer only the rebels in a situation country or only government forces in a situation country, it is entirely unclear whether it can exempt nationals of non-ICC States Parties. Put another way, while Security Council power is extremely broad under the U.N. Charter,²² the ICC's Prosecutor and Judges take their directives from the Rome Statute, including the text of article 13(b) and article 27 (no immunity based on official capacity). Thus, there is at least some question as to whether the current jurisdictional carve-outs, vis-à-vis the nationals of non-ICC States Parties, are legally effective.²³

²⁰ S.C. Res. 1970, para. 6; S.C. Res. 1593, para. 6.

²¹ See Rome Statute, art. 13(b).

²² See, e.g., U.N. Charter, arts. 40-42.

²³ As noted above, one provision of ASPA restricts U.S. participation in U.N. peace-keeping operations absent an exemption from ICC jurisdiction covering them. See ASPA, § 105(a). Specifically, it states:

the President should use the voice and vote of the United States in the United Nations Security Council to ensure that each resolution of the Security Council

(7) The U.S. should allow secondment of U.S. personnel to the Court

Currently the U.S. does not second U.S. personnel to the ICC. Secondment would permit the U.S. both to support the Court and permit U.S. nationals to play a greater role in the Court's actual work. The ICC could also benefit from the extensive expertise of U.S. nationals who have worked at other international and/or hybrid tribunals such as the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone. The U.S. has already taken a positive step in a similar direction by deploying 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.²⁴ This additional step would allow the U.S. to take a different role in the Court's operations, through its nationals, and foster a greater understanding of the Court among U.S. citizens and other government officials.

(8) The U.S. should contribute to the Trust Fund for Victims

The U.S. should also lend its support by contributing monetarily to the Trust Fund for Victims ("TFV"). The TVF was created to implement reparations ordered by the ICC and to provide "physical and psychosocial rehabilitation or material support to victims of crimes within the jurisdiction of the ICC."²⁵ Twenty-four countries have contributed to the TFV to date.²⁶ Contributions are voluntary and can be made by any state, individual, or organization. Donations to the TFV do not fund ICC operations, but are separate. Thus, U.S. funding of the TFV would not constitute funding of the ICC. Monetary reparations are a

authorizing any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations permanently exempts, at a minimum, members of the Armed Forces of the United States participating in such operation from criminal prosecution or other assertion of jurisdiction by the International Criminal Court for actions undertaken by such personnel in connection with the operation.

ASPA, § 105(a). This provision, on its face, applies to peacekeeping and peace enforcement operations and not to referral resolutions and does not seem to mandate the type of non-State Party jurisdictional carve-outs found in Security Council resolutions 1593 and 1970. As argued above, we also suggest eventual repeal of ASPA.

²⁴ "U.S. sends special operation forces to Uganda," Digital Journal, Oct. 15, 2011, at <http://digitaljournal.com/article/312830>. See also The Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009, 111th Cong., 2nd sess. Cong. S.1067. Washington, D.C.

²⁵ Website of the Trust Fund for Victims, at <http://www.trustfundforvictims.org/>.

²⁶ Website of the Trust Fund for Victims, Financial Info., at <http://www.trustfundforvictims.org/financial-info>.

small but important part of helping victims and families of victims of war crimes, crimes against humanity, and genocide to rebuild their lives and communities. The U.S. could play a significant role in this process by lending its financial support.

* * *

In conclusion, the ABILA ICC Committee is very encouraged by the steps taken by this Administration regarding the ICC, including U.S. participation at the Eleventh Session of the Assembly of States Parties to the ICC; its commitment to assist states in building their capacity to prosecute atrocity crimes at the national level; assistance being provided to Ugandan forces to apprehend members of the Lord's Resistance Army; and numerous supportive statements made by you and other Administration officials. We strongly encourage continued principled and constructive engagement with the ICC. The U.S. has always been a leader in bringing those who commit the worst atrocities to justice and we support this Administration's commitment.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Jennifer Trahan". The script is cursive and fluid, with the first name "Jennifer" written in a larger, more prominent hand than the last name "Trahan".

Jennifer Trahan,
Chair, American Branch of the International
Law Association, ICC Committee

INTERNATIONAL HUMAN RIGHTS COMMITTEE

Statement of Activities

The International Human Rights Committee sponsored a panel for International Law Weekend Midwest 2013 on the Role of Institutions in Developing and Enforcing International Human Rights Law, chaired by Dean Janet Levit and featuring Paul Dubinsky, Christopher N.J. Roberts, Mark Osiel, and Leila Sadat. The Committee also sponsored a panel for International Law Weekend 2013 on the Globalization of Child Rights and Remedies, chaired by Aaron Fellmeth and featuring Susan Bitensky, Sara Dillon, Shifa Alkhatib, and Karl Hanson from the Kurt Bösch University Institute in Switzerland. For International Law Weekend, 2014, the Committee sponsored a panel on Hate Speech and the Human Right to Freedom of Expression. Aaron Fellmeth served as chair, and the panel consisted of Stanley Halpin, Jr., Molly Land, and Ruti Teitel.

Finally, the Committee is preparing a submission to the U.N. Human Rights Council for the Universal Periodic Review of US Compliance with its International Human Rights Law obligations, scheduled for early 2015. The subcommittee drafting the document consists Aaron Fellmeth, former chair Christina Cerna, Gwynne Skinner, and Julie Cavanaugh-Bill.

INTERNATIONAL LAW OF THE SEA COMMITTEE

Statement of Activities

The Law of the Sea Committee sponsored a panel at International Law Weekend 2014 on law of the sea baselines issues, following recent reports at the International Law Association. Issues related to change of baselines due to rising or lowering sea levels were also discussed. The moderator was George Walker and panelists were David Freestone, Coalter Lathrop, and J. Ashley Roach.

George Walker's article, *The Interface of Admiralty Law and Oceans Law*, has been accepted for publication by the *Journal of Maritime Law and Commerce*. An earlier draft was the basis of his remarks at the Law of the Sea Committee panel discussion at the 2013 International Law Weekend. That panel was entitled Oceans Law and the Practitioner, and featured James Kraska, moderator, and David O'Connell, Charles Norchi, and George Walker.

IV. CONSTITUTIONS AND BY-LAWS

INTERNATIONAL LAW ASSOCIATION CONSTITUTION OF THE ASSOCIATION

(adopted at the 76th Conference, 2014)

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 An executive chair of the International Law Association ("the Chair");

5.2.2 such number (not exceeding 4) of vice-chairs of the International Law Association 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 reelection 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

(AS AMENDED)

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, and subsequently amended)

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 by the President.

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 converted 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.

V. IN MEMORIAM

CECIL B. OLMSTEAD

Longtime ABILA member Cecil Jay Olmstead died June 25, 2014 near his home in Westport, Connecticut. Cecil had a long and distinguished career as an international lawyer, serving for many years as of counsel with Steptoe & Johnson, as well as Associate Reporter on the ALI First Restatement of Foreign Relations Law of the United States and Advisor on the Second Restatement. He was also a dedicated member of our Branch and played an important part in building it up.

Cecil began his work for the American Branch by serving as Honorary Secretary/Treasurer from 1954-1963. He was elected President at the May, 1963 Annual Meeting, succeeding Pieter Kooiman, and served as President until succeeded in 1973 by Professor John Hazard of Columbia Law School. In a very real sense, Cecil was the father of what was then called the “Fall Conference” and is known today as International Law Weekend, put on by ABILA and ILSA.

In 1972 Cecil raised the funds and arranged for the American Branch to host the 1972 ILA Biennial in New York. The celebratory gathering at the Biennial was at Pocantico Hills, the Rockefeller family estate in Tarrytown, New York.

As President of the Biennial’s host branch, he then became President of the ILA itself and served until the following Biennial in 1974. The following year he was elected a Vice-Chairman of the ILA Executive Council, which consists of the elected delegates of all the Branches and some Co-opted Members. He served Lord Wilberforce diligently as a Vice-Chairman until 1986.

During that time, Cecil helped repair the ILA’s ailing finances by putting on in London a major conference on extraterritoriality with, of course, a registration fee. The book resulting from that conference is still available from the ILA and could certainly be topical in today’s concerns.

In 1986, Cecil succeeded Lord Wilberforce as Chairman of the Executive Council, stepping down after serving only two years of his four-year term to allow the organization to return to its very strong tradition of having a member of the House of Lords be Chairman of the Executive Council. Subsequently, at a ceremony at the British Embassy in Washington, D.C. in 1990, Cecil was awarded the distinction of Commander of the Most Excellent Order of the British Empire (CBE, Hon.) in recognition of his distinguished service to the United Kingdom, that is, in effect, the International Law Association. At the 2004 ILW, the Branch presented him with its Distinguished Service Award.

We honor all his contributions to the ILA and ABILA and will miss him dearly.

Cynthia C. Lichtenstein